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# C A S E S

DECIDED IN

## THE COURT OF SESSION, COURT OF JUSTICIARY,

AND

## HOUSE OF LORDS,

FROM AUGUST 10, 1888, TO AUGUST 8, 1889.

REPORTED BY

MIDDLETON RETTIE, JAMES PATTEN, C. C. MACONOCHIE,  
H. J. E. FRASER, AND JOHN DAVID SYM,  
ESQUIRES, ADVOCATES.

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**Abstract**



**J U D G E S**  
**OF THE**  
**COURT OF SESSION**  
**DURING THE PERIOD OF THESE REPORTS.**

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**FIRST DIVISION.**

**Lord President, The Right Hon. JOHN INGLIS.**  
**Lord MURE.**  
**Lord SHAND.**  
**Lord ADAM.**

**SECOND DIVISION.**

**Lord Justice-Clerk, { The Right Hon. J. H. A.**  
**MACDONALD.**  
**Lord YOUNG.**  
**Lord RUTHERFURD CLARK.**  
**Lord LEE.**

**PERMANENT LORDS ORDINARY.**

**Lord FRASER.\***  
**Lord M'LAREN.**  
**Lord KINNEAR.**  
**Lord TRAYNER.**  
**Lord WELLWOOD.**  
**Lord KYLLACHY.**

---

\* Lord Fraser died on 27th March 1889.

## HIGH COURT OF JUSTICIARY.

Lord Justice-General, Right Hon. JOHN INGLIS.

Lord Justice-Clerk, Right Hon. J. H. A. MACDONALD.

## LORDS COMMISSIONERS OF JUSTICIARY.

Lord YOUNG.

Lord LEE.

Lord MURE.

Lord FRASER.

Lord ADAM.

Lord KINNEAR.

Lord M'LAREN.

Lord TRAYNER.

Lord SHAND.

Lord WELLWOOD.

Lord RUTHERFURD CLARK.

Lord KYLLACHY.

---

Lord Advocate,	{	The Right Hon. J. H. A. MACDONALD, succeeded by J. P. B. ROBERTSON, Esquire.
Dean of Faculty,	{	WILLIAM MACKINTOSH, Esquire, succeeded by the Right Hon. J. B. BALFOUR.
Solicitor-General,	{	J. P. B. ROBERTSON, Esquire, succeeded by M. T. S. DARLING, Esquire.

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## HOUSE OF LORDS.

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### P E E R S

WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, LORD HALSBURY.

Lords WATSON, FITZGERALD, HERSCHELL, and  
MACNAGHTEN.

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ERRATUM.

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P. 793.—Add *Crole* as counsel for Marquis of Breadalbane.

# CASES

DECIDED IN

## THE HOUSE OF LORDS,

1888-89.

ROBERT MACKILL & COMPANY AND OTHERS (Pursuers), Appellants.—

*Finlay, Q.C.—Leck.*

WRIGHT BROTHERS & COMPANY (Defenders), Respondents.—

*J. Gorell Barnes, Q.C.—W. S. Robson.*

No. 1.

Dec. 18, 1888.  
Mackill & Co.  
v. Wright  
Brothers & Co.

*Ship—Charter-party—Guarantee that ship should carry a certain dead-weight—Stowage of machinery and coal—Construction of charter-party with reference to cargo contemplated by the parties.*—By a charter-party it was agreed that the vessel should proceed to G, and there load “all such goods and merchandise as the charterers” should tender alongside, “not exceeding what she can reasonably stow and carry”; that the charterers should pay a lump sum of £2200 for the voyage; that the “owners guarantee that the vessel should carry not less than 2000 tons dead-weight of cargo”; that, “should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made” from the freight. At the time the charter-party was signed, this unsigned note was written upon its margin with consent of the parties, “including machinery, the largest pieces measure about say,”—the dimensions and weight of twenty-five pieces of machinery being then given.

The charterers tendered 2000 tons of cargo, consisting partly of large pieces of machinery, including, in addition to the twenty-five pieces mentioned in the note, sixty additional pieces of the same description, and partly of coal and of general cargo. In consequence of the large space required by the machinery, which was stowed separately, only 1691 tons were shipped. Had the coals and machinery been stowed together, the vessel would have held the 2000 tons.

In an action for payment of the balance of freight, the charterers claimed deduction in respect of the 309 tons not shipped, on the grounds (1) that by the contract the freight was limited to the dead-weight actually carried, and (2) that the short shipment was due to improper stowage, *held* (*rev. judgment of the Second Division*) that, as the owners had provided a vessel capable of carrying a dead-weight of 2000 tons, and as the short shipment was not due to improper stowage, but to the charterers providing a cargo more bulky than that contemplated by the parties when they entered into the contract, the charterers were not entitled to any deduction from the full freight.

(In the Court of Session, July 5, 1887, 14 R. 863.)

By charter-party, dated London, 28th May 1886, it was mutually agreed between Robert Mackill & Company, of Glasgow, managing owners of the steamship “Lauderdale” (then at sea), therein described as of 1134 tons nett register and 1738 tons gross register, and Wright Brothers & Company, merchants, of London, *inter alia*, as follows:—“That the said

Ld. Chancellor  
(Halsbury).  
Lord Watson.  
Lord Mac-  
naghten.

No. 1. steamship shall, with all convenient speed, proceed to such loading-quay, berth in Glasgow, in such dock as ordered, and there . . . load from the factors of the said charterers all such goods and merchandise as the said charterers or their agents shall tender alongside for shipment (including acids on deck to the extent of ten tons weight if required by charterers), not exceeding what she can reasonably stow and carry over and above her tackle," &c. "The whole of the vessel to be at the disposal, except room for eighty tons extra bunker coal, of the charterers for the conveyance of goods. . . . Owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo. . . . A regular stevedore and clerks as customary, appointed by the charterers, to be employed by the owners to stow and take account of all goods received on board, with the measurements, &c., to be paid by, and to be under the direction of, the master, who is responsible for improper stowage. . . . Cargo to be brought to and taken from alongside the steamer at merchants' risk and expense, and being so loaded, shall, on being despatched by charterers, therewith proceed under steam *via* the Suez Canal to Kurrachee, or so near thereunto as she may safely get, and deliver the same . . . on being paid freight as follows—say, for the use and hire of the said steamer a lump sum of £2200 . . . Should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight."\*

In pursuance of the charter-party, Wright Brothers & Company tendered 2000 tons of cargo for shipment, including over and above the twenty-five pieces of machinery specified in the memorandum sixty pieces of large machinery of the same description, two parcels of coal of respectively 100 and 270 tons of dead-weight. The remainder of the cargo was general goods.

The machinery and the coals were stowed in separate holds, and being so stowed, the vessel was able to take on board only 1691 tons of the cargo tendered. Had the machinery and the coals been stowed together so that the coal filled up the interstices of the machinery, the whole 2000 tons tendered could have been loaded. The vessel left Glasgow with only 1691 tons on board.

Wright Brothers paid certain sums to account of freight, but claimed to be entitled to retain from the balance a sum in respect of the 309 tons short shipped.

Mackill & Company and the other owners, on 2d November 1886, brought an action against Wright Brothers & Company for payment of the full balance.

(1) On the construction of the contract, the pursuers, the shipowners, contended that all they had guaranteed was that the vessel should be able to carry a dead-weight of 2000 tons, while the defenders, the charterers, contended that the guarantee was that the vessel should be able to carry 2000 tons of any cargo.

(2) The defenders further contended that the machinery and coals should have been stowed together, and that, on the assumption that it would not have been proper stowage to put the machinery and coals

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\* During the meeting at which the charter-party was signed, the following note, which was not signed, was by consent of both parties written upon its margin :—"Including machinery, the largest pieces measure about say—

10 pieces	25·10 × 9·6 × 4·5	and weighs about 12 tons 12 cwt. each.
10 "	20·10 × 8·1 × 5·1	" " 10 " 6 " "
5 "	36·0 × 3·1 × 1·0	" " 6 " 3 " "

together without the consent of the owners of such cargo, it was the duty of the shipowners to have obtained the consent of the respective owners of the machinery and of the coal. The pursuers disputed both of these contentions.

The Lord Ordinary (Trayner), after a proof, gave decree against the defenders for the portion of freight for which they admitted liability, and *quoad ultra* assoilzied them.

The pursuers having reclaimed, the Second Division (*diss.* Lord Rutherford Clark) adhered to the Lord Ordinary's interlocutor.

The pursuers appealed.

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LORD CHANCELLOR.—The question in this case arises on a charter-party dated the 28th of May 1886.

The owners of the screw steamer "Lauderdale" (the appellants) and the charterers (the respondents) agreed upon the face of that document that the "Lauderdale," then on a voyage, should proceed to Glasgow and there load all such goods and merchandise as the charterers or their agents should tender alongside for shipment. The whole of the vessel was to be at the disposal of the charterers except room for eighty tons extra bunker coal.

By the charter-party the owners guaranteed that the vessel should carry not less than 2000 tons dead-weight of cargo. It was also further provided that a regular stevedore and clerks, as customary, to be appointed by the charterers, should be employed by the owners to stow and take account of the goods received on board.

The freight was to be a lump sum of £2200; and it was provided that "should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight."

I have omitted to notice for the moment the marginal note upon the charter-party, with which I propose to deal separately.

The vessel reached Glasgow on the 5th of June 1886. The cargo included machinery consisting of locomotives and tenders, and two parcels of coal of 100 tons and 270 tons respectively. On the loading of the vessel being completed it was found that only 1691 tons of cargo had been shipped.

The respondents maintain that the appellants are responsible for the short shipment, and claim a deduction proportionate to the amount by which the cargo fell short of 2000 tons.

I have very great difficulty in reconciling the somewhat divergent views of the learned Judges below with the conclusion at which they have nevertheless arrived.

The Lord Ordinary in terms finds the owners' guarantee is subject to the implied condition that the charterers shall tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed in the vessel.

His Lordship proceeds to decide against the shipowners apparently upon the ground that the coal should have been stowed as was customary among the machinery in holds 1 and 2, the size and character of the machinery making it inevitable that large spaces would be left unoccupied in the holds where it was stowed.

His Lordship finds as a fact proved that it is quite customary to stow coals among heavy pieces of machinery—provided that the owners or shippers of both coals and machinery consent to this being done. But he further holds that

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without such consent it is not customary, and would be improper stowage, for the consequences of which the owners would be liable not only at common law, but also under the stipulations of the charter-party in question.

The Lord Ordinary's judgment assumes that—given the machinery which in fact the charterers tendered and the quantity of coal—it would be impossible properly to stow cargo up to the guaranteed amount; this, together with the implied limit which the learned Judge places on the guarantee, would lead to a conclusion the opposite to that at which the learned Judge arrived. But the argument which appears to have decided the learned Judge's view is that the appellants were bound to obtain the consent of the owner of the machinery and of the coals, and as it is admitted they did not obtain it, he holds them liable.

This seems to be a wholly novel principle, and one to which I cannot assent. The charterers are to tender the cargo, and if, as the Lord Ordinary says, the owners' guarantee is subject to the implied condition that the charterers should tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed, it is obvious to ask from what part of this contract am I to infer an obligation upon the part of the shipowners to procure the consents of different owners to that which it is admitted but for such consent would be improper stowage.

I am unable to agree, as I have said, with the judgment of the Lord Ordinary, but it is consistent with itself, and if the principle insisted on, namely, the obligation to procure the consents, existed on the part of the owners, I should agree in the conclusion.

I am not so certain that I am able to follow the reasoning of the Lord Justice-Clerk or Lord Young. I find the Lord Justice-Clerk, after describing the cargo, and giving his exposition of the true construction of the guarantee to be that it was a guarantee applying to the capacity and not to the actual fact, points out that "the stevedore acting on his own responsibility put the machinery into one part of the hold of the vessel and the coals into the other. Unquestionably by so doing," he says, "a good deal of space was occupied by the machinery which might have been occupied by ordinary cargo." His Lordship adds: "It appears that the coals might have been packed with the machinery, so as to fill up the interstices of space, but that it does not appear that there was any duty on the stevedore to do it." His Lordship thinks that there was "no sufficient evidence that the stevedore did anything but what was reasonable and right in the stowage, and that such a stowage might be injurious both to the machinery and to the coal." I cannot reconcile this series of propositions.

I can only understand the learned Judge's judgment on the view that the guarantee on its true construction is an absolute guarantee to carry 2000 tons of cargo of whatever kind the cargo may be, and that, inasmuch as in fact the cargo fell short of that amount, the owners are responsible. Such a construction gives no effect to the words "dead-weight."

Lord Young, on the other hand, holds that if the cargo presented can only properly be stowed to the weight of 1600 odd tons, "that does not shew that the vessel is not of the guaranteed dead-weight carrying capacity, because, whatever the dead-weight carrying capacity of a ship may be, it is quite plain that it will not carry any cargo up to that weight. The area of a ship will not permit it."

To this view I entirely assent. The guarantee is the dead-weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose

that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead-weight. But I so far agree with Lord Young that if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting, but I fail to see that the learned Judge is justified in holding that this was an ordinary cargo "exactly such as was expected," namely, coals and machinery. I am not quite certain in what sense I am to understand the adverb "exactly," or in a later part of his judgment the words "the very cargo." It seems to me that a serious question would have arisen without the aid of the marginal note, which I have reserved for special treatment: whether the disproportionate excess of bulk over dead-weight would not have been so unreasonable as that the cargo would not, according to the ordinary mercantile understanding of such a contract, have been a reasonable cargo. But the marginal note upon the charter-party, whether part of the contract or not, seems to me to free the question from all doubt. It certainly was information afforded to the shipowners for the purposes of the contract, and I think I may invert the terms of the judgment of Lord Young;—the cargo tendered was not "the very cargo," nor "exactly" such as was expected, as indicated by the marginal note in question. The bulk so far exceeded the proportion of dead-weight that the cargo tendered was not at all the cargo expected and represented in the declared contemplation, and I think the reasoning of the learned Judge should have led to an opposite conclusion.

I only notice for the sake of dismissing a suggestion made in argument before your Lordships, but of which I cannot find any trace in the Courts below, that there was some breach of duty by the shipowners in not informing the charterers as soon as it was ascertained that the ship could not carry to the guaranteed amount with the cargo then being loaded.

I doubt very much whether till the loading was completed, or nearly completed, the shipowners could in fact conjecture how far the loaded cargo would fall short, if at all, of the guaranteed amount, but if they could, it appears to me that those who are responsible for tendering the cargo should have themselves ascertained from time to time what would be the ultimate effect upon the carrying capacity of the vessel of the goods that they were entitled to tender, and which it is manifest the shipowners would have no right to refuse. Such a claim is an entire novelty, for which no authority whatever was advanced, and would certainly be imposing upon the shipowner a new liability recognised by neither lawyers nor merchants up to the present time. I agree entirely with the judgment of Lord Rutherford Clark.

Under these circumstances I move your Lordships that the interlocutor appealed from be reversed.

**LORD WATSON.**—By the contract of affreightment upon which this action is laid the appellants guaranteed that their steamship, the "Lauderdale," would, over and above eighty tons of extra bunker coal, "carry not less than 2000 tons dead-weight of cargo." With reference to that warranty, it was stipulated that, "should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per

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ton to be made from the first payment of freight." The latter clause simply imports that, should the charterers furnish a suitable cargo, within the meaning of the guarantee, and the vessel prove incapable, with proper stowage, of fulfilling it, her owners must allow a deduction from the lump freight, proportioned to the tonnage of cargo short shipped, together with the costs occasioned by their breach of contract.

The construction of the guarantee is attended with more difficulty. The appellants undertake, in common form, to load "all such goods and merchandise as the charterers or their agents shall tender alongside, not exceeding what the vessel can reasonably stow or carry." To hold that the terms in which that obligation is conceived are necessarily conclusive in determining the kind of cargo which comes within the scope of the guarantee, would, in my opinion, neither be consistent with mercantile usage nor with the principles of the law merchant. Business men are in the habit of making shipping contracts in these general terms for the purposes of a particular adventure; and wherever it appears that the precise nature of the cargo which the charterers had in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes matter of reasonable inference that such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description. Of course no such inference can be admitted when it is inconsistent with the express or implied conditions of the charter-party. But in cases like the present it is competent to investigate the whole facts and circumstances attendant upon the execution of the charter-party, with the view of ascertaining what particular kind of goods, if any, it was then in the contemplation of both parties should be shipped and carried, that being the cargo with reference to which it must be presumed, in the absence of express or implied stipulation to the contrary, that the guarantee was given and accepted.

There is really no conflict of evidence with respect to the mutual understanding of the parties to this appeal, before and at the time when they contracted, regarding the character of the cargo which it was then intended that they should respectively provide and carry. It was to be a general cargo, consisting in part of railway locomotive machinery, some portions of which occupy an extent of stowage room out of all proportion to their dead-weight. During the same meeting at which the charter-party was signed (whether before or after signature does not clearly appear) a note, unauthenticated by their subscription or otherwise, was by consent of both parties written upon its margin, specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. These, as described in the note, were to consist of twenty-five pieces in all, of which twenty appear to have required about 375 tons stowage space, calculated at 40 cubic feet per ton, with an aggregate dead-weight of 229 tons. For the purposes of this case it is not necessary to consider whether the note in question ought to be regarded as *pars contractus*, or as an unsigned jotting, because in either view it leads practically to the same legal result. Assuming it to be a mere memorandum, it nevertheless amounts to a distinct representation by the charterers that the appellants would not be required under their guarantee to carry more than twenty-five pieces of machinery of the size and character which it describes. That being the case, if the fact that the "Lauderdale" did actually stow and carry only 1690 tons dead-weight of cargo was attributable to the respondents having sent forward large machinery

in excess of their representation, their claim to a rateable deduction from freight is as effectually barred as if the representation had been embodied in the contract and made an express condition of the guarantee.

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It appears from the evidence of the witnesses for the appellants that, over and above the twenty-five pieces specified in the marginal note, there were forwarded for shipment by the respondents, and carried by the "Lauderdale," no less than sixty pieces of large machinery, of the same description, consisting of ten tenders and ten tender frames, weighing about four tons a-piece, the other forty pieces each weighing from two to four tons. That extra machinery was an awkward species of cargo, and if stowed by itself was calculated to interfere seriously with the dead-weight carrying capacity of the ship. When so stowed, the tenders alone must, according to the estimates given by different witnesses, have occupied from 186 to 240 tons of measurement space, in excess of their dead-weight. No attempt was made by the respondents to impugn that testimony, either on cross-examination or in their own evidence.

The respondents, in their statement of facts, allege that, in the list of machinery which they furnished to the appellants for their guidance in loading the vessel, there were included two parcels of 100 and 270 tons of coal respectively, which they intended to be "stowed in odd places beside and among the machinery and locomotives, so as to fill up the spaces between the large pieces, and utilise the ship's space to the best advantage." That was admittedly not done; but they say that it ought to have been done, in accordance with the mercantile usage; and an examination of their record and evidence has satisfied me that they offer no other substantial excuse for having shipped large machinery in excess of their representation. Mr William Wright, one of the partners of the respondents' firm, who went to the ship and found that the coals and machinery had been kept separate, says,—“I was very much surprised at that, because I expected to see the coals stowed amongst the machinery. That was our intention when we ordered the coals”; and he adds that it is “invariably done.” That was obviously the intention and belief of the witness and of his firm; and, at the trial of the cause before the Lord Ordinary, they adduced no less than eight witnesses with the view of proving that the packing of coals amongst machinery is proper stowage. Unfortunately for the respondents, the testimony of their own witnesses disproves their contention. It merely comes to this, that when coals are stowed along with machinery not much harm is done to the latter, but the damage to the coals may be considerable; that coals are frequently stowed in that manner by special arrangement between the parties interested in ship and cargo; and that in such cases it is usual for the ship-owner to allow a deduction from the freight of the coals, varying from 2s. to 3s. per ton, in order to cover damages. It is in vain to represent a practice of that kind, depending upon special agreement, as constituting a proper mercantile custom; and upon this point I agree with the learned Judges in both Courts below, who were all of opinion that loading coals amongst machinery is improper stowage.

By the charter-party the appellants are made responsible to all concerned for improper stowage; but it was suggested in the argument for the respondents, and it appears to have been strongly urged in the Court of Session, that it was the duty of the appellants to obtain permission from the respective owners of the machinery and coals to stow them together. The suggestion appears to me to be utterly unreasonable. I am of opinion with Lord Rutherford Clark that



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the respondents, if they desired the stowage to be in accordance with their own views, were bound to obtain the requisite permissions from all interested, and to furnish these to the appellants before the proper time arrived for loading the machinery and coals. That they admittedly declined to do, and therefore the cargo must be held to have been properly stowed within the meaning of the contract of affreightment.

There is only one other argument addressed to us on behalf of the respondents which I think it necessary to notice. It was said that whenever it became known to those engaged in loading the ship that she could not, owing to the character of the goods sent forward, carry 2000 tons dead-weight, they were bound to make an intimation to that effect, so as to give the respondents an opportunity of substituting other goods for the extra machinery. But the respondents were fully aware of the terms of their contract, and of the representation which they had made in regard to the larger machinery. In my apprehension, it was for them to consider what amount or description of cargo they would furnish. So long as the goods which they chose to send alongside were capable of being properly stowed and carried, without danger to the ship or her navigation, the appellants could not reject them on the ground that they were not of the precise description contemplated in the guarantee. The appellants might be thereby released, either in whole or in part, from their undertaking to carry 2000 tons dead-weight; but they would not have been justified in refusing to carry any safe and otherwise suitable cargo which the charterers might find it possible or convenient to ship.

I have accordingly come to the conclusion that the so-called failure of the appellants to fulfil their guarantee was due, not to any act of theirs, but to the act of the respondents; and that the judgments appealed from must therefore be reversed.

LORD MACNAGHTEN.—The question turns upon the true construction of a charter-party in some respects peculiar. It is a charter for the hire of a vessel for a lump sum from Glasgow to Kurrachee. It has a note in the margin as to the description of part of the proposed cargo, and it contains this guarantee, "Owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo." In effect, the charterers say to the owners, "We want a vessel to carry to Kurrachee a general cargo, including parcels of machinery; we give you the dimensions and number of the largest pieces; will your vessel carry 2000 tons dead-weight?" The owners say "It will." That is, I think, something more than a mere guarantee of carrying capacity. It is a guarantee of the vessel's carrying capacity with reference to the contemplated voyage and the description of the cargo proposed to be shipped, so far as that description was made known to the owners.

It is not disputed that the "Lauderdale" possessed a carrying capacity of more than 2000 tons dead-weight.

It is admitted that the "Lauderdale" did not, in fact, carry 2000 tons.

It is admitted that a cargo up to but not in excess of that weight, and consisting partly of machinery and partly of coal and other goods, was tendered by the charterers.

It is not disputed that the cargo so tendered could not have been carried on the "Lauderdale," unless the coal had been packed with the machinery.

Though not admitted by the charterers, it is, I think, clear upon the

evidence, and proved even by the testimony of the charterers' witnesses, that it is not proper stowage to pack machinery and coal together. The coal is invariably crushed and injured. The machinery generally suffers too, especially if the coal be damp or the machinery of delicate construction.

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Further, it seems to me that the fair result of the evidence is, that in regard to the machinery which was tendered for shipment and shipped, the cargo was not such a cargo as was contemplated by the charter-party. It contained more large pieces; it was more bulky in comparison to its weight, and it was more awkward for stowage than the terms of the charter-party would naturally have led the owners to expect.

These being the material facts of the case, the clause in the charter-party on which the question turns remains to be considered. The charter-party has this provision:—"Should the vessel not carry the guaranteed dead-weight, as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* deduction per ton to be made from the first payment of freight."

What is the meaning of this provision? What is the event contemplated? Is it the case of the vessel (1) not actually carrying 2000 tons dead-weight from any cause whatever; or (2) not carrying that weight from any cause not attributable to the charterers?

I think it would be unreasonable to read the provision as allowing abatement in the freight in every case of short-weight. Such a construction would place the shipowners at the mercy of the charterers. They might fill the whole space at their disposal, and yet the cargo might be much under the contemplated weight, and so the shipowners would lose their full freight without any fault on their part.

I think that the provision was intended to have effect in the event of the vessel not carrying the specified weight, assuming the cargo tendered to be such a cargo as was contemplated by the charter-party; that is, an ordinary general cargo, with a fair and reasonable proportion of machinery corresponding as to the largest pieces with the numbers, dimensions, and weights specified in the margin of the charter-party. In other words (to put it most favourably for the charterers), the provision was to come into effect in the event of the vessel not carrying 2000 tons dead-weight from any cause not attributable to the charterers.

I think that the loss of cargo space and the short-weight of the cargo carried on the "Lauderdale" were attributable to the charterers. It was their doing; I do not say it was their fault. They have committed no breach of the charter-party. They were not bound to load a full and complete cargo, and no blame, therefore, in the proper sense of the word, attaches to them. But I do not think that they could take advantage of the stipulation for reduction of freight unless they tendered a cargo of the contemplated description and not in excess of the specified weight. They did tender a cargo of proper weight, but it was not of the contemplated description, and the result was that that cargo could only be stowed on board if stowed improperly. The charterers were at liberty to load the vessel with such goods as they pleased not inconsistent with the intention of the charter-party. They did not take the trouble to avail themselves of the whole space at their disposal. Why should the shipowners be fined for that?

I think that the charterers were altogether wrong in contending that the shipowners ought to have obtained the consent of the owners of the machinery and the consent of the owners of the coal to a method of stowage which would have

No. 1. been improper without the consent of both. I am unable to understand how any obligation of that sort could fall on the shipowners.  
 Dec. 18, 1888. It was said that the shipowners placed some coal of their own for which space  
 Mackill & Co. was reserved by the charter-party, among the machinery. But that does not  
 v. Wright prove that it was a proper thing to do. The observation seems to be matter of  
 Brothers & Co. recrimination rather than argument.

It was urged by the learned counsel for the respondents that the charterers knew nothing about the vessel except what was told them in the charter-party. After the charter was signed they gave the shipowners in ample time a list of the goods they proposed to ship, specifying weight and dimensions. With this list before him the stevedore, it was said, had as good means of judging whether the whole 2000 tons could be shipped as if the goods had been arranged on the quay alongside. It was contended that the shipowners and the stevedore ought to have prepared a scheme for loading the vessel, and that when it was found that the whole quantity of cargo could not be shipped, the shipowners ought to have communicated with the charterers and given them an opportunity of altering or re-arranging the cargo. Now, that might have been a reasonable course for the owners to have taken; I say nothing to the contrary. But advice unsought is not always welcome, and I am not sure that if any such advice had been given to the charterers they would not have told the shipowners that it was their business to take the cargo and stow it the best way they could. Of course the shipowners knew more about their vessel than the charterers. But the charterers ought to have known more about the cargo they proposed to ship. There is no evidence tending to shew that the vessel was of peculiar construction or different in any respect from what a charterer with the charter-party before him would have been led to expect. I cannot help adding that if the charterers really felt so much in the dark and so helpless as they are now represented to be, it would have been more natural for them to have consulted the shipowners and the stevedore than to have waited for advice, without giving any intimation that advice was expected or that advice would be well received.

Neither the appellants nor the respondents were, I think, conspicuously reasonable. But the respondents were the more unreasonable of the two, and what is more to the purpose, I think they took a wrong view of the construction of the charter-party, and of their own position.

I therefore agree that the appeal ought to be allowed.

INTERLOCUTORS appealed from reversed with costs, and cause remitted to Court of Session with directions to give the appellants decree for the sum claimed by them, together with their expenses in the Court of Session.

LOWLESS & Co.—WEBSTER, WILL, & RITCHIE, S.S.C.—STIBBARD, GIBSON, & Co.—  
 BOYD, JAMESON, & KELLY, W.S.

No. 2. HENRY JOHN HOOD AND ANOTHER (Mrs Gregory's Trustees) (Second Parties), Appellants.—*Sir Horace Davey, Q.C.—Murray—Haldane.*  
 April 8, 1889. SIR ARCHIBALD ALISON, BART., AND OTHERS (Fifth Parties), Respondents.  
 Gregory's —*Rigby, Q.C.—Low.*  
 Trustees v. Alison.

*Succession—Vesting—Destination to "nearest of kin."*—In a postnuptial contract of marriage the spouses conveyed "each of them to the other, in case of his or her survivancy, in liferent," and to the children of the marriage in fee, divisible as after mentioned, their whole estate and effects, heritable and move-

able, it being declared "that the said funds and estate hereby settled upon the children of the present marriage in fee, in manner above mentioned, shall be divisible amongst such children in such shares as their father should appoint, and failing such appointment, equally." The deed further declared, "that in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor," then "it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties, and failing any such disposition, then, and in that case, the said whole funds and estate settled by these presents shall, after the decease of the said parties, suffer division in manner after mentioned—that is to say, the whole funds and estate after mentioned belonging or which may belong to" the husband "shall fall to and become the property of his own nearest of kin," and the wife's property to her nearest of kin.

The husband died without leaving any further deed, and was survived by his widow and by one child. The latter died, leaving one child. Both predeceased the widow.

In a question raised after the widow's death as to the right to the husband's moveable estate, *held* (rev. judgment of the First Division) (1) that on the husband's death the fee of his moveable estate vested in the only child of the marriage, and that as he was his father's "nearest of kin," in the sense of the deed, his right was not subject to divestiture in the event (which happened) of his predeceasing his mother, the liferentrix.

*Observed* that the deed being a contract executed in 1840, and not of a testamentary nature, the construction of the words "nearest of kin" was not affected by the passing of the Moveable Succession Act, 1855.

*Wannop* (*Haldane's Trustees*) v. *Murphy*, 9 R. 269, *questioned*.

(In the Court of Session, 21st Jan. 1887, 14 R. 368.)

The second parties, the trustees and executors of Mrs Gregory, appealed.

The fifth parties alone appeared as respondents.

At delivering judgment,—

LORD WATSON.—My Lords, this appeal depends upon the construction of a destination by the late Dr William Gregory, which occurs in a postnuptial contract between him and the deceased Mrs Lisette Scott or Gregory, executed in March 1840. The spouses thereby conveyed, each to the other in the event of his or her surviving in liferent, and to the children of the marriage in fee, certain funds and estate specially described, and in general, the whole estate, heritable and moveable, then belonging to them or which might be acquired by them during the subsistence of the marriage. Power was given to Dr Gregory to apportion the fee amongst the children; and failing appointment by him it was declared that they should take share and share alike. Two declarations are added, the first of which reserves power to the spouses severally to dispose of their own estate by testament, to take effect at the death of the longest liver, in the events either of there being no children of the marriage alive at the death of the predeceaser, or of children then existing but dying in the lifetime of the survivor. The second provides that, in the same events, and failing such disposition by will, the whole estates settled shall, on the expiry of the survivor's liferent, "suffer division in manner after mentioned, that is to say, the whole funds and estate above mentioned belonging or which may belong to the said Dr William Gregory shall fall to and become the property of his own nearest of kin; and the whole funds and estate above mentioned belonging to or which may belong to the said Mrs Lisette Scott or Gregory shall fall to and become the property of her own nearest of kin."

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Dr Gregory died in 1858 survived by his widow and by one child of their marriage, James Liebig Gregory, who died in 1863, leaving an infant son, Henry, born in November 1862. The estate specifically conveyed by Dr Gregory consisted of moveables; but in the year 1848 he purchased with his own funds (whether acquired before or after the date of the postnuptial contract does not appear) certain heritable subjects in Princes Street, Edinburgh, at the price of £2275. The liferentrix, who had made up a title to these subjects upon the assumption that the deed of 1840 gave her a right of fee, sold them in 1877 for £7500. In consequence of objections taken by the purchasers to the validity of her title, an arrangement was come to by which she executed a disposition in their favour, with the consent and concurrence of her grandson Henry, then a minor (who subsequently expedite a title through his father James Liebig Gregory), and the price was invested in the names of three gentlemen, who granted a declaration of trust, acknowledging that they held the money as a *surrogatum* for the subjects sold, to be applied in terms of the destination and conditions in the postnuptial contract. Henry Gregory died in 1881 unmarried and in minority, leaving a settlement by which he bequeathed to his grandmother his whole right and interest in and to the trust-fund of £7500.

Mrs Gregory died in May 1885, when the fund in question was claimed by various parties. In order to ascertain judicially which of them had the best right to it, a special case was presented to the Court of Session by (1) trustees of the fund, who are mere stakeholders; (2) the testamentary trustees of Mrs Gregory; (3) the heirs in heritage of Dr Gregory, and also of Henry Gregory, as at the death of the liferentrix; (4) the representatives of the late Lieutenant-Colonel Gregory, who was the heir-at-law *ab intestato* of Henry Gregory; and (5) the next of kin of Dr Gregory as at the time of his widow's death. A majority of the First Division, consisting of the Lord President Inglis, with Lords Mure and Adam, *dissentiente* Lord Shand, by interlocutor dated the 21st January 1887, preferred the parties of the fifth part, who are the only respondents appearing in this appeal, the appellants being the trustees of Mrs Gregory, the parties of the second part, who claim the fund as personal estate of Henry Gregory, which was carried to their author by his *mortis causa* settlement.

The conveyance of Dr Gregory's estate was, according to its terms, to take effect at his death, and there being a direct destination of the fee to children necessarily *natis*, and not *nascituris*, I think it vested in James Liebig Gregory upon his father's decease. In considering the quality of the interest which then vested in him, the power reserved to Dr Gregory to make another disposition of his estate in the events which have since occurred need not be taken into account. In *Balderston and Fulton* (Jan. 23, 1857, 19 D. 293) it was held that the existence of such a power does not impede vesting, and in the present case it was never exercised by Dr Gregory, and expired with him. Whether James Liebig Gregory took a right of property, absolute or subject to defeasance, must depend upon the terms of the second declaration. He was the nearest of blood to his father in both lines of succession at the death of the latter in 1858, and if he was also "nearest of kin" within the meaning of the deed, he became the absolute owner of the estate conveyed by Dr Gregory. If, on the other hand, the words "nearest of kin" be taken to represent a class ascertainable at the death of the liferentrix, and therefore exclusive of the settler's descendants, the fee which vested in him and his issue was subject to divestiture, and became divested by their failure in the lifetime of Mrs Gregory.

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So long as the old law governing the descent of personal estate remained unaltered, the term "nearest of kin" and equivalent expressions were used to designate the class of blood relations entitled to the moveable succession of an intestate. That succession belonged, as stated by Lord Stair (III 8, 31), "to the nearest of kin, who are the defunct's whole agnates, male or female, being the kinsmen of the father's side, of the nearest degree, without primogeniture or right of representation; wherein those joined to the defunct by both bloods do exclude the agnates by one blood." In the common law of Scotland next of kin and heirs *in mobilibus* meant one and the same thing, but another meaning might of course be impressed upon the term next of kin, occurring in a written instrument, if the context shewed, either expressly or by reasonable implication, that the testator or settler used it in a different sense. Thus, in *Connell v. Grierson* (Feb. 14, 1867, 5 Macph. 379), where the succession to a landed estate held under a deed of entail feudalised in 1782 devolved in the year 1863, in terms of the ultimate substitution, upon the entailor's "own nearest of kin and their heirs and assignees and disponees whomsoever," the Court, having regard to the whole tenor and objects of the deed, were of opinion that the entailor meant by these words to describe his nearest blood relation in the line of heritable succession, and they accordingly gave the estate to his heir of line, in preference to an agnate who was one degree nearer in blood. Again, in *Scott v. Scott* (14 D. 1057), a testator directed the residue of his trust-estate to be paid over to his "nearest relations," and the Second Division held that the settlement contained sufficient indications of his intention to include in that term nephews and nieces of the half as well as of the full blood. In affirming the judgment the Lord Chancellor (Cranworth) (2 Macq. 281<sup>1</sup>) said,—"If, indeed, the words of his will had been merely that the testator gave the residue to his nearest relations without more, no doubt the words would, according to the law of Scotland, mean those persons who would have taken in the event of his intestacy. But here the question is not who would take in the event of intestacy, because the testator has been his own interpreter of what he intended."

The Act 18 and 19 Vict. cap. 23, altered the rule of moveable succession by admitting representation among descendants, and in the collateral line among brothers and sisters and their descendants, and also by giving a share to the father, and in the case of his predecease, to the mother of an intestate dying without issue. But the term "next of kin" is still used in that statute to denote those persons who would have been the legal heirs of the intestate under the old law; and it expressly reserves to them exclusive right to the office of executor, in competition with children or remoter descendants of persons who would have been next of kin if they had survived the intestate. The effect which these enactments may have upon the significance of the words "nearest of kin" was recently discussed by the learned Judges of the First Division in *Young's Trustees v. James* (Dec. 10, 1880, 8 R. 242), but the circumstances of the case made it unnecessary to give any decision on the point. One thing is clear, that the expression is no longer equivalent to legal heirs *in mobilibus*, inasmuch as it does not include all the members of that class. It appears to me, however, that, in its legal sense, the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act, and are now preferably

<sup>1</sup> *Scott v. Scott*, May 10, 1855, Paters. Ap. 507, 27 Scot. Jur. 372.

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entitled to administer the succession of the intestate. There may be a question whether and how far the surviving parent of a defunct ought to be regarded as one of his next of kin. Upon that point, which does not arise in this case, I express no opinion.

Of the three learned Judges constituting the majority in the Court below one only relies upon the case of *Wannop v. Murphy* (Dec. 15, 1881, 9 R. 269), which was decided in 1881 by a bench of seven Judges. Lord Adam no doubt considered himself bound by that decision, which, if well founded, appears to me to be a direct authority for the judgment now appealed from. In that case a testatrix who died in 1877 directed her trustees to pay the whole income of the residue of her estate equally to and between her nieces A and B during their lifetime, and on their deaths, to convey one half of the capital to the children of A, and the other half to the children of B, declaring that it should be in the power of the trustees to delay the division until the children attained the age of twenty-two, they receiving the free income in the meantime. In the event of A and B dying without issue, or of such issue predeceasing the last mentioned period of division, the trustees were directed to pay and convey the residue to and among the truster's "own nearest heirs in moveables whomsoever, the division always being *per stirpes* and not *per capita*." A and B both died without having had issue. The Lord Justice-Clerk (Moncreiff) with Lords Deas, Young, and Craighill, held, in these circumstances,—(1) That no interest vested in the heirs whatsoever of the testatrix before the period of distribution; and (2) that these heirs were a class to be ascertained as at that period, and not as at her death, and decree was pronounced in accordance with their opinions. The Lord President (Ingليس) and also Lords Mure and Shand, dissented from the judgment, being of opinion—(1) That the residue vested *a morte testatoris* in the heirs called by the ultimate destination, subject to defeasance to the extent of one half in the event of A having issue, and to the extent of the other half in the event of B having issue; and (2) that A and B the liferentrics, being among the heirs *in mobilibus* of the testatrix at the time of her death, each took a share of the capital, which passed to their representatives. Upon both these points I concur in the opinion of the minority. I cannot reconcile the judgment of the majority upon the first point with the decision of this House in *Taylor v. Gilbert*, July 12, 1878 (L. R. 3 App. Ca. 1287, 5 R. (H. L.) 217), and, upon the second, with its decisions in *Bullock v. Downes*, July 24, 1840 (9 Clark, H. L. Ca. 1) and *Mortimore v. Mortimore*, May 15, 1879, (L. R. 4 App. Ca. 488). These last were not Scotch cases, but in neither did the judgment of the House proceed upon any specialty of English law, and the canon of construction which they recognise appears to me to be applicable to the language of a Scotch deed, which has not acquired technical significance, and falls to be construed according to the intention of the maker. The rule, as I understand it, is simply this, that in cases where a testator or settler in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context.

In the present case I do not think it necessary to consider what would have

been the result of attributing to the expression "nearest of kin" the meaning which it may be taken to have borne since the Act of 1855 became law. The deed which we have to construe is not a will which might be held to speak as at the decease of Dr Gregory. So far as the interests of children of the marriage are concerned, it is, in substance as well as form, a mutual contract; and its pactional provisions must be construed now in the same sense in which they were understood by the contracting parties at the time of its execution in 1840. I cannot conceive that they meant the class whom they then preferred to vary with subsequent alterations in the law of intestacy. Their deed of contract contains no invocation of intestacy, in the proper sense of the word. Dr Gregory's estate is not left to descend *ab intestato*, but the then existing law is referred to for the purpose of describing the persons who are to take *provisione hominis*. In these circumstances, I am of opinion that his "~~nearest of kin~~," within the meaning of the deed, are the same person or persons to whom the law prevailing in 1840 would have assigned his intestate moveable succession at the time of his death in 1858. I can find nothing adverse to that interpretation of the deed, unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children, and also to include them in the destination to their "nearest of kin." That is a kind of probability which has frequently been put forward without success in cases of this description; and whenever it is, as here, unsupported by the context, it can only afford material for conjecture.

In the course of the argument it was pointed out that, in the event of your Lordships holding that the subject of this litigation vested absolutely in James Liebig Gregory at the time of his father's death, that would reopen a question between the present appellants and the parties of the fourth part, who represent the heir of line of his son Henry. They claim upon the footing that the trust-fund was heritable in the person of Henry, who died in minority, and did not pass by his will. They were called as respondents, but did not appear by counsel, and it was not against their interest that the interlocutor under appeal should be reversed. Had I not, on consideration, been of opinion that their claim is untenable, I should have thought it advisable either to give them an opportunity of being heard for their interest before disposing of the appeal or to remit the cause. But it has long been settled that a *minor pubes* can dispose of his heritable estate with the effect of altering his succession by an onerous contract of sale. It remains open to him, or to his heir-at-law, to set aside the transaction *intra quadriennium utile* on proving that it was to the enorm lesion of the minor. But the period limited for such challenge has run out, and the sale of 1877 is now as valid as if Henry Gregory had been of full age at the time. The terms of the trust, under which the price is still held, were intended for the protection of contingent interests which might be set up under the deed of 1840, and cannot affect the rights *inter se* of Henry Gregory's representatives.

For these reasons I am of opinion that your Lordships ought to reverse the interlocutor appealed from, and to declare that the appellants, the parties of the second part, are entitled to the whole funds held in trust by the parties of the first part, and I move accordingly.

LORD CHANCELLOR.—My Lords, I have had an opportunity of reading the opinion which has just been delivered by the noble and learned Lord, and I desire to add nothing to what he has said.

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LORD MACNAGHTEN.—My Lords, I also desire to express my entire concurrence in the opinion of my noble and learned friend.

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INTERLOCUTOR, so far as appealed from, reversed: Declared that the appellants, the parties of the second part, are entitled to the whole funds held in trust by the parties of the first part.

LEE & PEMBERTON—TODS, MURRAY, & JAMIESON, W.S.—HANBURY & WHITTING—  
J. S. & J. W. FRASER TYTLER, W.S.

## No. 3.

SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY (Pursuers), Appellants.

—*Asher, Q.C.*—*Sir Horace Davey, Q.C.*

June 24, 1889.  
Scottish  
Drainage and  
Improvement  
Co. v. Camp-  
bell.

REV. J. P. CAMPBELL (Defender), Respondent.—*Rigby, Q.C.*—*J. Wallace.*

*Statute*—*Construction of private Act*—*Scottish Drainage and Improvement Company Act, 1856 (19 and 20 Vict. c. lxx.)*—*Right in security*—*Personal action*.—*Held (aff. judgment of First Division)* that the Scottish Drainage and Improvement Company Act, 1856, imposes no personal liability upon a landowner to whom advances are made under the Act, and that a personal action against such landowner for payment of the annual rent charge is incompetent.

*Observed per Lord Herschell* that when a private Act is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinised, and that they ought not to be held to possess any right unless it be given in plain terms, or arises as a necessary inference from the language used.

Ld. Herschell.  
Lord Watson.  
Ld. Fitzgerald.

(IN the Court of Session, Dec. 2, 1887, 15 R. 108.)

The pursuers appealed.

LORD HERSCHELL.—The only question that arises upon this appeal is whether the appellants can maintain a personal action against the respondent in respect of his occupation of certain land over which they have obtained a charge. That charge has been obtained by reason of an advance made in pursuance of the provisions of the Scottish Drainage and Improvement Company's Act, 1856, under which a limited owner is enabled to obtain an advance for the improvement of his land and, by pursuing the course there prescribed, to give a charge upon the land which binds it in the hands of his successors.

The 52d section of the Act provides that "when the fee of any land is, in pursuance of this Act, charged with any money, the company shall be entitled to, and shall have from the time from which such rent-charge shall commence and take effect a charge upon such land for the money ascertained and approved by the Commissioners as aforesaid,"—that is, the Inclosure Commissioners, whose assent must be obtained in order to create a valid charge under the Act. The section further provides that "such lands shall thenceforth be and continue liable to the payment of such charge," and it gives the charge priority, speaking generally, over all other charges. It, therefore, in terms not merely creates a charge upon the land, but provides that the land is to be liable for the payment of the charge. So far as that section is concerned it is obvious that there can be no question of the creation of any personal liability, and, if that provision stood alone, it is conceded on the part of the appellants that the only remedy of the Drainage Company must be by real diligence,—that is to say, by proceeding according to Scotch law for recovery of the payments, to be made out of the land.

But the appellants place reliance upon the 61st section of the company's Act as giving them the right to enforce the liability personally which they claim by

this action to enforce against the respondent. Before applying myself to the terms of that section, I desire to say that when an Act of this description is obtained by a company, incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinized, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used. The 61st section does not in terms create any personal liability. The appellants seek to infer that liability solely from the nature of the remedy which that section gives to the company. The section provides that "every charge on land by virtue of this Act may be recovered by the company" "by the same means and in like manner in all respects as any feu-duties, or rent, or annualrent, or other payment out of the same lands would be recoverable in Scotland." Now, it is said that that provision was unnecessary if the only effect of it was to enable the appellants to enforce a charge by real diligence. I do not stop to inquire whether that view be correct or not. I think it is only natural, even if the Court would have inferred such a right from the mere creation of the charge, that the right should be given in express terms when what was being created was a charge of this peculiar character,—a charge which was created pursuant to these statutory provisions. However that may be, I think it clear that the language of this section is, at least primarily, directed to the mode of recovering the charge itself out of the land.

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The contention of the appellants rested mainly upon the provision relating to the recovery of feu-duties. It was said that feu-duties are recoverable not only by real diligence but also by a personal action against the original vassal or against any person who subsequently comes into occupation of the land in terms of the feu-charter, and that inasmuch as this section provided that the charge might be recovered "by the same means and in like manner in all respects as any feu-duties out of the same lands," that by implication must mean that the same kind of personal action which the superior would have against any person in occupation as his vassal was intended by this Act to be possessed by the Drainage Company against the person in occupation of the land over which the charge was created.

Now, I think that the language of the Act does not necessarily, and does not even naturally, bear such a construction. It is obvious that the words "feu-duties, or rent, or annualrent, or other payment out of the same lands" are all coupled together, and the use of the word "other" before the word "payment" indicates clearly that the Legislature is speaking of "feu-duties, or rent, or annualrent" in relation to their being "payments out of the land." They are bound together by that common character that they are all obligations for payment out of the land, and it is only in so far as they are payments out of or would be recoverable as payments out of "the same lands" that they are made recoverable in the case of this particular charge; because they are to be recoverable by the same means, and in like manner in all respects, as feu-duties or other payments out of the same lands. And what is made recoverable? The provision in respect of recovery has relation to a "charge on land." It is only in respect of its being a charge that it is made recoverable in the same way as feu-duties or other payments out of the land.

Those words are perfectly apt to confer upon the company, for the enforcement of that charge to which the land has been in terms rendered liable, every

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mode of recovery, every mode of real diligence, which was open for the enforcement of any of these other payments which were charges upon the land in respect of their being payments out of the land. Is it possible to say that beyond those rights there has been conferred upon the company a right to enforce a personal liability? No doubt personal liability may be enforced, as regards feu-duties, not only against the original vassal, but also against any occupier taking subsequently under the feu-charter. But if such a liability be enforceable, it does not arise by reason of the charge upon the land, it is not a mode of enforcing the payment out of the land, but it is a mode of enforcing a personal obligation which comes into existence owing to the creation of the relation of superior and vassal, or, it may be said, owing to the covenant for payment which arises from the original feu-charter running with the land, and passing to the person who afterwards takes the land from the original vassal. In whatever light it is to be regarded, that certainly is the enforcement either of a contractual or of a quasi-contractual obligation. Now, here there is no such original liability created at all in respect of the payment—it is never made anything except a charge upon the land; and there is certainly no such relation created between the Drainage Company and the occupier from time to time of the land as is created between the feuar and his vassal, or the person representing the feuar and any subsequent vassal.

I have dealt principally with the words “feu-duties,” which are here used, because those were most relied upon by the learned counsel for the appellants; but I do not think that the other words render the case any stronger in the direction of his contention. On the contrary, as was pointed out by Lord M'Laren, if you are to regard these words as implying personal liability, the person who would become, upon the death of an occupier, liable to these payments would not in all cases be the same.<sup>1</sup> In the case of rent it might be the executor, in the case of feu-duty the successor; and consequently it would involve one in very considerable difficulties if he were to say that this clause, which only relates to the mode of recovery, also determines the person against whom the recovery is to be had; because the contention of the appellants is and must be not merely that this section in effect says that there shall be a personal action in respect of this liability, but that it also determines against whom that personal action can be maintained, namely, the person in occupation in succession to the original occupier, or the occupier for the time being.

Therefore, upon the construction of section 61, I am unable to find anything which by necessary inference confers upon the company a right which undoubtedly is not conferred upon them anywhere in terms, or creates a personal liability which undoubtedly there is no language expressly to create.

Certain other sections of the Act were relied upon by the learned counsel for the appellants as throwing light upon the section with which I have been dealing—those were principally sections 68 and 69. The 68th section contains a provision in the first instance dealing with the liability to this charge as between persons becoming in succession entitled to the land upon which the charge is created; and then it has a proviso, I admit, of a somewhat singular character: “Provided that any such person entitled to succeed and becoming entitled in possession shall not be liable to pay any arrears of the charge remaining unpaid at the time of his succession or right to succeed exceeding the amount of one

<sup>1</sup> 15 R., note at p. 110.

year's payment of such charge." Now, it is said that this, by implication, No. 3.  
shows that the person succeeding was to be personally liable for one year's arrears.

(It was admitted that if you were to take the analogy of feu-duties the successor would not be liable for the arrears in any personal action.) There is no creation, in terms, of such liability. The argument was this—you must infer from these words that the Legislature created a liability as to one year's arrears, and therefore it could hardly be supposed that it was not intended by the other section to make the successor liable in respect of his occupation of the land for payments which became due during the time of his occupation. Whatever may be the meaning of this section, such an argument appears to me to be somewhat far-fetched. It cannot be put higher than this, that if that construction be correct it would render it probable that the Legislature would have made a provision creating a personal liability. We cannot from any such suggestion of probability come to the conclusion that a right has been given and a liability imposed which we do not find in the words which are said to create or impose it.

Then the 69th section undoubtedly speaks of "the person for the time being bound to pay the yearly or other periodical payments of such charge." I say again, with regard to that clause, that it is not possible, whatever may be the meaning of those words, and however they may have come to be used, to derive from them such assistance in construing the other section as to find in it the imposition of a liability which the words are not, I think, apt to create.

There is one other provision, to which I drew attention in the course of the argument, which I think is not without importance. By the 59th section of the original Act it is provided that, "if any charge payable under this Act to the company shall be in arrear, the same shall not bear interest for a longer period than six months," but that it shall for that period bear interest at the rate of 5 per cent per annum. By the later Act amending the company's original Act, namely, the Act of 1860,\* that provision was modified to this extent, that if there were not upon the land charged sufficient to answer and satisfy the arrears and interest for the period of six calendar months, then the arrears should continue to bear interest at the rate of 5 per cent until payment or satisfaction, and such interest might be recovered in the same manner as the sum in arrear. Now, if the only remedy were against the land, that provision would be perfectly intelligible, and by no means unreasonable; but looking at the provisions in the earlier Act and its manifest purpose, it seems to me that it would be very strange if, because there was not enough upon the land to enable the company to enforce to the full extent their charge, they should therefore be allowed to permit the payments to run into arrear, and interest on these arrears to run, enforceable (interest as well as arrears) at any subsequent time, at all events until barred by some Statute of Limitations, against the occupier of the land. I think, therefore, that this points in the opposite direction. I do not lay great stress upon it, but looking at the other parts of the Act as well as section 61, it certainly appears to me that they do not all point in the same direction, and that the safer course is to limit ourselves really to the interpretation of the only section which it can be contended confers the right which the appellants are now seeking to enforce.

Upon these grounds I think that the judgment of the Court below was right, and I move your Lordships that this appeal be dismissed with costs.

\* 23 and 24 Vict. c. clxx. sec. 12.

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LORD WATSON.—Notwithstanding the able and ingenious argument of Mr Asher, I have been unable to discover any good ground for disturbing the judgment of the Court below.

There are two sets of clauses in these statutes which require to be attended to, the first constituting as the debt the money advanced by the company for the purpose of drainage or improvements; and the second prescribing the remedies by which that debt is to be recovered by the company. As to the construction of the first set of clauses there is no controversy—their terms are perfectly plain—they declare the money advanced in terms of the Act to be a charge upon the estate, and raise no personal liability either against the representatives of the original borrower or against his successor in the lands drained or improved. The controversy is confined to the 61st section of the statute. It is said that the effect of that clause is to attach to the *debitum fundi* not only the remedies which are ordinarily competent by the law of Scotland in such a case, but also the remedies which are applicable to a mere personal debt.

Now, I think that, in construing the clause, it is necessary to keep in view the fact that a personal action is not an action for the recovery of a charge upon land. It is a misnomer, a contradiction in terms, to say that a creditor is recovering a charge upon land when he brings a personal action of debt for the purpose of obtaining a decree under which he can recover payment out of any part of the debtor's estate, or (at the time when these Acts were passed) by his incarceration. In the same way, a sum recovered under a personal contract or obligation is in no sense a sum recovered out of land or a payment out of land. So also in the case of a feu-duty. When the superior sues on the express personal contract which is contained in the writs constituting the feudal relation between him and his vassal, he does not seek to attach the land or the accessories of the land. The same is true of "rent or annualrent," when in addition to its being made a charge upon the land it is matter of personal stipulation between the parties that the executors or successors of the owner or landlord shall be liable.

It is unnecessary for me, after the observations which have been made by the noble and learned Lord in the chair, to say anything further upon the terms of the 61st clause. I may say in a single word that the only remedies which it appears to me to give to the company are the remedies applicable to feu-duties, rent, and annualrent, in so far as these are charges upon land or payments out of land, and not in so far as they are matters of personal contract.

LORD FITZGERALD.—At the close of the address of Mr Asher I was in considerable doubt, possibly created by an impression that the pursuers ought to have judgment on the merits. There is no doubt as to the existence of the debt; there is no doubt as to its being a charge upon the land; and there is no question that the present incumbent of the parish, who has succeeded to the reverend gentleman who procured this loan, is in possession of the thing charged and in receipt of the rents and profits. It did seem to me at first to be a very strong thing to say that the company should have no personal remedy against this present incumbent (in respect of the profits he has received) but must resort to the land and the land only. However, we are dealing now not with a public but a private Act of Parliament, and I have always understood, with reference to private Acts as contradistinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual it must be so imposed in clear and express terms and not left to implication.

The original Act of 1856 seems to have been prepared with very considerable care, and I would say with a due regard to the rights and interest of others. But, after all, the language of this Act is the language of the Drainage Company. I presume they had no opponents. The Act presents the language of the company and of the company alone.

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Now, it has been already observed that all through this Act until you come to the 61st section there is no doubt that the Legislature is dealing only with a charge upon land, a real security, which by no means imports a personal obligation. One may further observe, too, that before a loan under this Act of Parliament is sanctioned an inquiry is made, and it is only sanctioned by the Commissioners when they are satisfied that there is to be a permanent and real improvement of the land commensurate with the sum to be advanced, and with the annuity with which the land would thereupon become charged.

The Act being for the improvement and reclamation of land deals with public improvements as well as private improvements, and as to some of the classes of improvements it would be exceedingly difficult either to import a personal obligation, or to ascertain against whom it was to be enforced. I may refer for instance to the 4th section of the Act, and to the 12th class of improvements referred to in it, namely,—“The construction or improvement of jetties or landing-places on the sea coast or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, or other agricultural stock and produce.” It would appear to me in reference to these words that it would be difficult to ascertain where the personal responsibility could rest if it was intended to be imposed. But proceeding further on we find that the company is to be incorporated. What powers is the company to have? Such powers and authorities as by this Act are granted, and none other.

The provisional contract deals with the sum to be charged as “an improvement loan on such land” (sec. 33); and the charging section (sec. 49) makes it a charge on the fee of the land, and to take effect as such charge, and so far no allusion is made to any personal liability save in sec. 37, but that section, so far from importing any personal liability beyond its express provision, seems to me to negative it, for according to that section “the Inclosure Commissioners may require security by bond or otherwise” from the parties making the application, for the payment of the expenses; and if they do not grant a provisional order, “such payment shall be made by such landowner or by the company, and shall not be a charge on the land to which such application relates.” That provision dealing with personal liability does not support the contention of the pursuers.

If there was nothing further in the statute, it is clear that the party would be left to the enforcement of his charge upon the land, and that alone. Possibly he would have been in a better position without the aid of sec. 61, for then the law might step in and provide him with some adequate remedy if it were not given by the Act. But sec. 61 gives a remedy, and when a remedy is given by an Act of Parliament of this kind you must pursue that remedy.

Then, referring to sec. 61, upon which the argument principally turned, what does it do? The thing to be recovered, with which it deals, is a “charge on land by virtue of this Act.” It provides for the means and manner by which that liability of the land may be enforced, but it uses no words or terms whatever to indicate that any mere personal liability is cast on either the landowner or his successor in title or in occupation, or that he shall be liable in respect of or to the extent of profits received. Two things are referred to, the charge on

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the lands, and the recovery of it out of the same lands, which is to be "by the same means and in like manner in all respects as any feu-duties or rent, or annualrent, or other payment out of the same lands would be recoverable in Scotland."

We were very much pressed by Mr Asher with this argument, that the 61st section did refer to an action "in like manner in all respects as any feu-duties" might be recovered by; and he called our attention to this circumstance, that in certain instances feu-duties were recoverable by what might be termed a personal action. But that was only in cases in which the superior sued upon the obligation of an express contract of the vassal for the payment of the feu-duty.

I do not mean to say that the original contract between the company and the applicant might not possibly have been so framed as to give them a right to resort to his personal security. I express no opinion upon that, but I observe that in this case there is nothing urged in the summons or its conclusions to shew any personal liability in respect of contract or in respect of the receipt of rents or profits of the land.

My noble and learned friend in the chair has referred to sec. 68, but that section creates no real difficulty, for it only determines as between the land-owner and his successor their respective rights; and if his successor should be compelled, in respect of the land, to pay "one year's payment of such charge" in arrear, which his predecessor ought to have paid, then he has a personal right to recover it from his predecessor.

After four years' trial of this Act of Parliament there came an amending Act; and there are some provisions in the amending Act which are deserving of observation. Sec. 4 contains the same definition of improvements or even a larger one than had been in the original Act, and the 13th subsection of that section is applicable to "the construction or improvement of jetties or landing-places on the sea coast or on the banks of navigable rivers or lakes." Then, by sec. 11, when the land to which the application for a provisional order relates is land held in right of any church, the advance cannot be made without the consent of the presbytery of the bounds and the patron of the benefice. Sec. 13, which is not unimportant, provides for fire insurance. "Where any farm-houses, farm-buildings, or works susceptible of damage by fire have been erected, improved, or added to" under these Acts, fire insurance is to be effected—"the person for the time being bound to make the yearly or other periodical payments of such charge shall insure and keep insured against damage by fire all such farm-houses," and so on, and in the event of his not doing so "it shall be lawful for the company, with the assent of the Inclosure Commissioners, to insure against damage by fire the said farm-houses, farm-buildings, and works in an amount not exceeding the principal amount originally secured by such charge"—the company may pay the premium, and he is bound to "repay to the company" (and here a personal right is given) "any sums so paid by them" in respect of premiums on fire insurance.

Now, when we are dealing with this amending Act it is not unworthy of observation that the only reference in it to any personal obligation is the obligation to keep up the fire-insurance premium, and if that is not done by the person in possession the company may pay it, and then, and then only, they have a personal right to sue, not for the charge, but for the sum paid in respect of fire insurance.

Both these Acts of Parliament were no doubt very beneficial for their purposes; they gave a security charged only upon the land without any words which would import a personal obligation either upon the part of the original borrower or of the landowner in succession, or, in the case of an advance upon glebe land, which would make either the original incumbent or the next incumbent personally liable. Whilst I feel coerced to agree with the motion which is to be presently put from the chair that the decision of the Court below be affirmed, I do so somewhat unwillingly. If there is any property which would require for improvement purposes the aid of an advance of money upon such easy terms as are provided by this Act, it would be such property as glebe lands and residences. I presume that this case is not defended by the present respondent merely in his own interest—probably he may be supposed to represent the interests of a large class; and I see this very clearly, that after the decision of this appeal it will be difficult, if not impracticable, to obtain from the Drainage Company advances of money upon such a security as the present.

I concur in the judgment which has been proposed, affirming the decision of the Court of Session, and dismissing the appeal.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

GRAHAMES, CURREY, & SPENS—RONALD & RITCHIE, S.S.C.—JOHN GRAHAM—MENZIES, COVENTRY, & BLACK, W.S.

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WILLIAM BINNIE (Pursuer), Appellant.—*Shaw—A. S. D. Thomson.*  
DAVID BROOM AND OTHERS (Binnie's Trustees) (Defenders), Respondents.  
—*Lord Adv. Robertson—Shiress Will, Q.C.*

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*Process—Proof.*—In an action of damages brought by the beneficiaries under a trust-settlement against the trustees the pursuers averred that in 1857 and 1858 when the trustees entered upon office, the testator's heritable property might have been sold for £42,980, which was sufficient to pay the testator's debts and leave a surplus of £17,000; that instead of selling, the trustees had borrowed £26,000 on the security of the heritage, and that the result was that the trust-estate had proved insufficient to pay debts.

The Court remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the amount of debts due by the truster and paid by the trustees, and the yearly income and expenditure of the trust, and to report." The accountant reported valuations of the heritage at various dates, and the Court, on the basis of his report, found that if the heritage had been sold soon after the testator's death, the trust-estate would have been insufficient to pay his debts, and assolized the defenders, on the ground that the pursuers had failed to prove that they had sustained loss.

In an appeal the pursuers maintained that as they had not renounced probation, they were entitled to a proof of their averments as to the value of the testator's heritage. The defenders craved that in the event of the pursuers being allowed a proof, they (the defenders) should be allowed a proof of their averments as to the circumstances which led them to borrow.

*Held* that as the pursuers had not renounced probation they were entitled to a proof of their averment as to the value of the testator's heritage, and that the defenders were entitled to a proof of their averments relating to the circumstances which induced them to borrow on the security of the heritage.

*Opinions* (per Lord Herschell, Lord Watson, and Lord Fitzgerald) that the fact that trustees in the exercise of an express or implied power have borrowed money for trust purposes on the security of the trust-estate does not necessarily involve personal liability in the event of loss resulting to the estate from the



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(In the Court of Session, February 10, 1888, 15 R. 417.)

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The pursuer William Binnie appealed, and contended that the pursuers were entitled to a proof of their averments as to the value of the testator's heritage at the commencement of the trust, as they had not renounced probation.

The defenders maintained that if the pursuers were allowed a proof, they (the defenders) should be allowed to prove their averments as to the circumstances which induced them to borrow money on the security of the heritage.

LORD HERSCHELL.—I have had an opportunity of perusing the opinion which my noble and learned friend (Lord Watson) is about to deliver, and I entirely concur in it.

LORD WATSON.—I have come, with much regret, to the conclusion that, notwithstanding the inquiry which has already been made in the Court below, the facts of this case have not been sufficiently investigated to enable your Lordships to dispose of it by a final judgment.

The action was brought in November 1886 by the appellant and two others, sons of William Binnie, builder in Glasgow, who died in October 1857, as beneficiaries under their father's settlement, against the respondents, who are the trustees or representatives of trustees who accepted office and administered the trust created by that deed. The trust-estate chiefly consisted of house property in Glasgow, burdened with an heritable debt of £12,000. The truster left a large amount of personal debt, and the trustees borrowed £26,000 upon the security of the real estate, with which they paid the charge of £12,000 and other debts, leaving a considerable balance unpaid. It is sufficient to say here that the results of their administration, whether prudent or not, were unfortunate, and that in June 1867 the trustees applied for a sequestration of the estate, which was accordingly realised and distributed under the provisions of the Bankruptcy Acts, some of the creditors receiving less than 20s. in the pound.

The pursuers averred that in 1857 and 1858, after the trustees entered upon office, the heritable property was worth and could have been sold for £42,980—a sum sufficient to pay the whole debt and leave a substantial margin for the beneficiaries—and that the trustees exceeded their powers and violated their duty in borrowing money on the security of the property instead of selling it. The defenders denied these allegations, and stated a variety of circumstances, which it is unnecessary to detail, in explanation and justification of the course of management which was pursued by the trustees.

The Lord Ordinary (M'Laren) allowed the parties a proof of their averments, but his interlocutor was recalled by their Lordships of the First Division, who remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due by the truster and paid by the trustees, and the yearly income and expenditure of the trust, and to report." The course thus adopted in order to prepare the case for judgment was in my opinion an expedient one, because a remit to an accountant of skill is a much more satisfactory method of investigating the details of trust management and its pecuniary results than a general proof. At the same time a remit of that kind does not deprive the parties of their right to prove in the ordinary way disputed facts which are not proper matters of accounting.

The report when completed disclosed the following facts upon which the controversy between the parties came to depend in the Court below—(1) That the heritable property was valued as for a loan, part of it in May, before the trusteer's death, and part in October 1857, after that event, the sum of the two valuations being £42,980; (2) that in the year 1862, after the sale of one tenement in November 1861 at the price of £7000, the remainder was valued, with a view to sale, at £29,748; and (3) that the entire property was sold in parcels between November 1861 and March 1870, the prices realised amounting *in cumulo* to £41,900. The reporter also stated that "as any sum that may be arrived at as the value of the property at the date of the trusteer's death must necessarily be a valuation," there would in his opinion be no injustice done to either party if £41,900 were taken to represent its value at that date.

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When the case was heard upon the report the pursuers impeached it, without lodging a note of objections according to the usual practice, and insisted that they were entitled to a proof of their whole averments on record.

They offered, however, to waive their demand for proof, and to take the report as the evidence in the case, upon condition of the Court accepting as conclusive the accountant's view with regard to the value of the real property. Both alternatives were very properly rejected by the Court. The first of them was again pressed by the appellant at the bar of the House, but it is clear that a party who has joined issue with his opponents, and has been fully heard before the reporter upon proper questions of accounting, cannot be permitted to re-open these questions in a proof at large.

Neither of the parties having moved for a limited proof, the First Division proceeded to dispose finally of the case upon the basis of the report. Their Lordships assoilzied the defenders upon the ground as expressed in the interlocutor, "that the pursuers have failed to prove that they have sustained any loss through the misconduct of the trustees." It appears from the judgments delivered at the advising of the cause that their Lordships were of opinion that the trustees had been guilty of misconduct which would have involved the defenders in liability, had not the pursuer's *injuria* been *sine damno*. But their Lordships, differing therein from the reporter, estimated the heritable property of the trust at £36,748, adopting the valuation of 1862 plus the sum received for the part sold in 1861. To that estimate they added £573 as the amount of the personal estate, making the total charge against the trustees £37,321. On the other side of the account their Lordships held that the trustees were entitled to credit for debts and charges paid by them, or by the trustee in the sequestration, to the amount in all of £37,521, the result being that had the real estate been sold at the time when the appellant alleges it ought to have been the liabilities of the trust would have exceeded its assets by £200, nothing whatever being left for the beneficiaries.

Were it now necessary to determine the market value of the property at the commencement of the trust with no other assistance than the information contained in the report, I should hesitate to disagree with the conclusion which was arrived at in the Court below. I certainly do not think that the prices which it fetched when sold in lots between the years 1861 and 1870 can fairly be taken to represent its selling value in the end of 1857, and experience leads me to doubt whether a valuation obtained in 1857 solely for the purpose of a loan can be safely relied on as an approximate estimate of its value for immediate sale. Besides, I do not find anything in the report tending to the inference that the

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market value of such properties was higher in 1857-58 than in 1862. But the appellant has now insisted before us for a proof of his averments touching the value of the subjects for sale at the time when the trustees entered upon office and could have sold, and seeing that he has never renounced probation, or agreed to accept the report as containing all the evidence which he desires to adduce, I cannot advise your Lordships that he ought not to have the opportunity which he asks for. He may at this distance of time have some difficulty in bringing forward evidence of market value in 1857 of a more direct and less speculative character than that which is to be found in the report, but that circumstance cannot affect his right to make the attempt. The respondents, in the event of the appellant being allowed a proof, expressed their desire to have an opportunity of instructing their averments bearing on the motives which induced the trustees to borrow, and I think their request ought to be conceded.

Besides the main question regarding the value of the real estate, two items in the accounting were fully discussed in the course of the argument. The appellant maintained that the Court ought to have charged the trustees with £562, being the estimated value in 1857 of furniture liferented by his mother, who is still alive. I am of opinion, for the reasons assigned in the judgment of the Lord President (Inglist), that the charge was rightly disallowed. Again, the respondents argued that the trustees ought to have had credit for the sum of £2652 which represents payments made to the widow for the maintenance of herself and the children who lived with her until her re-marriage in 1861, and payments made between 1857 and 1867 towards the maintenance and education of beneficiaries who were not living with their mother. These sums were no doubt in excess of the free income of the trust, but the trustees had under the trust-settlement a power of advancement out of capital sufficient in my opinion to validate such payments in any question with the appellant and others beneficially interested. The estimate of the house property which the Court below adopted made it unnecessary to decide as to this item, but if it were added to the sums with which the trustees have been credited the balance would still be against them if the appellant's statements with regard to the value of the property were established.

I should have contented myself with making these observations, which are sufficient for the disposal of this appeal, had it not been that in the Court below the learned Judges have expressed themselves with regard to the conduct of these trustees, and of trustees generally, in terms to which I cannot assent. The Lord President, with the concurrence of Lords Mure and Adam, said (15 R. 422),—"The conduct of trustees in borrowing money under any circumstances is highly imprudent. If it turns out to be a mistake, it subjects the trustees to personal liability." I do not know whether by these words the Lord President intended to lay down a principle of law or a proposition of fact; the result in either aspect might prove very unfortunate so far as the interests of beneficiaries are concerned. A trustee would incur unnecessary risk (which his duty in no case compels him to do), if he borrowed in order to pay debts prudently and with a reasonable prospect of securing a considerable reversion to the beneficiaries, and he would be justified for his own protection in at once selling, to the destruction of their interests, although no prudent person (himself included) thought it the better course to pursue. But there is really no such rule in existence. All that the law requires from a trustee who has power to sell or borrow is, that he shall follow the dictates of ordinary prudence

in adopting the one course or the other, and the question whether he did or did not act prudently is one of fact which must be solved according to the circumstances of each case.

Looking to the terms of Mr Binnie's trust-deed, I see no reason to doubt that the trustees had implied power either to sell or borrow for the purpose of paying debt if the exigencies of the trust required it; and I am consequently of opinion that the conduct of the trustees in borrowing and not selling raises a question of prudent management only. If it were not for the unbending rule which they laid down as to the imprudence of borrowing in any circumstances, there might be difficulty in reconciling the views which the learned Judges took of the conduct of these trustees with the considerations which led them to fix the value of the property at £36,748. These were that house property in Glasgow became in the end of 1857 greatly depreciated in value and in many cases unsaleable. In that state of the market I cannot help thinking that prudent men would have been most reluctant to sell if that step could by possibility be avoided. I have thought it proper to make these remarks with no desire to prejudice any question which may arise when the facts are ascertained, but in order to guard against its being supposed that in my opinion the appellant will be necessarily entitled to prevail in this action if he succeeds in proving the value which he has alleged.

I am accordingly of opinion that the interlocutors appealed from, in so far as these concern the appellant, ought to be reversed, and the cause remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security. If the appellant had asked in the Court below for the restricted proof which has been allowed him here, I see no reason whatever for supposing either that the respondents would have resisted the motion or that the Court would have hesitated to grant it, and I am therefore of opinion (seeing that the appellant sues *in forma pauperis*) that there ought to be no costs of this appeal.

**LORD FITZGERALD.**—I entirely concur in the judgment, and have nothing to add.

THE cause was remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security.

**SCOLLES & COMPANY**—**MARCUS J. BROWN, S.S.C.**—**BIRCHAM & COMPANY**—**HENRY & SCOTT, S.S.C.**

**HECLA FOUNDRY COMPANY (Respondents), Appellants.**—

*Att.-Gen. Sir R. E. Webster—Healey.*

**WALKER, HUNTER, & COMPANY (Complainers), Respondents.**—

*Asher, Q.C.—Üre.*

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Aug. 8, 1889.  
Hecla Foundry  
Co. v. Walker,  
Hunter, & Co.

*Copyright of designs—Infringement—Registration “for shape or configuration”*  
—*Patents, Designs, and Trade-Marks Act, 1883 (46 and 47 Vict. c. 57), sec. 58.*—A design was registered for shape or configuration, under the 60th section of the Patents, Designs, and Trade-Marks Act, 1883, the application being for “a range door with moulding on top, moulding forming front of range, shape to

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No. 5. be registered." The drawing shewed a moulding on the top of the door fitting into the moulding on the front of the range and flush with it. *Held* (in *aff. judg.* Aug. 8, 1889. ment of First Division), that another design, which differed from the above in Hecla Foundry this, that the moulding on the door overlapped the moulding on the front of the Co. v. Walker, range was, when compared with the other, an "obvious imitation" of the registered design, and an infringement of it. Hunter, & Co.

*Observed* that the test of infringement was whether the shape in the two designs was the same.

Ld. Herschell.  
Lord Watson.  
Ld. Fitzgerald.

(IN the Court of Session, May 25, 1888, 15 R. 660.)

The respondents in the suspension and interdict appealed.

At delivering judgment,—

LORD HERSCHELL.—This is an appeal from an interlocutor of the First Division refusing a reclaiming note against an interlocutor of the Lord Ordinary finding it proved that the appellants at your Lordships' bar had infringed the respondents' exclusive privilege of making for sale fire-doors of the pattern produced, and interdicting the appellants accordingly.

The respondents in November 1884 registered a design, the nature of which was stated in the application to be "range fire-door with moulding on top, moulding forming front of range, shape to be registered."

The drawing which accompanied the application shewed a rectangular door for a fire-range, with a moulding at the top of it of a form which appears to be known as ogee.

The sole question for determination is, whether a fire-door manufactured by the appellants is an infringement of the right secured to the respondents by the registration of their design? It undoubtedly is so if it is either the same design or a fraudulent or obvious imitation of it.

The Lord Ordinary in delivering his opinion used the following language—"Now, upon the question whether there is here an infringement, nothing was said to the contrary of the complainers' proposition that mere differences in the outline of the moulding would not take the respondents' design out of the patented copyright. That seems to me perfectly clear, because there is nothing original in the moulding, and in the claim of registration it is made evident that the registration was claimed, not for the particular moulding, but for the material form given by placing a moulding—any suitable moulding—upon a fire-door in the described position. Well, then, I have to consider if there was no exclusive privilege claimed for the particular pattern of moulding, whether the exclusive privilege is limited to the case of a moulding which exactly fits into the adjoining mouldings so as to present a continuous flowing surface, or whether it is not a privilege granted for putting such a moulding upon a fire-door in such a manner as to exclude air, and to accomplish the object which had been previously accomplished by putting the moulding upon the fire-cover or fall-bar." The Lord President adopted this language of the Lord Ordinary, and the view which he had taken of the subject-matter of the claim of the present respondents.

With all respect for these learned Judges, I cannot but think that they took into account elements which were not proper to be considered for the purpose of determining what was the design protected by the registration, and whether there had been an infringement of the copyright in that design.

By section 60 of the Patents, Designs, and Trade-Marks Act of 1883 "design" is defined as meaning "any design applicable to any article of manufacture or to any substance . . . whether the design is applicable for the pattern, or for the

shape or configuration, or for the ornament thereof." In the present case the applicant declared that it was for "the shape" that he desired registration. Under the designs part of the Act of 1883 I do not think the object which the designer has in view in adopting the particular shape, or the useful purpose which the shape is intended to serve, or does serve, ought to be regarded in considering what is the design protected. The scheme of this part of the Act is entirely different from that relating to patents for inventions, where the object attained by the invention for which the patent is granted is of course very material to the inquiry what is the subject-matter, and whether there has been an infringement. I cannot agree therefore that the registration was claimed, or could be claimed, "not for the particular moulding," but for the form given by placing "any suitable moulding" upon a fire-door in the described position, or that a privilege was granted "for putting a moulding upon a fire-door in such a manner as to accomplish" a particular object. I think the protection was granted for the shape, and for that alone, and that in such a case when an infringement is alleged the only question is, whether the shape of that which is impeached is the same, or whether the one is an obvious imitation of the other, without reference to whether it does or does not accomplish the same useful end. I quite agree with what was said by Lord Shand in *Walker v. The Falkirk Iron Company*, 14 R. 1072, that "the Act in this branch gives protection only to the shape or configuration or to the design for the shape or configuration in such a case as the present. The result of such protection may be, however, to secure important advantages such as attend a mechanical contrivance if these advantages should be the result, directly or indirectly, of the shape or configuration adopted." But this is a mere incident. If such advantages are obtained it is only because no shape not substantially the same, and which is therefore not an infringement, will achieve the same end. The test of infringement must always be whether the shape is or is not the same. If it be, then the exclusive privilege has been infringed, even though the same object be not accomplished; if it be not, then, though the object be accomplished, there has been no infringement. In the present case, for example, by a very slight deviation from the design, which would scarcely be apparent, the air might be admitted to the fire. I do not think that a person making such a fire-door could successfully answer the complaint that he had infringed the rights of the proprietor of the design by shewing that when applied to a range it would not exclude the air.

It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other. I ought perhaps to qualify this by saying that as a design to be registered must, by section 47, "be a new or original design, not previously published in the United Kingdom," one may be entitled to take into account the state of knowledge at the time of registration, and in what respects the design was new or original when considering whether any variations from the registered design which appear in the alleged infringement are substantial or immaterial.

Applying the test which I have laid down, I have come to the conclusion that there has been a violation of the respondents' rights. There are no doubt certain distinctions between the door shewn on their drawing and that manufactured by the appellants. But to establish this is not enough to free them from liability. By section 58 of the Act it is not lawful for any person to apply

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**No. 5.** either the design, or any "obvious imitation thereof," in the same class of goods in which the design is registered. It is impossible in such a case as the present to give reasons for the opinion formed. I can only say that to me it appears without doubt that the door complained of is an obvious imitation of the registered design.

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I therefore move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

**LORD WATSON.**—The evidence led before the Lord Ordinary shews that until 1884 kitchen-ranges were commonly made with a cornice or ogee moulding running along the whole front of the range, that part of the moulding which is opposite to the furnace being invariably attached either to the fire-bar or to the hot-plate which forms the cover of the range. In November of that year the respondents registered in terms of the Act of 1883 the drawing or design of a door which, in compliance with the statutory rules issued by the Board of Trade, they described as a "range fire-door with moulding on top, moulding forming front of range, shape to be registered."

The witnesses appear to have generally agreed that the attachment of the moulding to the fire-door, or the making it part of the door itself, as shewn in the respondents' design, was an improvement upon previous arrangements, because it obviated various disadvantages which were inseparable from these arrangements. That may be so, but in my opinion such considerations are of no relevancy in the present case. It is quite immaterial for the purposes of registration under the Act of 1883 whether a design is useful or devoid of utility. All that the statute requires, in order to its registration and protection, is that it shall be new or original, and shall not have been previously published in the United Kingdom, and the person registering acquires no exclusive right except to the shape and configuration of his design. If his design should be calculated to serve some useful purpose, it is nevertheless open to every member of the public to attain the same end by using an article which differs from it in shape and configuration. The statutory prohibition which constitutes the measure of his privilege is to the effect that so long as his copyright endures, it shall not be lawful for any person, without his licence or consent in writing, to apply his design "or any fraudulent or obvious imitation thereof," in the class of goods in which such design is registered.

Accordingly, the only relevant consideration in any question of infringement is, whether the article complained of is a copy, or a fraudulent or an obvious imitation of the registered design. The observations which were made by Lord Westbury in *Holdsworth v. M'Rea*, 2 Eng. & Ir. App. 388, with reference to the Acts now repealed, are in my opinion equally applicable to the provisions of the recent statute. His Lordship there said—"Now in the case of those things as to which the merit of the invention lies in the drawing or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether therefore there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same."

I agree with my noble and learned friend on the woolsack that the appellants' fire-door is an obvious imitation of the respondents' registered design, and I am therefore of opinion that this appeal must be disallowed.

LORD FITZGERALD.—I concur in the two judgments which have just been delivered. I may remind your Lordships that in the course of the discussion at the bar one of the learned counsel asked us to put the two things side by side, and said that we should see by a look that the article produced by the appellants was an obvious imitation of the registered design of the respondents. I looked minutely at the two things then, and I came to the conclusion that the door of the appellants was clearly an obvious imitation of the registered design of the respondents, and from that moment I thought the argument was at an end.

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THE interlocutor appealed from dismissed, with costs.

MARTIN & LESLIE—J. & J. ROSS, W.S.—GRAHAMES, CUREKY, & SPENS—  
AULD & MACDONALD, W.S.

No. 6.

JANE DONALDSON REID RAE AND ANOTHER (Pursuers), Appellants.—

*Asher, Q.C.—Rhind—M'Iraith.*

JOHN MEEK (Defender), Respondent.—*D.-F. Balfour, Q.C.—G. W. Burnet.* Aug. 8, 1889.  
Rae v. Meek.

HOTSON & HOWIE (Defenders), Respondents.—*Rigby, Q.C.—Law.*

*Trust—Investment—Liability of trustees—Law-agent.*—A marriage-contract empowered the trustees acting under it (two of whom were the spouses) to lend on, *inter alia*, heritable securities, or personal securities or obligations, and declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The greater part of the trust-funds was lent by the trustees on the security of buildings in the course of erection, the rents of which, after their completion, turned out to be insufficient to meet the interest on the loan, and the borrower became bankrupt. While both spouses were alive the children of the marriage, whose interest under the contract was during the marriage contingent merely, brought an action against the trustees and the law-agent to the trust, concluding to have them ordained, "conjunctly and severally, or severally," or in such other way or manner as should seem just, to restore the money to the trust. The law-agent and one of the trustees lodged defences.

It appeared from a proof that the buildings, which were in Glasgow, were of the nature of a speculation in the particular locality, and that the speculation wholly failed. The proposal for the loan was (along with others) placed before the trustees at a meeting where the spouses were present, and with it a valuation by an architect which had been obtained by the borrower. This valuation shewed an ample margin on the estimated value of the buildings when completed. The trustees obtained no separate valuation, nor did their law-agent suggest the propriety of obtaining one. The loan was agreed to at the meetings at which it was placed before the trustees.

*Held* (aff. judgment of Second Division and consulted Judges), that the pursuers had no title to sue the law-agent, because he had not been employed by them.

*Held* (rev. judgment of Second Division and consulted Judges), (1) that the trustee, in making the investment, had failed to shew the reasonable care that a man of ordinary prudence would exercise in the management of his own business, and therefore (2) that he was personally liable for the trust-funds so invested, the clause of immunity affording no protection for such negligence.

*Knox v. Mackinnon*, August 7, 1888, 15 R. (H. L.) 83, *followed*.

*Judicial Factor.*—Appointment of judicial factor to protect contingent interests.

(In the Court of Session, July 19, 1888, 15 R. 1033.)

The pursuers appealed.

At delivering judgment,—

Ld. Herschell.  
Lord Watson.  
Ld. Fitzgerald.

LORD HERSCHELL.—The circumstances of this case are somewhat peculiar. The appellants are the children of the marriage of Robert Reid Rae and



No. 6. Jessie Croil, and the défendant Meek is one of the trustees of the marriage-contract between these parties, entered into on the 7th of September 1852.

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Under this contract Robert Reid Rae and his wife were also appointed trustees, a major part of whom was to form a quorum, the wife during her lifetime being a *sine qua non*. By this contract Jessie Croil conveyed all her estate inherited from her deceased father to the trustees named in it for behoof of herself in liferent, and in case she survived her husband absolutely in fee. In case Robert Reid Rae survived her, he was to enjoy a liferent so long as he remained unmarried. Upon his death or marriage the property was to pass to the children of Robert Reid Rae and Jessie Croil. The trustees were authorised to invest the trust property "in the purchase of heritable property, feu-duties or ground-annuals, or Government or bank stocks, or heritable securities, or even upon such personal securities or obligations as they may approve of as good and sufficient."

In 1874 the trustees sold a portion of the trust property for £2750, and received payment of another sum of £2000, which had been lent on heritable security. They had thus £4750 to invest. On the 5th of May in that year, a meeting of the trustees took place, at which Mr and Mrs Rae and Mr Meek were present, when it was resolved that a loan should be made to Mr William Anderson on the security of unfinished buildings in the Gallowgate, Glasgow, provided Mr Hotson, their law-agent, should be satisfied with the title, and that such part of the loan should be deposited in a bank in the joint names of the parties' law-agents as Mr Burnet, an architect who had valued the buildings, should deem to be sufficient for finishing them.

The loan was accordingly made, and the entire sum of £4500 ultimately paid to Anderson. I shall have presently to revert to the circumstances attending the loan, but it will suffice for the present to state that the transaction turned out a disastrous one for the trustees, and that the money lent has been lost to the trust-estate. This action has been brought by the present appellants to compel the défendant Meek to make good the loss. The law-agents who acted for the trustees at the time of the loan were joined as défendants, and the same relief was claimed against them.

The Lord Ordinary required the appellants to elect whether they would proceed against the trustee or the law-agents, and on their declining to do so, dismissed the action on the ground that the trustee and the law-agents ought not to have been sued in the same action. This interlocutor was recalled by the Inner-House, and the parties were allowed to proceed to proof. After proof had been led the cause was argued before the Second Division and three Judges of the First Division of the Court. The Lord President, the Lord Justice-Clerk, and Lord Adam delivered their opinions in favour of all the defenders. Lord Young concurred in thinking that the defender Meek was not liable, but held that a case had been made out against the law-agents. Lords Mure, Shand, and Rutherford Clark thought that the liability of the trustee had been established, but that there was no case against the law-agents.

At the conclusion of the argument of the learned counsel for the appellants all your Lordships were of opinion that they had failed to shew any ground for their action against the law-agents; I share the difficulty which was felt by the Lord Ordinary. I cannot see how the law advisers could in any view be held liable to restore to the trust-fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all it could

only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And considering the contingent nature of the appellants' interest in the fund it is obvious that this must be something very different from the amount of the loss to the estate. Liability as against the defenders with whose case I am now dealing could in my opinion only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that having undertaken this employment they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees and not to the beneficiaries. If there has been a breach of it, the trustees and not the beneficiaries are the parties to sue. There may be cases where, if trustees failed to call to account those who are under liability in respect of acts injurious to the trust-estate, the beneficiaries may compel them to do so, or even enforce the right themselves. But no such question is raised by the averments in the present action. But further, I think it right to say that in my judgment the evidence does not establish that the law-agents were employed to advise the trustees as to the sufficiency of the security, or that the trustees acted on any such advice. It seems to me, therefore, that the case against these defenders entirely fails, and that the appeal as against them ought to be dismissed.

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I turn now to the case against the defender Meek, which has given rise to such divergence of opinion amongst the learned Judges in the Court below. I may remark at the outset that if a breach of duty on his part has been proved, I think it is competent for the appellants to maintain this action. It is clear that neither Mr nor Mrs Rae could obtain any relief against the defender Meek, for if there has been a violation of duty they were as much parties to it as he was. They cannot claim to have the sum lost replaced, to be held on the trusts of the marriage-contract so far as those trusts are for their benefit. But I see no reason why the appellants may not claim to have their contingent interest under the trusts of the marriage-contract protected.

The law bearing upon the liability of trustees has been recently considered by your Lordships in the cases of *Whiteley v. Learoyd*, August 1, 1887, L. R. 12 App. Ca. 727, and *Knox v. Mackinnon*, August 7, 1888, 15 R. (H. L.) 83, the one coming from the English, the other from the Scottish Courts. I think these cases establish that the law in both countries requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. The Lord President in the present case did not adopt this as the test. "We must not demand," he said, "of Mr Meek any more prudence or diligence or knowledge than he actually possesses or uses in the management of his own business. For that purpose we must consider what Mr Meek is." As a result of this consideration he came to the conclusion that Meek was not a man of business habits, or of great intelligence or discretion. I do not think the inquiry thus entered upon was a relevant one. The test which the Lord President applied was rejected as erroneous by this House in *Knox v. Mackinnon*. Lord Watson there said,—"It was seriously argued that according to the law of Scotland the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster), be tested by reference not to an average standard but to the degree of care and prudence which he uses in the management of his private affairs. The rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is

No. 6. imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member, the interest of the trustee being to shew that he was a stupid fellow, careless in money matters, and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness."

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I think therefore that the ground upon which the Lord President, and the learned Judges who concurred with him, rested their judgments upon this part of the case cannot be supported.

Has it then been shewn that the trustee failed to exercise that degree of diligence which a man of ordinary prudence would exercise in the management of his own affairs? In order to answer this question it is necessary to lay the facts before your Lordships more fully than I have hitherto done.

The buildings which were to form the security for the loan agreed upon at the meeting of the trustees to which I have referred were an unfinished portion of a large block which the borrower was erecting in Gallowgate upon a site which was part of an area cleared of a very inferior class of buildings in the course of the city improvements. The ground-annual upon that portion which was to be the security of the trustees amounted to £192. The buildings in course of erection were intended for use as warehouses and offices, and were of a character hitherto unknown in that locality. The only guide which the trustees possessed as to the adequacy of the security was an estimate of Mr Burnet, who valued the buildings when finished at £6500, over and above the annual feu-duty. This valuation was contained in a letter addressed by Mr Burnet to the agents of the borrower by whom it had been obtained. The trustees sought for no independent valuation. They made no inquiry before agreeing to the loan as to the rentals to be anticipated from the property, and had no estimate of those rentals before them. It has been suggested that they were advised by their law-agents that the security was sufficient. I can find no evidence of this. Mr Meek asked whether they could lend on unfinished buildings, and received the answer that they could, and that such loans were common. I see no reason to doubt that this answer was correct. If the buildings in course of erection had been of the same character as those which previously existed on the same site, and these had been constantly let, I do not think that the mere fact that the new buildings were unfinished would be material if due security were taken for their completion. I lay no stress therefore on the mere fact that they were not completed at the time of the loan. But I have said enough to shew that the erection of these warehouses was an adventure on the part of Mr Anderson, the borrower. Whether it proved successful or not would depend entirely upon whether the business the purposes of which they were intended to serve took root in the locality or not. This was a pure matter of speculation. No doubt Mr Anderson was sanguine as to its success, and he was entitled to run what risk he pleased. But the duty of the trustees was to obtain a safe investment which would afford a security for the money advanced, and not to hazard it upon a speculation. The event which happened was such as ought to have been anticipated by any person of prudence, if not as a probable, at least as a possible one. The buildings remained in great part untenanted, the rents never reaching a sufficient sum to discharge the ground-annual. Anderson became insolvent, and the trust fund has been lost. I cannot think that under these circumstances the defender Meek exhibited in this transaction the care which a person of ordinary prudence would exercise in the management of his own affairs.

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The Lord President, who took the view most favourable to him in the Court below, used the following language with reference to the security taken :—"The failure of the security arose from this, that the erection of buildings of the character of those which were erected in this locality—that is, in the Gallowgate of Glasgow—was in itself a very great risk, and an experiment, and turned out to be an entirely unsuccessful experiment." The defender not only advanced money upon such a security, but he obtained no independent opinion as to the value of the property, the rental it was likely to yield, or the prospects of speedily obtaining tenants. He was content to rely exclusively on the lump valuation of the borrower's architect, obtained for the purposes of the loan. To hold that a trustee who thus acted had discharged his duty, and was under no liability if the security proved worthless, would, I think, be highly dangerous.

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But it was urged on behalf of the defender that this did not conclude the case against him, inasmuch as he was protected by the clause of immunity contained in the trust-deed. That clause is in the following terms :—"That the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only." Such a provision, in terms identical or not distinguishable in their effect, is a common one, and is to be found in many trust-deeds. It does not now come before the Courts for construction for the first time. Its effect was considered with great care in the case of *Seton v. Dawson*, Dec. 18, 1841, 4 D. 310, long before the preparation of the trust-deed with which we have to deal. And it has been the subject of discussion in several cases since the date of that decision. I adopt the law as laid down by Lord Watson in this House in *Knox v. Mackinnon*, 15 R. (H. L.) 86, which I think is well warranted by the authorities—"It is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata* or gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who from motives, however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinions expressed by Lords Ivory, Gillies, and Murray in *Seton v. Dawson*, to the effect that clauses of this kind do not protect against positive breaches of duty."

It is impossible to draw any hard and fast line between the want of that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed *culpa lata*. But I have arrived without hesitation at the conclusion that there was *culpa lata* in the present case. Indeed, I think that to advance money on such a security, with only such information and under such circumstances as I have described, was a positive breach of duty on the part of the trustee towards those beneficially entitled to the trust fund.

I feel some regret at being compelled to arrive at the conclusion that the defender is liable, for I should be most unwilling to press the case hardly against any trustee who has acted honestly and without any improper motive. But it is the bounden duty of the Courts to enforce against trustees the obligations they have undertaken, and to protect the trust funds committed to their charge.

I have already said that no order ought to be made in this case from which

No. 6.  
 Aug. 8, 1889.  
 RAE v. MECK.

Mr or Mrs Rae can obtain any benefit. It is impossible therefore to ordain *simpliciter* that the defender should replace the lost trust fund, and that the fund thus replaced should be held subject to the trusts of the marriage-contract. I think the order should be as follows:—That the judgment be affirmed, and the appeal dismissed as regards the respondents other than John Meek, and that as regards that respondent the judgment appealed from be reversed, and that the case be remitted to the Court below with directions to ordain the said respondent to pay to a judicial factor to be appointed by the Court the sum of £4500, to be held by him for the trusts and purposes following—that is to say, to pay to the said John Meek the interest derived from the investment of the fund, less the necessary expenses, during the joint lives of Robert Reid Rae and Jessie Rae. In case the said Jessie Rae should survive the said Robert Reid Rae, then to transfer the said £4500, or the securities representing the same, to the said John Meek, but in case the said Robert Reid Rae should survive the said Jessie Rae, then to pay to the said John Meek the interest derived from the investment of the fund, less the necessary expenses, so long as the said Robert Reid Rae shall live and remain unmarried, and upon the decease or second marriage of the said Robert Reid Rae, to hold the fund upon the trusts declared by the marriage-contract. And to further ordain that upon payment of the aforementioned sum to the judicial factor the security relating to the Gallowgate property be transferred to the respondent Meek at his expense, if he shall so require. And that the said respondent do pay the appellants their expenses of process in the Court below, so far as occasioned by his defence to the action; and that the said respondent do pay to the appellants two-thirds of their costs of this appeal, to be taxed in the manner usual when the appellants sue *in forma pauperis*. I move your Lordships accordingly.

LORD WATSON.—My Lords, I have had an opportunity of considering the terms of the judgment which has just been delivered, in which I entirely concur.

LORD FITZGERALD.—My Lords, I have carefully listened to the judgment delivered by the noble and learned Lord on the woolsack, and I entirely concur in it; in fact it is in accordance with what we agreed upon at the close of the argument.

THE HOUSE ordered in the terms proposed by Lord Herschell.

A. BEVERIDGE—W. OFFICER, S.S.C.—W. ROBERTSON—J. W. & J. MACKENZIE, W.S.—  
 MURRAY, HUTCHENS, & STIRLING—HOTSON & BROWN, Glasgow.

# CASES

DECIDED IN

## THE COURT OF JUSTICIARY,

1888-89.

HER MAJESTY'S ADVOCATE.—*Sym, A.-D.—J. C. C. Brown.*

SIMON MACLEOD.—*Ure.*

RODERICK GEORGE MACLEOD.—*Strachan.*

No. 1.

Sept. 12, 1888.  
Her Majesty's  
Advocate v.  
Macleods.

*Specification—Indictment—Falsehood, fraud, and wilful imposition—Trader obtaining goods on credit by means of false representations as to capital.*—Two persons were indicted on the charge that “you having” while carrying on business in partnership “formed a fraudulent scheme for obtaining on credit the goods of others on false pretences, and appropriating them to your own use, did in pursuance thereof” make certain specified false representations “concerning your means and financial position” to other traders, and did thereby deceive and impose upon them, “and did thus induce” them “to supply you on credit with . . . goods to the value specified” in the indictment, “towards the settlement of which you did not pay more” than certain sums specified, “and you did thus cheat and defraud” these traders of certain specified amounts, being the difference between the sum paid by the accused and the total value of the goods. Objections were taken to the relevancy of the charge, viz, first, that the alleged false representations were not stated to be the cause of obtaining the goods, and second, that the indictment did not set forth a crime, because it appeared from its own terms that part of the goods had been paid for, and that to the credit thence arising the delivery of the other goods must be ascribed. The Court *repelled* both objections.

*Contravention of Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 13, subsection B (3)—Obtaining property by any fraud within four months of sequestration.*—Two persons who were sequestered on 17th March 1888 were charged with an offence against the Debtors Act, 1880, sec. 13, subsection B (3),\* in respect that within four months prior to sequestration they obtained by means of fraudulent representations, made more than four months prior thereto, property on credit, and which had not been paid for, viz, “from R. Walker & Sons to the extent of £297, 6s. 7d.,” and from four other traders specified “to the extent of” certain specified sums. *Held* that the charge was irrelevant, because it did not specify the particular goods supplied within the four months.

*Opinion, per Lord M'Laren*, that in order to a relevant charge under the subsection the prosecutor must aver that the false representation by means of which the goods were obtained was itself made within the four months prior to the sequestration.

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\* The Debtors (Scotland) Act, 1880, section 13, provides that “the debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence . . . subsection B, in each of the cases following . . . (3) if within four months next before the presentation of the petition for sequestration or cessio he by any false representation or other fraud has obtained any property on credit, and has not paid for the same.”

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Sept. 12, 1888.  
Her Majesty's  
Advocate v.  
Macleod.

HIGH COURT  
(GLASGOW).  
Ld. McLaren.  
Lord Lee.  
Justiciary  
Clerk.

SIMON MACLEOD and RODERICK GEORGE MACLEOD were indicted before the High Court of Justiciary at Glasgow on two charges set forth as follows in the indictment, viz. :—"The charges against you are that you, while carrying on business as hosiery manufacturers under the firm of S. & R. G. Macleod, at 73 Mitchell Street, Glasgow, having formed a fraudulent scheme for obtaining on credit the goods of others on false pretences, and appropriating them to your own use, did, in pursuance thereof, on 13th December 1886, write and despatch to R. Walker & Sons, manufacturers, Leicester, the letter No. 6 of the productions lodged herewith, which letter was duly received by them, and the representations as to your means and financial position therein contained were false, and on the dates in 1887 in the first column of the schedule annexed hereto, in your said premises, you did verbally make the same or similar false representations as those contained in the said letter to the persons named and designed in the second column of said schedule, and in addition you falsely stated to the said persons mentioned in the said second column, that £10,000 of the capital in your said business was your own, all made since you began business; and did by said letter, and by the foresaid false verbal representations to John Peach Butlin, referred to in said schedule, deceive and impose upon him and upon the said firm of R. Walker & Sons, and by said false verbal representations, deceive and impose upon the other persons named in the second column of said schedule, and did thus induce the said firm of R. Walker & Sons, and the other firms mentioned in said schedule, during the period in the third column of said schedule set opposite to the respective names of the said firms in the said third column, to supply you on credit with yarn and hosiery goods to the values specified opposite to the respective names of the said firms in the fourth column of said schedule, towards the settlement of which you did not pay more than the sums in the fifth column of said schedule, and you thus did cheat and defraud the said firm of R. Walker & Sons, and the other persons in the second column of said schedule, or the said firms represented by them, of the amounts respectively specified in the sixth column of said schedule; or otherwise, the estates of the said S. and R. G. Macleod, and of you the said Simon Macleod and Roderick George Macleod, having been sequestrated on 17th March 1888, and you being thus debtors in a process of sequestration, did in your said premises in Mitchell Street, between 17th November 1887 and 17th March 1888, being within four months of the presentation by you of the petition for the sequestration of your estates, by means of the said false representations, obtain property on credit, which has not been paid for, from (1) the said R. Walker & Sons to the extent of £297, 6s. 7d.; (2) Robert Pringle & Son to the extent of £5, 13s. 7d.; and from the following firms named in said schedule, viz. (3) John Paton, Son, & Company, to the extent of £19, 14s.; and (4) David Sandeman & Company to the extent of £440, 12s., contrary to the Act 43 and 44 Vict. cap. 34, section 13, subsection B (3)."

Objection was taken on behalf of the panels to the relevancy of both charges.

Argued for them;—1. The common law charge was defective in specification, and made no averment of crime. It was clear that there was no case of fraud here, for the indictment itself, by the words "towards the settlement of which [goods] you did not pay more than the sums in the fifth column of said schedule," shewed that the prisoners had paid part of the price before they were overtaken by misfortune. The indictment and schedules shewed a course of dealing with payments at intervals. Credit, it must be presumed, would be given because of satisfaction with

these honest payments, and not because of representations made before the course of dealing began. The indictment, further, did not connect the alleged false representations with the obtaining of the goods. 2. The statutory charge was bad, because the alleged "fraud" was, according to the indictment, committed more than four months before the sequestration. The simple grammatical reading of the statute was that the whole crime, of which the fraud was the essence, must be committed within the four months. In any view that was a natural reading, and being the more favourable for the prisoner was the reading which the Court would favour in scanning an indictment. 3. The statutory charge did not specify the goods obtained within the four months.

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Argued for the Crown ;—1. The indictment contained every essential element of relevancy in common law charges of obtaining the goods of others by fraud, for it set forth (1) that false representations were made, (2) that they were made for the purpose of cheating, and (3) to the effect of obtaining the goods of the person cheated. The false representations were connected with their successful result by the words "deceive and impose upon" certain persons, and "did thus induce" them to part with their goods. The objection that they supplied the goods in part because the goods first supplied had been paid for probably would be a good objection if the proof did not negative it, but it was no objection to relevancy. 2. The statutory charge was relevant. The statute placed the limit of time on the "obtaining" of the goods, not the misrepresentation. A fraud once committed lived on into the future dealing. The reading proposed by the prisoners would defeat the statute.

LORD M'LAREN.—There are two charges here, one at common law and the other under the Debtors Act of 1880. As regards the common law charge it does not appear that the indictment is open to any exception on the ground of failure on the part of the prosecutor to set forth the particulars of the crime. There have been cases—I know of one that occurred since the passing of the new Procedure Act—in which it was laid down that you do not necessarily make a relevant indictment by just copying the words of the schedule, because every indictment must be considered with reference to the particulars of the case, and it might be necessary to expand the description of the crime which is in substance indicated in the schedule of the Criminal Procedure Act. In the present case it appears to me that there is a full and fair specification both of the representations on the faith of which the goods are said to have been obtained, and of the particular transactions resulting in the loss to the dealers who gave credit. Two objections to the relevancy of the indictment have been stated, one of them being that there are no words properly connecting the representations with the obtaining of the goods, for the one is said not to be the direct consequence of the other. It is possible that the indictment might have been made more precise in this respect, but I think the words which follow the narrative of the representations made, viz., "and you did thus induce the said" firms to supply the goods, are sufficient to connect the representations with the resulting injury. The second objection is, that it is of the essence of the crime of obtaining goods on false pretences that the goods should not be paid for. It is argued, no matter whether the representation be true or false, if the goods are paid for no fraud is committed; there may be a moral fraud, but no one is defrauded in the sense of being injured in his property. Now, it may be that in the investigation of the facts stated in this indictment the prisoners will be able to establish that they paid for certain of the specified goods; and in that case a question will arise



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for the consideration of the jury, whether the goods subsequently obtained were obtained in reliance on the original representation? If it were shewn, for example, that the seller had meantime become aware that these representations were not trustworthy, and had nevertheless gone on supplying goods to the panels because he had been paid for those already supplied, and hoped for payment against future orders, then the case would very likely break down. If, on the other hand, it was proved that the seller supplied goods on the faith of the original representations, it would not be any answer to a case of that kind to say that an interval of time had elapsed between the representations and the obtaining of the goods, and that in that interval other goods had been got and paid for. Mr Ure's observation, though entitled to weight, ought to be addressed to the jury on the import of the evidence rather than to us on the question of relevancy.

Regarding the charge under the statute, I agree with my brother Lord Lee that in order to make a relevant charge under the Debtors Act, 1880, there must be a separate schedule setting forth the particular goods that were obtained within the period of four months; the schedule in the indictment framed with reference to the common law charge—extending over a period of two years—is not properly applicable to the statutory charge. It would be necessary either to have a separate schedule or to have the particular items stated that were intended to be made applicable to the statutory charge. That appears to me to be sufficient to dispose of the question of relevancy arising on the statutory charge.

I may say, further, although it is not necessary for the decision of the case that I have the greatest possible doubt whether any relevant charge under the statute could be framed upon the facts of this case. It appears to me that there is one possible interpretation of the statute which would be adverse to the relevancy, viz., that the representation and supplying the goods must both be within the specified period of four months. No doubt there is another possible interpretation, viz., that, provided the goods were obtained within four months of sequestration on the faith of a written representation previously made, an offence is committed. But as between the two interpretations, neither being a strained interpretation, but both fair and possible readings of the statute, I think that, in accordance with known rules, we ought to apply the principle of "strict construction," that is to say, the construction which gives the least extension to this new category of crime.

LORD LEE.—I have arrived at the same result, and upon both the objections, though upon the objection to the charge under the statute I am not prepared to assent to the opinion which your Lordship has indicated upon the construction of the statute. With regard to the first charge, and indeed with regard to both charges, the kind of case which I think this indictment discloses is that of obtaining goods by false pretences,—of persuading men of business by means of a false representation concerning the financial condition of a firm to enter upon a course of dealing the result of which is that goods are supplied on credit and not paid for. I am of opinion that that kind of charge is sufficiently alleged in the first part of the indictment. As regards the common law charge, it is in my opinion sufficiently set forth that this false representation was made by the panels in pursuance of a scheme, and secondly, that the result of these false representations was to induce the persons alleged to have been defrauded to supply the goods on credit to their ultimate loss. There then arises the question upon the

*facts*, whether the balance of goods supplied to the panels after the first goods had been sent to them and paid for, were or were not supplied on the false representation? That is a question for the jury, and I say nothing upon it at present. I am of opinion, therefore, that the common law charge is relevant.

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With regard to the statutory charge, I am of opinion with your Lordship, that it is necessary that there should be a sufficiently distinct allegation that the panel has by false representations obtained property on credit which has not been paid for, and that it is necessary that the goods so obtained must be specified. I do not find that they are. The only allegation here is that the panels fraudulently obtained goods from various firms amounting in value to (1) £290, (2) £5, (3) £19, and (4) £440, within four months of sequestration. I do not think that is a sufficient compliance with the statute. What were the particular articles so supplied? Is this sum of £440 to be made up out of goods supplied prior to the period of four months? What were the goods that the prosecutor undertakes to shew were delivered in that four months, and amounting in value to the sums mentioned in the schedule? I do not find that there is any specification of these in the indictment, and I think that is sufficient for our decision on the relevancy of the statutory charge. I agree with your Lordship, that either of the constructions of the statute suggested by your Lordship is possible, but I do not propose to give any opinion as to which is to be preferred. I am for sustaining the objection to the relevancy of the statutory charge, but repelling the objection to the charge at common law.

The objections to the first charge were repelled, and the statutory charge was found irrelevant. The panels were convicted on the common law charge, and sentenced to six months' imprisonment.

PROCURATOR-FISCAL FOR LANARKSHIRE—BORLAND, KING, & SHAW, Writers—  
MACBEAN & MACDONALD, Writers—Agents.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Darling—Wallace, A.-D.*

JAMES PARKER.—*J. C. Thomson—M'Lennan.*

JAMES BARRIE.—*C. S. Dickson—Younger.*

No. 2.

Nov. 5, 1888.  
Her Majesty's  
Advocate v.  
Parker and  
Barrie.

*Indictment—Ship—Collision—Competency of charging pilots of respective ships in one indictment—Culpable and reckless steering—Culpable homicide.*—Two pilots, J. P. and J. B., were charged in one indictment, setting forth that on an occasion and at a place libelled, "you, J. P., when pilot in charge of the ship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Acts Amendment Act, 1862, and you J. B., when pilot in charge of the said steamship 'Princess of Wales,' there being risk of collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill certain persons."

*Held* (1) that it was competent to try both the accused under one indictment for their alleged separate and unconnected acts of negligence; and (2) on a motion to separate the trials, that the trials ought not to be separated.

*Held* further, that the indictment was relevant, *repelling* objections to the relevancy (1) that the Regulations founded on were neither referred to in the manner prescribed by sec. 9 of the Criminal Procedure (Scotland) Act, 1887, rendering quotation of statutes unnecessary, nor fully and correctly quoted; (2)

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that the charge of "failing to navigate your respective vessels with proper and reasonable care" was defective in specification.

*Indictment—Relevancy—Use of qualifying words—Criminal Law Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), sec. 8.*—Held that a libel in the terms above quoted was a relevant charge of culpable homicide, although not containing words such as "culpably and recklessly" qualifying the acts charged.

*Observations on the case of Her Majesty's Advocate v. Dingwall, May 26, 1888, 15 R. (Just. Cases) 69.*

HIGH COURT.  
Lord Justice-  
Clerk.  
Justiciary  
Clerk.

JAMES PARKER and JAMES BARRIE were indicted before the High Court of Justiciary on the charge "that on 16th June 1888, on the Clyde, near Skelmorlie, Ayrshire, you, James Parker, when pilot in charge of the steamship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18\* of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Act Amendment Act, 1862, and you, James Barrie, when pilot in charge of the said steamship 'Princess of Wales,' there being risk of collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill Andrew Ferguson, joiner, Cross Street, Partick," and two other persons named, "who were on board the said steamship 'Princess of Wales,'"

In the list of productions notice was given that the Crown would produce an "official Copy of Orders in Council containing regulations now in force for preventing collisions at sea."

At the first diet before the Sheriff Court of Ayrshire the following objections were stated to the relevancy of the libel, viz. :—"(1) That both panels are charged in one indictment, while the acts of negligence are separate; (2) that the rules founded on are not sufficiently set forth; (3) that facts are not alleged sufficient to infer a breach of the rules; (4) that the charge of failure to navigate with proper and seamanlike care is wanting in specification; (5) *culpa* is not set forth in the libel, *culpa* being of the essence of the crime; (6) that the indictment does not set forth facts relevant and sufficient to constitute an indictable offence."

These objections were reserved for the consideration of the Court at the second diet.

Argued for the panels;—It was incompetent to try the accused under one indictment. The result would be that one of them would cross-examine the witnesses for the Crown, lead his own evidence, and close his case without having an opportunity of cross-examining the witnesses brought for the other prisoner, who might, and indeed would, in the case made for him, throw the whole blame on his fellow-accused. In such circumstances it would be in vain that the jury should be directed not to consider the evidence led for one prisoner as affecting the case against the other. The jury could not, if they would, refuse weight to that evidence. The case was not one of concert between two prisoners to

\* Art. 18.—"Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary."

Art. 15.—"If two ships under steam are meeting end on or nearly end on so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

"This article only applies to cases where ships are meeting end on or nearly end on in such a manner as to involve risk of collision."

commit a crime. It was one in which the whole blame, criminal or civil, might rest with one of the accused, and the case of the other would be to shew that. It had been decided in a recent case<sup>1</sup> that in a charge of such a kind it was incompetent to charge both the accused in one libel. [LORD JUSTICE-CLERK.—That case was different, because it was not set out in the libel what each accused did or failed to do. Here, on the contrary, the prosecutor has set out what particulars he proposes to prove against each prisoner.] But the judgment was that the use of one libel for such a case was incompetent. Lord M'Laren's opinion made that clear. No reported case could be cited on the other side in which the masters of two ships charged with culpable and reckless steering had been tried on one indictment. It was true that in an unreported case tried at Inveraray Circuit in 1868, such a charge had been sustained, but it had not been objected to, probably because the accused thought it for their interest not to take the objection. In the case of *Rowbotham*,<sup>2</sup> where the manager and locomotive superintendent of a railway company had been tried along with a telegraph officer for neglect of duty, no objection was taken to the competency of trying the prisoners together, and a motion to separate the telegraph officer's trial was refused, but other persons accused as to blame for the same accident were tried under a separate libel.<sup>3</sup> But further, the libel was irrelevant from deficient specification in that part of it which set forth a breach of regulations for preventing collisions at sea issued by Order of Council by virtue of the Merchant Shipping Acts Amendments Act, 1862, sec. 20 *et seq.* If an Act of Parliament or similar document were quoted under the old practice it required to be fully and accurately quoted. It might now be referred to, but here the reference was attempted by means of an inaccurate quotation of rules 15 and 18 of the rules founded on. It was not said, for example, that stopping and reversing was "necessary," but the rule said that a vessel shall, in circumstances in which it applied, "slacken her speed, or stop and reverse if necessary." So also the quotation of rule 15 was inaccurate. It was a case to which sec. 9 of the Criminal Law Procedure Act, 1887, applied, and not sec. 15.\* If so, a reference would have sufficed, but an inaccurate paraphrase was inadmissible.

Again, the general statement that the accused "did fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision," was clearly defective in specification. The prosecutor must allege specific fault. In the most recent case of this class there had been such an averment,<sup>4</sup> and in the case of *Fail*<sup>5</sup> an

<sup>1</sup> *Clelland v. Sinclair*, March 18, 1887, 14 R. (Just. Cases) 23.

<sup>2</sup> *H. M. Advocate v. Rowbotham and Petre*, March 15-19, 1855, 2 Irv. 89, 27 Scot. Jur. 338.

<sup>3</sup> *H. M. Advocate v. William M'Intosh and William Wilson*, March 19, 1855, 2 Irv. 136.

\* Sec. 9.—"It shall not be necessary in an indictment for a crime punishable under any Act of Parliament to quote the Act of Parliament or any part of it, but it shall be sufficient to allege that the crime was committed contrary to such Act of Parliament, and to refer to the Act and any section of the Act founded on without setting forth the enactment in words at length."

Sec. 15.—"Where in an indictment any document requires to be referred to, it shall not be necessary to set forth the document, or any part of it, in such indictment, but it shall be sufficient to refer to such document by a general description, and where it is to be produced, by the number given to it in the list of productions for the prosecution."

<sup>4</sup> *H. M. Advocate v. Drever and Tyre*, Nov. 2, 1885, 5 Couper, 680.

<sup>5</sup> *H. M. Advocate v. Fail*, Sept. 13, 1877, 3 Couper, 497.

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indictment for criminal carelessness in conducting blasting operations had been held irrelevant for want of it.

Lastly, the indictment was irrelevant on the simple ground that it did not contain any charge of crime. It was of the essence of the crime charged that the acts averred be done wilfully, or culpably and recklessly, and this was not averred. It had been decided in the case of *Dingwall*<sup>1</sup> that where the acts stated in the charge were indifferent the indictment must contain words shewing that these acts were in the circumstances criminal. Here this was the more necessary, because the rules founded on derived their force from the Act of 1862, which, in sec. 27, enacted that the master of a ship should be punished for breach of them if he was in "wilful default."

Argued for the Crown;—It was quite competent to charge and try two prisoners under one libel though their acts of crime were stated to be separate, and joint purpose was not part of the case. The case of *Clelland* was no authority to the contrary. The objection to the conviction in that case, which the Court sustained, was that the prosecutor had not stated in his libel what negligence he charged against each of the accused. The opinion of Lord McLaren as to the trying of the accused on one libel was *obiter* merely. Nor could any other authority for the proposition maintained on the other side be produced.

In the case of *H. M. Advocate v. M'Taggart and M'Lachlan* (n. r.), tried at Inveraray in 1868, two captains of steamers had been tried in one libel on a charge of reckless steering similar to that made in the present case. So it was a familiar thing to try in one libel two railway servants, e.g., a signalman and a station-master, whose separate acts of negligence had conduced to a railway accident.

The objection to the statement of the rules for navigation which the accused were said to have transgressed seemed to assume that the charge was one of breach of these rules. But the charge was a common law charge of culpable homicide, and the rules were to be produced in evidence in support of that charge. The prisoners had nothing to complain of in the way in which they were stated, for the prosecutor had shut himself up to prove that the particular duty of the accused was to adopt one of the alternatives mentioned in the rules, viz., that of stopping and reversing, and that that was "necessary."

It was unnecessary to use the words "culpably and recklessly." The Criminal Procedure Act, 1887, did not require it. The specimen charge of culpable homicide in the schedule of the Act did not use these words.\* They were read into the charge by the Act itself, and need not be libelled.† Assuming the soundness of *Dingwall's* case its doctrine need not be extended to one of a different class. A similar objection taken in the unre-

<sup>1</sup> *H. M. Advocate v. Dingwall*, May 26, 1888, 15 R. (Just. Cases) 69.

\* Schedule A of the Criminal Procedure Act, 1887, gives this example:—"You did, when acting as a railway signalman, lower a danger signal and allow a train to enter on a part of the line protected by the signals under your charge, and did cause a collision, and did kill William Peters, commercial traveller, of Brook Street, Carlisle, a passenger in said train."

† Sec. 8 of the Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), provides,—“It shall not be necessary, in any indictment, to allege that any act of commission or omission therein charged was done or omitted to be done ‘wilfully,’ or ‘maliciously,’ or ‘wickedly and feloniously,’ . . . or ‘culpably and recklessly,’ or ‘negligently,’ or ‘in breach of duty,’ or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice its insertion would be necessary in order to make the indictment relevant.”

ported case of *Macleod*, 14th May 1888, to a charge of knocking down part of a march fence, had been repelled by Lord Trayner. No. 2.

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LORD JUSTICE-CLERK.—I have listened to a very able argument indeed, and have received every possible assistance in dealing with the questions raised. The first objection taken at the former diet was that both panels are charged in one indictment, while the acts of negligence are separate. That to me is a novel objection relating to a case in which, whatever were the offences committed by the panels at the bar, they were offences committed simultaneously, and led to one result, being that which brought about this criminal investigation. There have been in the course of the last thirty or forty years very many cases in which two persons, by separate acts committed at the same time, contributed to the unfortunate result of loss of life, involving them in the charge of culpable homicide. I think I am right in saying that in no single case that has occurred, so far as I know, has there been an instance of a separate prosecution against two persons so charged. In every case the prosecution has been against both together, and in no case, so far as I know, has any objection been made to the competency of such a proceeding. I can see, on the other hand, that there would be very unsatisfactory results if in every case in which two, or three, or four people, by separate acts of carelessness in the execution of their duty, and by their combined fault, caused an accident, each prisoner was to be tried separately before a separate jury, and if the Court had not the full facts of the whole case completely before it in one inquiry. It is said by Mr Thomson that it would be perfectly vain, after a jury had heard evidence led in a case of this kind for one of the panels, which might tend to throw guilt upon the other, to direct them that, as regards the other prisoner, they were not entitled to take that evidence into account at all. But I am bound to assume—and there is nothing that has occurred in the history of this country to lead any Judge to assume the contrary—that when a jury receive a distinct direction in law from the Judge sitting on the bench the jury will regard it.

The case of *Glelland* is the only case which has been quoted from the bar which has any bearing on this case. That case, however, was a very different one indeed. It was a case in which the prosecutor charged the masters of two steam vessels together before the River Bailie in Glasgow under a complaint which practically made no statement of facts whatever. Both of them, he said, had mismanaged their vessels, and the vessels had come into collision. That would not in any circumstance be considered a relevant charge. It would simply be a statement that two people behaved recklessly, and nothing more. Of course that never would be dealt with, even in the most summary Court, as being a fair and relevant statement for the information of the prisoners as to what each of them did in order to contribute to the disaster which followed. It is true that Lord M'Laren in the course of his opinion says—"The collision may have been the result of the negligence of one or of both, but if the last were the case, then there were separate acts of negligence, and it is not in accordance with the spirit of our criminal law that two persons should be charged, in the circumstances of this case, in one libel." If I had considered that that was the ground of judgment of the three Judges who heard the case, I should certainly feel myself bound by it, however much I might differ from it, and however much I might be satisfied—as I am satisfied—that the whole course of decisions is quite contrary to that doctrine. But I take that statement of Lord M'Laren to be an expression

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of his individual view alone, because I find in the opinions both of his Lordship and of the other Judges the real grounds upon which they proceeded—viz., that it was an act of oppression to charge the two men simply with having caused a collision without any explanation whatever of what either of them did, and to put them upon their trial without either of them having the slightest notice as to what was the fault attributed to him. Now, it is different here. The indictment here makes a specific and separate statement in regard to each prisoner, and it will be in the power of counsel at the bar in addressing the jury—and it will be the duty of myself in charging the jury—to point out what are the specific things alleged against each of the prisoners, and what are the specific things which must be proved before either of them can be found guilty upon the charge made against him. I am not now speaking on the question whether the charge is sufficient. I am speaking merely of the fact that this case is different from the case of *Clelland* in respect that there is a specific allegation against each of the accused. While I am speaking of that, I may as well refer to the objection which was taken to the general statement that “you did both fail to navigate your respective vessels with proper and seamanlike care.” I quite concur with Mr Thomson that that by itself would be a wholly irrelevant charge; but then the prosecutor does not undertake to prove that as a separate charge at all. Nor does he make it as a separate charge. He makes his specific charges, and makes his general statement. In the case of other crimes, before the passing of the recent statute, it was almost the invariable practice to state in the statement of specific facts that the act was committed in a certain manner, which was described, and to add “or in some other manner to the prosecutor unknown.” If that latter statement was made in the form of a specific and separate charge it was irrelevant. In one case a charge was held irrelevant in which the prosecutor prefixed to these latter words “you did then and there,” making it read “you did then and there” commit the crime libelled “in some manner and by some means to the prosecutor unknown.” That was held irrelevant for want of specification; but in another indictment raised against the same person the words were again used in the proper way to cover slight differences in evidence, and not as a substantive charge, and the indictment was held relevant. I refer to the case *M'Que* (H.C.), February 20, 1860, 3 Irv. 552 and 578, and 32 Scot. Jur. 478. Therefore, as regards the first and fourth objections, I have no difficulty in repelling them.

The second objection is that the rules or regulations founded on are not sufficiently set forth. Now, it must be kept in view that this is a charge of culpable homicide brought at common law, and the prosecutor is perfectly entitled in making such a charge to make the rules which are issued for the guidance of persons of skill in executing their duties a test as to whether they acted with reasonable care and skill. The regulations in this case are merely documents for the information of the prisoners and their advisers in order that they may meet the case which the prosecutor intends to make. The Act of Parliament provides that where it is necessary to set forth documents in an indictment it shall be sufficient to refer to such documents by general description, and the present regulations are just a document to be produced. Now, in the indictment I find the regulations are referred to as being regulations issued in pursuance of the Merchant Shipping Acts Amendment Act, 1862, and that notice is given in the list of productions that an official copy of these regulations is to be produced. The section applicable is not section 9 of the Act of 1887,

which was referred to, but section 15, which provides—"Where in an indictment any document requires to be referred to, it shall not be necessary to set forth the document, or any part of it, in such indictment, but it shall be sufficient to refer to such document by a general description, and where it is to be produced, by the number given to it in the list of productions for the prosecution." Therefore I must also repel the second objection.

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The third objection is that facts are not averred sufficient to infer breach of duty. Mr Thomson made the statement that the rules are not accurately quoted in the indictment. The prosecutor has taken one of two alternatives, and has charged each of the prisoners with not stopping and reversing when they ought to have done so. I think that they can have no reason to complain of want of specification by the prosecutor limiting himself to one and not stating the two alternatives, which would have given him a general latitude.

The last and most formidable objection I have to deal with is the objection based upon the case of *Dingwall*,—that the indictment should have contained as a preliminary statement the words "culpably and recklessly, and in breach of your duty," and that according to the case of *Dingwall* this indictment should be considered irrelevant. That brings me to the question whether the case of *Dingwall* compels me to hold this indictment to be irrelevant because it does not contain the words which the Statute of 1887 says in express terms it need not contain. The question is a somewhat difficult one. Either the case of *Dingwall* implies that in all cases of crime the words, or some of them, given in section 8 of the Statute of 1887 must be used, or it implies that in certain cases they, or some of them, must be used. After giving the question the best consideration I can, I cannot accept the decision in the case of *Dingwall* as applying generally to all cases, and that for two reasons. In the first place, to hold that it applied generally would be simply to wipe out a clause (and relative schedule) of the statute as if it had not been enacted. Second, I cannot accept *Dingwall's* decision as applying generally, because I gather from statements made by the learned Judges, in giving their opinions, that they did not consider that the schedule contained an example relative to the case they were deciding. Now, as regards the first point, I cannot hold myself bound by a decision of two Judges against the strong dissent of another, and against numerous decisions of Judges in previous cases giving effect to sections 2 and 8. Indeed, I hold myself bound, on the contrary, to assume that their Lordships did not intend altogether to set aside these clauses of a statute, and that therefore their decision is not to be so read. It is no doubt true that Lord Young in *Dingwall's* case speaks in a tone of ridicule of the omission of the expressions referred to in section 8, and asks, "Will anyone give me a good reason why these words should be omitted? There are plenty of superfluous and unnecessary words, e.g. the name and designation of the public prosecutor, which is always the same. Is it economy? You would save more by omitting 'by authority of Her Majesty's Advocate' than by omitting 'falsely and fraudulently.'" But even assuming that the clause were in its intent ridiculous, it is a perfectly clear and distinct enacting clause. The prosecutor cannot be held to have tabled an irrelevant indictment merely because he has obeyed the statute and left out words which the statute has said may be left out and shall be implied. No doubt, also, Lord McLaren says,—“I should only like to add that every libel must, in my opinion, set forth a crime—must set forth what conveys the notion of a crime—and that, I think, this indictment does not.” But the answer to



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that is, that if the statute declares that certain words wherever they would have been necessary to relevancy under the old form are to be implied, then a Court of law is bound, in reading the indictment, to read in such words just as if they had been actually written. To refuse to read them in, and to throw out the indictment for want of them, would be nothing else than disobedience to express and unambiguous statutory enactments. The order given by the statute must be obeyed, and if the order is distinct and intelligible, a Court of law is bound to give effect to it. To hold otherwise would be to justify disobedience to statutory enactments on grounds relating to the policy or propriety of their contents. This would be to change the position of the Judge from that of an interpreter and administrator of the law and to constitute him its censor, entitled to veto its provisions if unable to consider them expedient or agree with the reasons which led to their being passed into law. I cannot, therefore, accept the case of *Dingwall* as an authority binding the Court in every case to ignore the provisions of clause 8, and to reject indictments framed in strict accordance with section 2 and schedule A.

The second point, viz., that the learned Judges held that the schedule was not applicable to the particular case, I gather to have been the real ground of judgment. For Lord Young, referring to Lord Rutherford Clark's opinion, says that he understands Lord Rutherford Clark to "assume that the case given in the schedule under the name of Norah Omond is a charge of falsehood, fraud, and wilful imposition." And his Lordship adds, "I see no reason for arriving at that conclusion. . . . The case is *toto cælo* different from the specimen relied on." And Lord M'Laren says,—“When we look into the schedule it appears uncertain whether the case is meant as a statement of the crime of falsehood, fraud, and wilful imposition, or of dishonest appropriation, a new *nomen juris* introduced by this statute.” I may be permitted to say that while willing to submit to the decision where it clearly applies, yet until it has been considered by a full bench I dissent altogether from the reasons given. I dissent from what is laid down by Lord Young, because while I know he has a strong view that to obtain goods on the false pretence of *bona fide* business purchase with the distinct intention not to pay for them is not a crime by the law of Scotland, the contrary has been affirmed by a full bench in the case of *Witherington*, 4 Coup. 475. And that case was really following up numerous previous decisions of the High Court, sitting with a bench of three Judges. This was what the prosecutor averred in the case of *Dingwall*, and this is what his Lordship in that case stated was not crime by the law of Scotland. In this conflict of opinion I am bound by that of the full bench, with which I concur in every particular.

Again, with reference to the reasons given by Lord M'Laren, I find from his opinion above quoted that his Lordship proceeds in *Dingwall's* case on the assumption that the statute has created, as regards crimes relating to property, a new *nomen juris*, viz., “dishonest appropriation of property.” Lest it should be supposed that I acquiesce in that statement of what is contained in the Act, I must here say parenthetically that his Lordship has fallen into an unaccountable error in matter of fact. For the statute, in no part of it, establishes any new *nomen juris*. It is a procedure Act, intended to abolish the use of *nomina juris*. It does not mention such words as “dishonest appropriation of property” in any connection applicable to a substantive charge of crime. The words “dishonest appropriation of property” do not occur in the part of the statute which deals with the libelling of the crime charged. They relate to the

notice of previous convictions to be used in evidence after trial and conviction, and to nothing else. As the statute extends the use of previous conviction in aggravation (after proof of crime) to all convictions for offence of a similar nature, it for convenience permits a number of these convictions to be described in the indictment by a comprehensive phrase, which is a form of notice intended to prevent surprise, the particulars being afterwards duly given in the list of productions. It is therefore clear that to speak of these words as a novel *nomen juris* for crime is entirely to mistake the meaning of the Act. But the important fact brought out by Lord M'Laren's special reference to these words in the case of *Dingwall* is that it is thus indicated that, in the opinion he was giving, he intended, as Lord Young also plainly intended, to deal with cases relating to offences against property, and to such offences only. I have therefore no hesitation in holding that, pending the decision of a full bench, I am not bound by that decision, except in so far as it relates to the particular crime in question in the case of *Dingwall*, and to the part of the schedule A applicable to that crime. The charge here is that the accused did guiltily do, or fail to do, certain acts libelled. The prosecutor undertakes to prove, according to what is required by law, the guilty character of the acts alleged to have been done. It is important to observe that it is the responsible public prosecutor alone to whom the privilege of thus libelling is given. He, on his responsibility, indicts and accuses of crime. The statute declares that the acts he specifies are to be read as being alleged to be done contrary to the criminal law of the country, and that if the charge with certain words read in would have been sufficient under the former law to make a relevant accusation, then they should be read in. Obeying the statute, I read them in here. It is not disputed that if these words were written in, the indictment would be relevant. The statute says they should be implied. That means that, for the purposes of relevancy, they are in the indictment.

I have only to add on the question of relevancy that Lord M'Laren refers to one case, in which the qualifying word "wilfully" is used in the schedule, in support of his view. He refers to the schedule, which gives an instance of the charge of fire-raising thus:—"You did set fire to a warehouse . . . and the fire took effect on said warehouse, and this you did wilfully (or culpably and recklessly)." But that very exception proves the rule, instead of being, as his Lordship suggests, an illustration of the application of the rule as he understands it. There are but few cases where the same acts described in the same words may fall into one or other of two categories of crime, and where a description in ordinary words without adjectives will not set forth the difference clearly enough—as, for example, between murder and causing death without murderous intent. But there are certain cases in which general words will not indicate any difference. The case of crime by raising fire is one of these. To say that a man set fire to a house gives him no notice whether he is accused of malicious crime or only of criminal carelessness. In such a case, therefore, where the same general words apply equally to an offence of great malignity and deliberate criminality and to an offence in which there was no wicked intent but only punishable carelessness, the schedule indicates that if the higher offence is to be charged this intention shall be given notice of. But here, in this case, and in most other cases, no such ambiguity exists, and there is no need for the specification given in the case of fire-raising. That case, by its exceptional character, brings into relief other cases in the schedule in which no such words are used,

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and the statute expressly declares that these forms may be used. I hold that the prosecutor has properly applied the schedule in this case, and repel the objections to the relevancy.

*Thomson*, for the panel Parker, then moved for a separation of trials, maintaining that prejudice would arise to him if the case against Barrie was proceeded with at the same time. If it were done, Barrie's counsel would lead evidence which he, on behalf of Parker, could not test by cross-examination, but which would be intended to shew that Parker was responsible for the collision, which undoubtedly occurred. Parker would thus not have the last word to the jury. It was the practice of the Court to accede to such an application when, as here, it was stated by a prisoner's counsel, on his responsibility as the prisoner's adviser, that he anticipated great prejudice from the cases proceeding together.

The *Solicitor-General* opposed the motion, on the ground that it would be inexpedient and unjust that the whole case should not be heard at one time by the same jury.

**LORD JUSTICE-CLERK.**—I am afraid that in this matter the only assistance I have obtained in the argument is the statement which Mr Thomson has made on his responsibility as the counsel for one of the accused, that it would be to his prejudice if the trials were not separated. But I confess I do not see the grounds on which that view is presented. If I did I would be willing and anxious to agree to a separation of the trials. My opinion however is, not being able to appreciate the grounds on which the motion is rested, that there is no case for a separation of the trials. The facts of both cases must be intertwined. I think that if the cases were separated difficult and complicated questions would of necessity arise. I think that great inconvenience would arise from the separation which is proposed. I think the case is one which of all cases is fitting to be sent to a jury as a whole, and that no prejudice to the panels will arise from that course being taken.

I therefore refuse the motion to separate the trials.

The case then proceeded against both prisoners. The jury returned a verdict of guilty against both.

SENTENCE, four months' imprisonment.

CROWN AGENT—RONALD & RITCHIE, S.S.C.—J. & J. ROSS, W.S.—Agents.

## No. 3.

Nov. 22, 1888.  
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GABRIEL DUNLOP, Appellant.—*A. S. D. Thomson*.  
ROBERT WEIR (Procurator-Fiscal of J. P. Court of Lanarkshire),  
Respondent.—*Dundas*.

*Contravention of Contagious Diseases Animals Acts, 1878 to 1886—Permitting cattle to be moved without declaration of freedom from pleuro-pneumonia—Animals Order, 1886.*—The Contagious Diseases (Animals) Act, 1878, enacts that any person shall be guilty of an offence who "without lawful authority or excuse, proof whereof shall lie on him, does anything in contravention . . . of a regulation of a local authority." The "Animals Order, 1886," passed under the powers vested in the Privy Council under the Contagious Diseases (Animals) Acts, 1878 to 1886, provides that "if an animal is moved in contravention of a regulation made by a local authority . . . the owner of the animal and the person for the time being in charge thereof and the person causing, directing, or permitting the movement" shall be deemed guilty of an offence.

A cattle-dealer was charged with an offence against those provisions, in respect

that he "did move or cause, direct, and permit to be moved" certain cattle without their being accompanied by a declaration in terms of the regulations of the Lanarkshire Local Authority, into whose district they were to be moved, and was convicted. A case on appeal obtained by him stated that the appellant sold the cattle in Ayrshire, that the purchaser's drover who removed them into Lanarkshire had not a declaration properly filled up and countersigned by a police-officer, in terms of the regulations of the Local Authority of Lanarkshire, and that the Justices were "of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanark, was guilty of the offence charged." *Held* that there were no grounds stated in the case to justify the conviction, and that it must be set aside.

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*Review—Appeal—Amendment of case.*—Where a case obtained by a person convicted of a statutory offence disclosed no ground for a conviction, and its amendment would have involved the statement of a totally new case after a considerable interval from the date of the proof, the Court *refused* to remit the case to the inferior Court for amendment.

GABRIEL DUNLOP, cattle-dealer, Castle Farm, Stewarton, Ayrshire, was charged before the Justice of Peace Court at Hamilton on 6th June 1888 under a complaint at the instance of Robert Weir, procurator-fiscal that Court, setting forth that on 30th April or 1st May 1888 he did "move or cause, direct, and permit to be moved by some person, to the complainer unknown, eight cattle, of which he, the said Gabriel Dunlop, was then the owner or person in charge, from Castle Farm, Stewarton, aforesaid, being within the district of the Local Authority of the county of Ayr, by road into the district of the Local Authority of the county of Lanark without the said cattle being accompanied with the declaration required by the regulations, dated 11th April 1888, made by the said Local Authority of the county of Lanark, in virtue of the powers conferred on them by the Contagious Diseases (Animals) Act, 1878 to 1886, and the Animals Order of 1886, the said movement being thus contrary to the Act of Parliament, 41 and 42 Vict. cap. 74, sec. 61, subsection (1)." \* [Contagious Diseases (Animals) Act, 1878]. The complaint further set forth that the accused had been previously convicted of a similar offence, and that he was liable in a certain penalty specified.

HIGH COURT.  
Lord Justice-Clerk.  
Lord Rutherford.  
Lord Lee.  
Justiciary Clerk.

\* The Contagious Diseases (Animals) Act, 1878 (41 and 42 Vict. c. 74), sec. 61, provides,—"If any person without lawful authority or excuse, proof whereof shall lie on him, does any of the following things he shall be guilty of an offence against this Act (1) If he does anything in contravention of this Act or of an Order of Council or of a regulation of a local authority."

By the Contagious Diseases (Animals) Act, 1886 (49 and 50 Vict. cap. 32), sec. 1, the Act of 1878, the Contagious Diseases (Animals) Transfer of Parts of Districts Act, 1884, and the Act of 1886 itself, may be together cited as the Contagious Diseases (Animals) Act, 1878 to 1886.

"The Animals Order, 1886," being an Order in Council of 16th September 1886, in virtue of the powers vested in the Privy Council under the Contagious Diseases (Animals) Act, 1878 to 1886, provides, by chapter 10 of Part IV., dealing with "offences," as follows, viz. :—"(5) If an animal is moved in contravention of . . . a regulation made by a local authority under the provisions of this part or of the conditions of a movement licence thereunder, the owner of the animal and the person for the time being in charge thereof, and the person causing, directing, or permitting the movement, and the person moving or conveying the animal, and the owner, the charterer, and the master of the vessel in which it is moved, and the consignee or other person receiving or keeping it, knowing it to have been moved in contravention as aforesaid, shall each according to and in respect of his own acts and defaults be deemed guilty of an offence against the Act of 1878."

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Dunlop pleaded not guilty, but was convicted on evidence. He took a case for appeal.

The case set forth the regulations framed by the Local Authority of Lanarkshire, which were in operation at the time of the alleged contravention.\*

The case further set forth, that at the proof on 25th June "four witnesses were examined in support of the complaint, and from the evidence adduced by them we held it proved that the appellant, who is a cattle-dealer, and resides at Castle Farm, Stewarton, in the county of Ayr, had a sale of cattle at his farm on the 30th of April 1888, when over 400 animals were sold; that eight of these were purchased by Robert Forsyth, grain merchant, Chapleton, Lanarkshire; that after the sale, the purchaser of the cattle, the said Robert Forsyth, depending upon the appellant making the necessary declaration before the cattle were moved, engaged John M'Millan, residing in M'Alpine Street, Glasgow, and who at the time was assisting the appellant at the sale, to drive the cattle from Stewarton Farm to Strathaven; that the cattle were accordingly driven there; that the declaration required by the regulations of the county of Lanark did not accompany the cattle, although the appellant averred that he had

\* The material regulations were as follows :—“(1) No cattle shall be moved into the district of the Local Authority of the county of Lanark except as expressly authorised by the regulations. (2) Cattle, fat or store, including cows, may be moved into said district from the district of any local authority in England, Wales, or Scotland, provided they are accompanied by a declaration signed by the owner, specifying the number and description of the cattle to be moved, the place from which and to which they are to be moved, and certifying that each head of such cattle has been in the place from which it is to be moved for at least fifty-six days immediately preceding the date of such declaration, and has not been within that time sold or exposed for sale in any market or fair or in a sale-yard or other public or private place where cattle are commonly exposed for sale, is not and has not been affected with pleuro-pneumonia, and has not been in contact with cattle affected or suspected of being affected with that disease, and that there is not at the time of making this declaration a pleuro-pneumonia infected place or a pleuro-pneumonia infected area within two miles of the farm or premises from which the cattle are to be moved, or within two miles of the road by which the cattle are to be moved.”

“(6) The declarations above provided for shall only be on forms to be supplied by the local authority, those for cattle from other districts at any police station in the county. Every declaration must be signed by the person making the same in presence of a police-constable, who shall countersign it, and add his address, and it must be returned to the office where the form was got, within four days from the date when the form was given out.”

A specimen of a form of declaration required by those regulations was one of the productions at the trial. It was in this form, viz :—“I, \_\_\_\_\_ of \_\_\_\_\_, the owner of the under-mentioned cattle, do hereby solemnly and sincerely declare that, to the best of my knowledge and belief, each of the cattle described below is not affected with pleuro-pneumonia, and has not been in contact with cattle affected, or suspected of being affected, with pleuro-pneumonia; and I further declare that each of the cattle described below has been in my possession, on the place or premises also described below, for a period of fifty-six days immediately preceding the date hereof, and has not, within that period, been sold or exposed for sale in any market or fair, or in a sale-yard or other public or private place where cattle are commonly exposed for sale, and that there is not, at the date hereof, a pleuro-pneumonia infected place within two miles of the place or premises from which the cattle are to be moved.”

The form contained spaces for the insertion of the number and description of cattle, the places from and to which they were to be moved, and the signature of the police-officer before whom the declaration might be signed.

made such declaration; that the witness, John McMillan, stated that the declaration (which was not produced) was blank, at all events not complete, and it was proved that it had not been countersigned by a police-constable, in terms of the said regulations issued by the local authority. No. 3.  
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The appellant contended that, in respect he neither moved nor was he the owner of the cattle nor in charge of them at the time they were removed into the county of Lanark, he was not guilty of the offence libelled. We, however, were of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanark, was guilty of the offence charged, and we convicted him, and adjudged him to pay the sum of £20 of modified penalty. . . . We also held proved the previous conviction libelled."

The question of law stated in the case was—"In the circumstances above set forth, was the appellant guilty of the offence charged?"

Argued for the appellant;—The cattle were removed, not by the appellant, but, as the case stated, by the purchaser, Forsyth. The appellant could not therefore be held responsible for the offence of removing without due precaution cattle which he had sold and delivered before the removal began. He had no duty to see that, before the purchaser removed them into the Lanarkshire district, he, the purchaser, made a proper declaration. The Justices had stated no fact to justify their conviction. They had simply convicted because they were "of opinion" that the appellant was the only person who could make the declaration, and that, in "permitting" the removal without it, he was guilty of the offence. It was not stated what he could have done to prevent it, and indeed it was clear he could have done nothing. Nothing having been proved to shew that he actively took part in the alleged offence, the conviction was unwarrantable.

Argued for the respondent;—It was clear that the appellant, and he only, could have made the declaration. No one else could have certified that the cattle had been his for fifty-six days, and been free of disease during that time. It had been proved that the appellant accepted the duty of making a declaration, and had given the drover a professed declaration which was not according to the regulations. The Justices ought to have found that as a fact. It would have then been seen that he took active part in the offence. The case could competently be remitted to have the facts properly stated, and that ought to be done.

At advising,—

**LORD RUTHERFURD CLARK.**—On 25th June 1888 the Justices of the Peace for the county of Ayr convicted the appellant of a contravention of the Contagious Diseases (Animals) Act. A case has been stated, and we have now to determine whether the conviction was right.

The respondent has moved us to remit to the Justices in order that the case may be amended, and the first question which we have to consider is whether we shall make that remit. I am of opinion that we should not. The case has no doubt been very imperfectly stated. But it was the duty of the parties to see that it was well stated, and I assume that it was submitted to them before it was finally adjusted. The imperfections are so great that it would require to be re-stated. I do not think that in the interests of justice it would be safe to direct this to be done. The time that has elapsed is very considerable, and there is of course no record of the evidence.

The charge against the appellant is that he "did move, or cause, direct, and

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permit to be moved," certain cattle from Ayrshire to Lanarkshire "without the said cattle being accompanied" with the statutory declaration.

The only word of which the meaning is not plain is the word "permit." I am disposed to think that it signified that if the permission had been withheld the cattle would not have been moved. But to use an obsolete formula, which is, however, well understood, we may safely hold that the charge against the appellant is that he was actor or art and part in the moving of the cattle.

It appears from the case that on 30th April 1888 the appellant had a sale of cattle on his farm, and that on that day the cattle in question were sold and delivered to Robert Forsyth, a grain merchant in Lanarkshire. It further appears that after the cattle were delivered they were moved to Lanarkshire by Forsyth, or by a person employed by him for that purpose. It is not said that the appellant in any way facilitated the removal of the cattle.

The case states that the appellant averred that he had made the statutory declaration. I presume that this averment was made to the Justices, and if so, it is nothing more than an untrue averment made in the course of the trial. Again, it is set forth that M'Millan, who was engaged by Forsyth to move the cattle, "stated that the declaration (which was not produced) was blank, at all events not complete." But it is not said that the appellant handed the declaration to M'Millan. If that had been so, there would have been room for the inference that the appellant was taking part in the moving of the cattle.

In conclusion the Justices say—"We were of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanark, was guilty of the offence charged."

I am disposed to think that the Justices were right in holding that the appellant was the person to make the statutory declaration. But the fact that he did not make it would not prove him guilty of the statutory offence. Yet I gather that it was from this circumstance that the Justices held the case to be proved. At least they state no other from which the guilt of the appellant can be inferred. From all that appears in the case the appellant, after he had delivered the cattle to the buyer, did nothing.

No doubt the Justices say, "in permitting the removal of the cattle," &c. This is stated, not as a fact, but as an inference, and there is nothing to support it. It is said that the appellant knew that the cattle were to be moved into Lanarkshire. It is not said that he had this knowledge before the cattle were delivered.

I am not determining any general question. I proceed entirely on the case as it has been stated to us, and on the circumstances therein set forth I am constrained to hold that the appellant was not guilty of the offence charged.

**LORD LEE.**—The question stated for the opinion of the Court in this case is, whether in the circumstances set forth the appellant was guilty of the offence charged?

The offence charged was that he did move, or cause, direct, and permit to be moved, certain cattle from a place in the district of Ayr into the district of Lanark without the said cattle being accompanied with the declaration required by the regulations made by the Local Authority of the county of Lanark in virtue of the powers conferred by the Contagious Diseases (Animals) Act 1878 to 1886, and the Animals Order of 1886.

It appears from the case that the cattle in question (eight in number) had

been sold by the defender on the morning before removal at his farm in the county of Ayr along with some 400 others, and it is stated as matter of fact that the purchaser, depending on the appellant making the necessary declarations before they were moved, engaged a man to drive them from the appellant's farm to Strathaven in the county of Lanark; that the cattle were accordingly driven there; that the declaration required by the regulations did not accompany them; and that although the appellant averred he had made such a declaration, it was proved that it had not been countersigned by a police-constable in terms of the regulations. The appellant's contention is stated to have been that as he neither moved, nor was the owner of the cattle, nor in charge of them at the time they were removed into the county of Lanark, he was not guilty. The finding of the Justices is stated as follows—"We, however, were of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanark, was guilty of the offence charged."

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If it had been stated as a finding in point of fact that the appellant did permit the cattle to be removed without the required declaration, I could not have answered the question before us in the negative, because I see no reason to doubt that the Justices were right in holding that under the regulations the appellant, as owner, selling and allowing the removal of the cattle, was the only person who could make a declaration of the kind required, and ought to have seen that it was made, not the less so that he ceased to be owner, before the removal into Lanark district took place. But the difficulty is that the essential fact in the case is not stated as a fact, but merely as matter of opinion. That is not sufficient, and I therefore agree that we cannot answer the question stated in the case in the affirmative.

I have had some doubt, however, whether, on the case as stated, we can answer it either way, and whether we ought not to deal with the case as insufficiently stated, and to remit to the Justices to give us the facts on which they founded their opinion. It is not satisfactory to my mind to quash the conviction merely because the Justices have not stated these facts which might or might not if stated have been sufficient to support it. I should have preferred for my own part to make a remit. But as your Lordships are against that course, and there certainly are many objections to getting the case re-stated now, I do not dissent from a finding that in the circumstances set forth it is impossible to find the appellant guilty.

**LORD JUSTICE-CLERK.**—I concur. I feel sympathy with Lord Lee's doubt whether there is enough stated in the case to enable us to dispose of the question without a remit to have the facts more properly stated. But I think we ought to safeguard somewhat strictly the course of sending such cases back to the inferior Courts for fuller statement. The magistrate is bound, at the time he states the case, to consider well whether he has fully set forth the facts on which his conviction—if he convict the accused—proceeded. It is quite proper to remit it for amendment where some slight alteration is needed to bring out the proper point. For example, a fact of importance might be stated in an ambiguous manner. But in my opinion, no case should be sent back where it is clear that what would be required would be practically the making up of a new one, or where there has been a total failure to state the real point, because



- No. 3.** the accused is entitled to be heard on a case stated when the facts were fresh in the mind of the magistrate who convicted him, and ought not to have the appeal heard on a new case stated, at great disadvantage to him, after the circumstances are no longer fresh in the mind of the magistrate.
- Nov. 22, 1888.  
Dunlop v. Weir.

THE COURT answered the question in the negative.

J. STEWART GELLATLY, S.S.C.—BRUCE & KERR, W.S.—Agents.

- No. 4.** GEORGE DUNCAN, Suspender.—*Orr*.  
RICHARD LAING (Procurator-Fiscal of Police Court of Alloa), Respondent.
- Nov. 21, 1888.  
Duncan v. Laing.
- HIGH COURT.  
Lord Justice-Clerk.  
Lord Rutherford Clark.  
Lord Lee.  
Justiciary Clerk.
- Public-house—Breach of certificate—Keeping open house—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. cap. 35), (Schedule A)—Alternative charge and general conviction.*—George Duncan, hotel-keeper, Crown Hotel, Alloa, was charged before the Police Court of the burgh of Alloa at the instance of Richard Laing, Procurator-fiscal, with a breach of his certificate, which was in terms of schedule A of the Public-Houses Acts Amendment Act, 1862, in so far as on two occasions he did “keep open house, or sell or give out” liquor during prohibited hours. He was convicted of “the offences charged.” In a suspension held, following *Murray v. M’Dougall*, Feb. 7, 1883, 10 R. (Just. Cases) 42, that the conviction was a general conviction on an alternative charge, and must therefore be set aside.

IRONS, ROBERTS, & Co., S.S.C., Agents.

- No. 5.** WILLIAM MUIR, Appellant.—*Salvesen—Shennan*.  
THOMAS CAMPBELL (Procurator-Fiscal of the Justice of Peace Court of Renfrewshire), Respondent.—*James Clark*.
- Nov. 21, 1888.  
Muir v. Campbell.
- HIGH COURT.  
Lord Justice-Clerk.  
Lord Rutherford Clark.  
Lord Lee.  
Justiciary Clerk.
- Public-house—Breach of certificate—Hawking spirits—Selling or giving out on Sunday—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35).*—The holder of a public-house licence received a bottle from a person on a Sunday, outside his licensed premises, and having entered his premises and filled the bottle with whisky, he thereafter, a short distance outside the premises, delivered it to the purchaser. Held that he was properly convicted of a breach of his certificate by selling or giving out liquor on Sunday.
- Complaint—Specification—Public-House—Breach of certificate—Name of person to whom liquor sold.*—It is not essential to the relevancy of a complaint for breach of a public-house certificate by selling or giving out liquors on Sunday that the name of the person to whom the liquor was given out should be stated.
- Observed that where the prosecutor knows the name of the person he ought to state it, and where he does not know the words “to the prosecutor unknown” ought to be inserted.
- WILLIAM MUIR, who held a public-house licence for the “Peesweep Inn,” Neilston, Renfrewshire, was, on 1st June 1888, charged before the Justice of Peace Court for Renfrewshire with a contravention of his licence. The alleged contravention was that the accused did, “at his licensed premises at Peesweep Inn aforesaid, sell or give out liquors,” on Sunday, the 6th May 1888. He objected to the relevancy of the complaint; that the description of the *locus* “at his licensed premises at Peesweep Inn” was insufficient; and further, that it was not averred to whom the prosecutor was to prove he had given out liquors.
- These objections were repelled. He was convicted on evidence, and fined £5.

He took a case for appeal, in which these questions were stated, viz., No. 5.  
 (1) Whether the complaint was relevant? and (2) Was the accused legally  
 convicted? Nov. 21, 1888.  
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The following was the statement of facts in the case:—"The Justices held it proved that on the afternoon of the Sunday in question Felix Mulholland, farm-labourer, Stanley Muir, in the county of Renfrew, while walking along the public road leading to Johnstone, in company with his son, David Mulholland, a labourer, residing in Paisley, halted at the gable of the Peesweep Inn (which is licensed as a public-house only), where the accused was at the time standing. Mulholland took something out of one of his pockets and handed it to the accused. Mulholland then walked slowly westwards, while the accused went into the inn, where he remained for a few minutes, when he came out and followed Mulholland. Having overtaken him, the two returned and walked eastwards till they had repassed the inn by about 400 yards, where, on the public road, the accused handed Mulholland something which he put into his breast pocket, and the two then parted—Mulholland proceeding eastwards and the accused returning towards his inn. Two police-constables (Donald Sinclair and John Collie) who had seen the manœuvre followed Mulholland, but, having been observed by the accused, he (the accused) shouted to Mulholland and drew his attention to the constables by pointing towards them with his stick, whereupon Mulholland took from his said breast pocket something clear in appearance and threw it into a peat field. The two constables, who had witnessed this from a distance of 400 yards or thereby, proceeded to the spot and there found a glass bottle (produced in Court with its contents) containing two gills or thereby of whisky, of which they took possession. The constables were 200 yards distant from Mulholland when the 'clear something' was thrown away by him, and the point at which the 'something' was thrown away and where the bottle was found was 800 yards distant from the inn."

Argued for the appellant;—The objections to relevancy ought to have been sustained. It was said in the complaint that the offence was committed "at" the licensed premises. This was too vague a specification of the *locus*. Secondly, the proof shewed that an offence had been committed several hundred yards from the premises. It was clear from the case that the offence, if any, was not a selling of liquors in the licensed premises, but an offence of hawking spirits. That was an offence against sec. 16 of the Public Houses Act, 1862.\* A publican who sold spirits on the street or elsewhere outside his premises might be guilty of hawking spirits,<sup>1</sup> but could not be said to be thereby selling or giving out liquor in his premises in contravention of his certificate, which provided that he "do not open his house for the sale of any liquors, or permit or suffer any drinking therein, or on the premises thereto belonging, or sell or give out the same . . . on Sunday." It was of no consequence that the accused was seen to enter the licensed premises to obtain the liquor. Everyone who hawked spirits must have some store from which they were taken.

But thirdly, the complaint was irrelevant, in respect that the specification of the alleged offence did not state to whom the liquor was alleged

\* The Public-Houses Amendment Act, 1862 (25 and 26 Vict. c. 35), provides, sec. 16,—“Every person hawking spirits or other exciseable liquors shall thereby be guilty of an offence, . . . and on being convicted of such offence, shall forfeit and pay a penalty not exceeding £10, and in default of immediate payment, shall be imprisoned for a period not exceeding sixty days.”

<sup>1</sup> Hamilton v. Inglis, May 22, 1879, 4 Couper, 244, 6 R. (Just. Cases) 45.

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to have been sold. The accused was entitled to that information in order to prepare his defence. If such information were withheld by the prosecutor, a man might be charged twice in respect of the same facts.<sup>1</sup> Even if the prosecutor did not know the person to whom the liquor was sold, he must at least state that it was sold to a man whose precise designation was unknown.

The Court intimated that they did not require any argument from the respondent on the two first points.

Argued for the respondent on the third point;—It was not indispensable that the prosecutor should state the particular person to whom the liquor was supplied.<sup>2</sup> The ends of justice could not be allowed to fail because he might be unable to do so. Here it was not known to the respondent who the man was until the proof, when it appeared that a witness named Mulholland, who was called by the accused in his defence, was the man. The accused could have received no information from a statement that the man was “to the prosecutor unknown,” and he had suffered no prejudice from the want of it. The prosecutor in the case of *Lauder* failed because no *locus* being given, the objection was to the jurisdiction, and was unanswerable.

LORD JUSTICE-CLERK.—Three objections are taken to this conviction. The first of these was as to the specification of the *locus*. It was said that it was vague and insufficient. I think Mr Salvesen did not very strongly press that objection, and I am not surprised, for I think “at” a place is a good description of the *locus*, and we are familiar with indictments in the High Court in which the charge is that a certain act was done “at or near” a particular place. If the word “at” did not mean something more than “near,” the words “or near” would mean nothing.

The next objection is that there is no specification of the person or persons to whom the liquor is said to have been supplied in contravention of the certificate. It appears that the fact is that the prosecutor did not know who that person was, and that that person appeared as a witness in exculpation, and that it was only in that way that he came to be known. If therefore the prosecutor had alluded in the indictment to the person to whom the liquor was sold, he could only have stated that the person was to the prosecutor unknown. Now, I think that the complaint should have said, when no person was named as the person to whom liquor was supplied, that it was supplied to a person “to the prosecutor unknown.” In such a case it is important that these words should be present—the prosecutor should be tied up to this, that if he attempt to prove something inconsistent with his ignorance of who the person was—if he endeavour to lead evidence that the liquor was supplied to some particular person whom he knows—the prosecution must fail. The prosecutor could not be allowed to prove a case inconsistent with his want of knowledge of the person to whom the liquor was sold. It is true that there appears to have been a practice of not inserting in such charges the name of the person with whom the transaction of selling in breach of certificate, or shebeening, or hawking, is to be proved to have taken place. I observe that in two cases quoted by Mr Salvesen—that of *Hamilton* (4 Couper, 244) and that of *M'Dougall* (24 S. L. R. 352)—

<sup>1</sup> *Lauder v. M'Dougall*, Feb. 19, 1887, 1 White, 327, 24 S. L. R. 352 (Lord Young).

<sup>2</sup> *Fitzimmons v. Linton*, July 18, 1861, 23 D. 1301; *Greenhill v. Stirling*, March 19, 1885, 5 Coup. 602, 12 R. (Just. Cases) 37.

the prosecutor did not give the names of these persons. I think that is a bad practice. The prosecutor, when he knows who the person is to whom the liquor was sold, ought to state that person's name in the complaint, and I should be sorry to encourage these officials to withhold information material to the question and which was in their possession. But here we must consider the fact that it is stated to us by the counsel for the prosecutor that he could not give the name. We have therefore to consider whether the failure to insert the words "to the prosecutor unknown" was so important as to make it our duty to quash this conviction because of their absence from the complaint. Now, I think that I cannot put the matter in that positive form. We cannot quash the conviction on that ground.

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There remains the merits and the objection that the case is one of hawking and not one of contravention of certificate. It seems that on a certain Sunday a person was seen by the police at the gable of this public-house, and that the publican came out and received something from him and carried it in, and then came out again, and at a little distance from the house (it is of no consequence whether the distance was little or great) handed something to the man. The man being followed by the police, threw away a clear object, which turned out to be a bottle containing whisky. The magistrates were justified in finding as they did, that the appellant received that bottle from the man to fill and to hand to him. I hold that to be a breach of certificate by selling or giving out the whisky at a time when the licence did not permit that to be done. It is said by Mr Salvesen that it was not a breach of certificate, and that the moment the appellant came out of the public-house with the whisky, his possession and his dealing with it were the acts of one hawking whisky, and that the prosecution should have been against him as such. I disagree with that altogether, and think it was the offence of giving out liquor, or no offence at all.

LORD RUTHERFURD CLARK.—I have felt the objection to relevancy to be important in so far as it is founded on the omission to give the name of the person to whom the appellant is said to have furnished the whisky. But it is plain that the appellant has not suffered prejudice from that omission. He knew who it was to whom he had furnished it, for he produced him as a witness at the proof. When that is so, I am reluctant to allow the appellant to escape from the consequences of an offence against his certificate. I take it that we may hold that the prosecutor did not know who the person was who obtained the whisky. That almost appears from the case itself, and it has been distinctly stated by the prosecutor's counsel. In these circumstances, I am not disposed to quash the conviction because the words "to a person to the prosecutor unknown" are not in the complaint. At the same time, I concur in thinking that in all cases in which the prosecutor is in a position to specify the name he ought to do so.

On the merits I have not felt much difficulty. We were invited to consider whether what the appellant did was a breach of certificate, or constituted the offence of hawking spirits, or was no offence at all. I have no hesitation in saying that it was a breach of certificate. It was not hawking. It would certainly be unfortunate if it were held no offence at all.

LORD LEE.—I agree. The only difficulty is as to the objection that no person was named as the person to whom whisky was said to have been given out, and

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that it was not said that the prosecutor did not know who the person was. But I think that the only essential element in such a charge of breach of certificate is that it be sufficiently set forth that liquor was given out on Sunday in breach of certificate. I agree that when the prosecutor is in a position to do so he ought to give notice in the complaint of the person to whom he means to prove that the liquor was given out. But that notice is not essential to relevancy. It is a rule of procedure to give it, and if the prosecutor gives no such notice, and states that the person is not known, he is not entitled to prove that the giving out was to a certain individual known to him. I think that here the facts themselves shew, apart from what has been stated to us by counsel, that we have a peculiar case to deal with. It is not a case of a publican openly trafficking in breach of his certificate. It was that these two men, who, as it afterwards appeared, are named Mulholland, were seen to go up to the gable of the public-house, where they met the publican and handed him a bottle with which he disappeared into the licensed premises, and then after a short time came out and gave them the bottle back with whisky in it. They were seen from a considerable distance by the police. I am satisfied that the prosecutor was not in a position to give the name, and a statement that the name was unknown would have given no additional information to the accused.

THE COURT answered the questions in the affirmative, and refused the appeal.

STURROCK & GRAHAM, W.S.—PARTY—Agents.

## No. 6.

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JOHN KIDGER, Suspender.—*Rhind.*

DONALD M'PHEE (Procurator-Fiscal of Glasgow Police Court),  
Respondent.—*D.-F. Mackintosh—Ure.*

*Police—Affixing bills to building without authority—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 149, 131, 132—Exclusion of review except by Circuit Court.*—The Glasgow Police Act, 1866, by sec. 149 imposes a penalty on "every person who is guilty of any of the following disorderly acts or omissions . . . in any street—namely," *inter alia* (subsection 28), "who affixes without the consent of the proprietor and occupier to any building any bill or notice." The occupier of a building was charged under this section with affixing "without the consent of the proprietors" certain bills to the wall of the building occupied by him, and was convicted. In a suspension the Court *held* that the section did not apply to the case of the occupier or owner of the building placing bills upon it, but only to third parties, and therefore that the charge and whole proceedings thereon were outwith the statute and illegal, and *quashed* the conviction.

Objection to the competency of the suspension founded on sections 131 and 132 of the statute, which exclude review except by the next Circuit Court, *repelled*, on the ground that the complaint and conviction were *ex facie* illegal.

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord Ruther-  
furd Clerk.  
Lord Lee.  
Justiciary  
Clerk.

JOHN KIDGER, designing himself as a "fancy letter writer," was charged before the Police Court, Glasgow, with a contravention of the Glasgow Police Act, 1866, section 149, subsection 28,\* in so far as he did on the

\* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 149, enacts that "every person who is guilty of any of the following disorderly acts or omissions on any turnpike road, or in any public or private street or court, or on the outside of any building adjoining the same, or in any common stair, shall in respect thereof be liable to any penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods hereinafter mentioned. . . ." (Subsection 28).—"Every person who writes

19th day of October 1888, "affix, or cause to be affixed, to the wall of a building, or part of a building, occupied by him, in West Nile Street, aforesaid, three or thereby bills or other notices, without the consent of M'Dougall & Hamilton, house-factors, No. 109 West George Street, Glasgow, proprietors of said building, or part of a building." No. 6.  
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Kidger stated as an objection to the relevancy of the complaint that the prohibition in the subsection libelled was not directed against either proprietor or occupier—the latter of which he was—but against third parties. The magistrate repelled the objection, and thereafter, on the evidence adduced, found "the charge of having caused to be affixed the bills as libelled proven," convicted Kidger "of the offence libelled," and find him 10s. 6d., with the alternative of seven days' imprisonment.

Kidger presented a bill of suspension, in which he stated;—" (4) The complaint on which the complainer was convicted as aforesaid was, and is, irrelevant. The subsection or clause founded on does not apply to an occupier, but to a person other than an occupier or proprietor of the subjects referred to, and no offence is disclosed. (5) The complainer is tenant and occupier of the subjects on the outer wall of which he, in connection with his business, caused to be placed certain samples of the work done by him in the premises, and it is upon this complaint of the alleged proprietors that the prosecution resulting in the complainer's conviction proceeded."

The respondent, the procurator-fiscal, objected to the competency of the suspension, on the ground that the remedy of the suspender, if aggrieved, was by appeal to the next Circuit Court at Glasgow.\*

Argued for the respondent;—The objection, as stated by the suspender himself, was to relevancy. He said that the magistrate had misconstrued the statute in holding that the particular complaint made a relevant charge under it. It followed that there was no review in the High Court, and that the review, if any were competent at all, must be by the Court at the next Circuit. The case was not like those of which *Marr v. M'Arthur*<sup>1</sup> was the type, where the complaint was that the proceedings of an inferior Court were plainly outwith the statutory authority they

upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint, or in any other way, or who without authority affixes or causes to be affixed to any church, chapel, or schoolhouse, or without the consent of the proprietor and occupier, to any other building, or to any wall, fence, or hoarding, any bill or other notice, or who wilfully breaks, destroys, or damages any part of such wall, fence, hoarding, or building, or any tree, shrub, seat, or other thing," shall, in respect thereof, be liable to a penalty not exceeding 40s., or in default of payment, to imprisonment for fourteen days.

\* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 131, enacts that "No warrant granted by the magistrate, or citation made in pursuance of the provisions of this Act, and no charge or complaint, and no proceeding or trial before the magistrate, and no order or sentence of the magistrate thereon, or the extract thereof, shall be quashed or vacated for any misnomer, or informality, or be subject to suspension, reduction, advocacy, or appeal, or to any other form of review or stay of execution, unless in manner and on some one or more of the grounds hereinafter mentioned."

Section 132 enacts,—“Any person who feels aggrieved by any order or sentence of the magistrate may, within fourteen days after its date, appeal to the Court of Justiciary at the next Circuit Court, to be held at Glasgow in the manner and under the rules, limitations, and conditions contained in the Act for abolishing Heritable Jurisdictions (20 Geo. ii. c. 43) on the ground of corruption, malice, or oppression on the part of the magistrate, wilful deviation in point of form from the statutory enactments, incompetency or defect of jurisdiction, but on no other ground.”

<sup>1</sup> *Marr v. M'Arthur*, March 28, 1878, 5 R. (Just. Cases) 38, 4 Couper, 53.

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professed to have, and disclosed no offence at all. In such cases the High Court exercised jurisdiction, because the proceedings were *funditus* null, and the High Court would then keep the inferior Courts from exceeding their province. But in cases of mere relevancy the High Court had always held that the excluding clauses applied.<sup>1</sup> Now, the subsection founded on made it a condition of leave to affix bills to a building that the proprietor's consent and the occupier's also must be obtained. The charge relevantly stated that the consent of one of these, the proprietor, had not been obtained. The Legislature had placed on the person doing what without authority would be a contravention the *onus* of shewing that he had the authority of both owner and occupier. If he himself were occupier he had none the less to get the owner's consent. If this were not the meaning of the statute the clause would have run "without the consent of the owner *or* occupier," instead of "without the consent of the owner *and* occupier." It was said that the statute only applied to third parties. There was no reason why it should not apply to the occupier. Besides an occupier might be to some extent exactly in the position of any third party. The letting to him of premises as a shop would not justify his using them as a place for sticking bills. The Legislature intended, *inter alia*, to prevent him from such use of it, and the magistrate would have to judge in any individual case whether the affixing of any bill or sign of which complaint was made was done with the express or implied authority of the proprietor. In many instances, it would be clear that the proprietor's implied authority was not exceeded. But in some, and this among the number, it might be equally clear that it was. Here the suspender, having taken an office on the first floor, the windows of which looked to the back, had used the front wall for the display of theatrical advertisements. He was not occupier for that purpose.

Argued for the suspender;—No offence was charged. Indeed the terms of the complaint excluded any offence,—for in charging as an offence a thing said to be committed without the authority of the proprietor and occupier it at the same time stated that the accused himself was the occupier. How then could he lack the authority of the proprietor and occupier? It was clear that the statutory prohibition extended only to third persons, *i.e.* to persons who neither owned nor occupied the building whereon the bills were affixed, for the introductory words of section 149, which must be applied to all the subsections, spoke of the acts specified as "disorderly acts." The words of the statute were amply satisfied by the construction that it was intended to prevent strangers from placing bills on a building without full authority. No doubt the statute spoke of "every person" who should do these acts, and these words *prima facie* applied to the occupier, but they must be reasonably construed *secundum subjectam materiem*.<sup>2</sup>

If the statute did not apply to occupiers at all, but was only intended to prevent a breach of good order by third parties, there was no offence libelled, and the proceedings were *funditus* null. It followed that the High Court would give redress, and was the proper Court to which to apply, and in practice such redress had always been given.<sup>3</sup> What a sus-

<sup>1</sup> Mackenzie v. Lang, Nov. 9, 1874, 3 Coup. 29, 2 R. (Just. Cases) 1; Walker v. Lang, Nov. 25, 1867, 40 Scot. Jur. 89, 5 Irv. 506; De Belmont v. Lang, June 28, 1871, 43 Scot. Jur. 572, 2 Coup. 95; O'Brien v. M'Phee, Oct. 30, 1880, 4 Coup. 375, 8 R. (Just. Cases) 8.

<sup>2</sup> Maxwell on the Interpretation of Statutes, p. 75.

<sup>3</sup> Marr v. M'Arthur, *supra*; Wemyss v. Black, March 19, 1881, 4 Coup. 419, 8 R. (Just. Cases) 25; Stirling v. Murray, June 13, 1883, 5 Coup. 265, 10 R.

pendent applied for in such a case was not review of a sentence, but the *setting aside of an incompetent proceeding.* No. 6.

Nov. 22, 1888.  
Kidger v.  
M'Phee.

**LORD JUSTICE-CLERK.**—The Act of Parliament under which the prosecution before us is raised is an Act for the purpose of the “better regulation and government” of Glasgow in matters of police. Under that Act there fall a large number of police offences. Under sec. 149, we find it prescribed that “every person who is guilty of any of the following disorderly acts or omissions on any turnpike road, or in any public or private street or court, or on the outside of any building adjoining the same, or in any common stair,” shall be liable to the various penalties therein described, and then follow the subsections, including that founded on in this complaint.

Now, I think it would be contrary to every principle of construction to consider any of the offences under the different subsections out of relation to the opening clause. The things specified in the subsections are “disorderly” acts. A great many of the things described are therefore of a nature which concern the public. They are interferences with public rights, with amenity, or with public decency. The particular subsection we are here concerned with is the 28th, which provides that “every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk, or paint, or in any other way,”—that is to say, the subsection points at disfigurement of the building, something of the nature of nuisance—“or who without authority affixes, or causes to be affixed, to any church, chapel, or schoolhouse, or without the consent of the proprietor and occupier, to any other building, or to any wall, fence, or hoarding, any bill or other notice, or who wilfully breaks, destroys, or damages any part of such wall, fence, hoarding, or building, or any tree, shrub, seat, or other thing,” shall be liable to a penalty. If that subsection, and particularly that part of it which applies to occupiers, can be read consistently with the view that it makes a provision as between the police authorities and the public, that no one is without the authority of the owners and occupiers to affix bills to any building, I think we have no right to place upon it a strained construction, so as to read it as applying, not only to such questions, but also so as to give the police magistrate jurisdiction to settle as between proprietors and tenants matters which are already amply provided for by the ordinary law of the land, and which are not matters of police regulation.

Now, the first question is why these words “proprietor and occupier” are in the statute at all. I think the reason is evidently this, that the subsection contemplates that a third party who interferes with any building by affixing to it notices or bills is doing something “disorderly,” unless he is doing it with the consent of both the proprietor and the occupier. It is something disorderly as to the proprietor, because he has a right to prevent his property from being disfigured, and it is disorderly towards the occupier, because it is out of the question, even if the proprietor allowed it, that anyone should paste up bills upon it without the occupier’s consent.

Now, taking that view, we have an intelligible meaning for those words, and do not need to adopt the strained construction to which I have alluded. That is my opinion on the merits of the case. The clause is not one under which

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(Just. Cases) 59; Bell v. M'Phee, July 18, 1883, 5 Coup. 312, 10 R. (Just. Cases) 78; Craig v. M'Phee, March 14, 1883, 5 Coup. 243, 10 R. (Just. Cases) 51; Collins v. Lang, Nov. 3, 1887, 15 R. (Just. Cases) 7, 1 White, 482.



No. 6. the occupier can be brought before the Police Court and fined and bound over to find caution for good behaviour, merely because of the placing of a notice on the building without the proprietor's consent.

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That being so, the remaining question is whether this suspension is incompetent in respect of the provisions as to review which are contained in the Glasgow Police Act. That turns on the further question whether the complaint is in its essence a bad complaint in the sense of being a lawless proceeding. It is clear, that if all that is wrong with a complaint be that it is defective in some detail of relevancy or specification, the clause excluding review would apply, and the remedy of the accused must be sought at the next Circuit Court. But this Court has always held that it is entitled to interfere to prevent the carrying out of a judgment which has followed on proceedings in themselves lawless. Here we have it said to be an offence that the suspender "did, on the 19th day of October 1888, affix, or cause to be affixed, to the wall of a building, or part of a building, occupied by him, . . . three or thereby bills, or other notices, without the consent of M'Dougall & Hamilton, house-factors, proprietors of said building, or part of a building." Now, being of opinion that that is no offence at all, and therefore that the complaint set forth nothing which in law can justify a conviction, I think that we ought to interfere to quash this sentence. In coming to this conclusion, I go on the same grounds as were expressed by Lord Young in the case of *Collins v. Lang* (1 White, p. 489),—"Now, it has been frequently decided in this Court, without referring to Acts of Parliament or any provisions that may be referred to as to the method of review, that if the procedure and conviction upon a complaint are *ex facie* illegal, remedy may be given by way of suspension."

LORD RUTHERFURD CLARK and LORD LEE concurred.

THE COURT suspended the conviction.

W. OFFICER, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 7. JAMES M'FARLANE (Procurator-Fiscal of Fifeshire), Appellant.—  
*J. A. Reid—Shaw.*  
Dec. 7, 1888.  
M'Farlane v.  
Birrell.

GEORGE BIRRELL, Respondent.—*D.-F. Mackintosh—Wallace.*

*Master and Servant—Contravention of Truck Act, 1831 (1 and 2 Will. IV. c. 37), sec. 2, sec. 23—Miner—Contract that employer may retain wages for "rent" after employment has ceased.*—The Truck Act, 1831, which applies to certain trades, including miners, in sec. 2 enacts "That if in any contract hereafter to be made between any artificer . . . and his employer any provision shall be made directly or indirectly regarding the place where, or the manner in which, or the person or persons with whom the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void." Sec. 23 enacts "That nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, . . . from demising to any artificer . . . the whole or any part of any tenement at any rent to be thereon reserved . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent. . . . Provided always that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer." Sec. 9 imposed penalties on employers entering into contracts declared to be illegal by the Act.

No. 7.

The regulations of a coal company, under which workmen were engaged, contained this article,—“4. All houses . . . leased or granted to workmen are to be held as leased or granted only during the period of the workman's engagement. Immediately on the expiration of said engagement the workman must remove from the subjects let to him. . . . Failing removal he will thereby become bound to pay as rent, for the subjects occupied by him, the sum of one shilling for each day or part of a day he shall occupy the same after the expiration of his said engagement . . . . The said company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under this article.”

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The pay-tickets signed by the workmen were in the following terms:—  
“Received payment of £ . . . . and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house rent. . . .”

In a complaint against the manager of the coal company, on the ground that an agreement with a workman in terms of the regulations was a contravention of the Act, *held* that as the written agreement contained in the pay-ticket signed by a workman was limited to the period of his employment, and did not authorise deduction of one shilling per day for his subsequent occupation in terms of article 4, the stipulation in that article that the employer should be entitled to make that deduction was a contravention of the Act, and did not fall under sec. 23, in respect (1) that it was not covered by the written agreement; and (2) that the payment for occupation without a title was not rent in the sense of the Act; and (3) that these payments were not due by a person employed.

GEORGE BIRRELL, general manager for the Dunfermline Coal Company HIGH COURT.  
of the Muircockhall Colliery, was charged before the Sheriff Court at Lord Justice-  
Dunfermline under a summary complaint at the instance of the Pro- Clerk.  
curator-fiscal with a breach of the Truck Act, 1831 (1 and 2 William Lord Ruther-  
IV. c. 37). The complaint set forth that the accused “did, contrary to furd Clerk.  
the Act 1 and 2 William IV. chapter 37, section 2,\* on or about the 23d Lord Lee.  
Justiciary  
Clerk.

\* The Truck Act, 1831 (1 and 2 William IV. c. 37), which is entitled “An Act to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm,” enacts by sec. 2 “That if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated† and his employer any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and the same is hereby declared illegal, null, and void.”

Section 23 provides “that nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such employers be employed in mining . . . nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this Act, the whole or any part of any tenement at any rent to be thereon reserved : . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent, or for or in respect of any such medicine or medical attendance, or for or in respect of such fuel, materials, tools, implements, . . . or for or in respect of any money advanced to such artificer for any such purposes as aforesaid, provided always that such stoppage or deduction shall not exceed the real and true value of such materials, tools, implements, . . . and shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.”

† By sec. 19 workmen employed in coal-mines are among those to whom the Act applies.

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day of January 1888, at the colliery office at Muircockhall, parish afore-said, contract with James Lowe, miner, residing at Townhill of the burgh of Dunfermline, working at said colliery during the fortnight ending 8th February 1888, that the said Dunfermline Coal Company should be entitled to retain the wages due to the said James Lowe until his removal, on the expiration of his engagement with said company, from premises that had been leased or granted to him by said company for the period of his said engagement, and should also be entitled to deduct from said wages such sums as should become payable by the said James Lowe until such removal from said premises, and did thereafter, contrary to said section of said Act, enforce or seek to enforce said contract."

Objections were stated to the relevancy of the complaint, which were repelled by the Sheriff-substitute (Gillespie). On the case going to trial the Sheriff-substitute found the accused not guilty. The procurator-fiscal obtained a case for appeal to the High Court of Justiciary.

The following was the statement of facts in the case:—"George Birrell was general manager for the Dunfermline Coal Company at their Muircockhall Colliery, and James Lowe was a miner in the employment of the said company, and lived in a house belonging to the company. The Dunfermline Coal Company, which recently took over the business of another coal company, called the West of Fife Coal Company, are members of the Fife and Clackmannan Coal Owners Association. That association adopted in 1874 certain regulations and conditions of employment, copies of which have since been regularly kept posted up by the Dunfermline Coal Company and their predecessors in conspicuous places at their collieries, and their employees have been requested to make themselves acquainted with their contents. Article 4 of the regulations is as follows:—"All houses, gardens, &c., leased or granted to workmen by the said company are to be held as leased or granted only during the period of the workman's engagement under article 1. Immediately on the expiration of said engagement the workman must remove from the subjects let to him, and leave the same in good order. Failing removal, he will thereby become bound to pay as rent, for the subjects occupied by him, the sum of one shilling for each day or part of a day he shall occupy the same after the expiration of his said engagement, without prejudice nevertheless to the said company ejecting the said workman from the said subjects. The said company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under this article."

"Throughout his employment at the colliery, Lowe signed pay-tickets in the following terms:—"Received payment of £ , being in full of all wages due to me; and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house rent, water, and school rates, the usual charges for medical attendance, and for sharpening and keeping in order my working tools; also, the price of coals supplied, and any cash that may have been advanced to me."

"The engagement of the said James Lowe was by the fortnight, and on or about 25th January 1888 he contracted with the said George Birrell to continue in the employment of the said company for the fortnight ending 8th February as formerly, upon the conditions specified in said article 4 of the regulations.

"In January last the men employed at the Dunfermline Coal Company's Collieries gave in notices that their engagements would cease on

Saturday, 11th February 1888, which was the pay-day for the fortnight ending 8th February. No. 7.

"On the morning of 11th February 1888, a notice to the following <sup>Dec. 7, 1888.</sup> effect was posted up by the instructions of the said George Birrell—viz., <sup>M'Farlane v. Birrell.</sup> that 12s. would be deducted from the wages of the workmen living in the colliery houses."

"The sum of 12s. was fixed by the advice of the law-agent of the Coal Owners Association, in order, on the one hand, to vindicate Rule 4, and, on the other hand, not to press too heavily on the men by the retention of a larger sum from their wages."

"Upon Lowe applying at the office for his wages, payment thereof was refused by the cashier, acting under the instructions of the said George Birrell, except under deduction of 12s. as above mentioned, which was to be retained for rent to become due until the house occupied by Lowe should be vacated in terms of said Rule 4. Lowe refused to accept of his wages under said deductions, but after some negotiations between the law-agents for the coal owners and for the miners Lowe's wages, less 12s., were, on 15th February (along with the wages of several other men, from whom similar deductions were made) handed by the coal owners' law-agent to the miners' law-agent, and afterwards received by Lowe. The 12s. kept back was ultimately paid to Lowe on his resuming work about three weeks after, he being charged only the ordinary rent for his house during the strike, as if he had been in the employment of the Dunfermline Coal Company throughout."

The case stated that the ground on which the Sheriff-substitute found the accused not guilty was "that article 4 of the general regulations, with the agreement contained in the fortnightly pay-tickets signed by Lowe, did not constitute a contravention of the statute referred to."

The questions of law stated in the case were:—"(1) Whether the complaint set forth any relevant case of contravention of the statute libelled? (2) Whether the said article 4 and its proposed enforcement by the said George Birrell were within the prohibition contained in the 2d section of the said statute? (3) Whether the said article 4 and its proposed enforcement by the said George Birrell were within the exceptions recognised by the 23d section of the said statute?"

Argued for the appellant;—There could be no doubt that the contract which the respondent had enforced was struck at by the Truck Act, unless (1) the sum of 1s. per day which he had retained was "rent" for a house let to the miner; and (2) there was a written contract, which, under section 23, would justify the contract to retain for rent. But the respondent could not discharge the burden of justifying himself by shewing that even one of these things was the case. In the first place, the deduction he had made was not for "rent," for the house was by the regulations of the respondent himself only let to the miner "during the period of the workman's engagement," and the deduction in question was the penal deduction of 1s. for each day the miner stayed in the house after he had ceased to be in the employment and was bound to leave the house. Again the respondent failed on the second point also. He appealed to the miner's signature of the pay-tickets as justifying the deduction. But by signing them the miner only consented to the deduction "so long as I am in your employment," which he ceased to be before the deduction was made.

Argued for the respondent;—(1) The deduction was for "rent" in the ordinary meaning of that word, for it was for the agreed-on price of the occupation of a heritable subject. In legal language the term "rent" was applicable to a payment to be made under a lease for occupation after the

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termination of the period for which the subject was originally let.<sup>1</sup> Now, article 4 of the regulations under which the miner served treated the sum of 1s. per day as "rent." (2) The deduction was justified by written contract signed by the miner, as section 23 of the Truck Act required, for the miner had, as the case stated, given his written consent to deduction for "rent."

At advising,—

**LORD RUTHERFURD CLARK.**—James Lowe was employed as a collier by the Dunfermline Coal Company, and it appears that while he was in their employment he leased a house belonging to the company at a certain rent. His engagement was by the fortnight, and was made in terms of article 4 of the regulations adopted by the company in 1874. From that article it appears (first) that the house which he occupied was leased to him only during the period of his employment; (second) that he was bound to remove from it immediately on the expiration of his engagement; (third) that he was bound to pay a shilling a-day for each day that he should occupy it after the term of removal; and (fourth) that the "company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under this article." The effect of this last stipulation is that the wages earned at the termination of his engagement were not payable till he removed from his house, and thus there was left in the hands of the employers a fund from which they could deduct such moneys as were due by him if he did not remove at the appointed term.

Lowe gave notice that his engagement should cease on Saturday, 11th February 1888, but he did not then remove from his house. The stipulation which I have just quoted was enforced against him. His wages were retained until he removed, and ultimately a portion was deducted in part satisfaction of the debt which he had incurred by occupying the house after the term of removal. A complaint was brought for breach of the Truck Act. The Sheriff-substitute assoilized the accused. A case has been stated, and we are now asked to determine whether his judgment was right.

It is plain—and indeed it was admitted—that the agreement contained in the regulations is a breach of the 2d section of the Truck Act. For it is a contract between an artificer and his employer, by which provision is made for the expenditure of wages due to the artificer. But the respondent maintains that it is taken out of the operation of the 2d section, in respect that it is an agreement permitted by the 23d, as being an agreement for the deduction of rent from wages due to the artificer.

In order to make out this defence two things are requisite—(first) that the agreement shall be in writing, and (second) that the rent which is to be deducted from the wages shall be rent within the meaning of the statute.

The written agreement on which the respondent relies is set forth in the case. It authorises the employer "to deduct from my wages in future, so long as I am in your employment," house rent, taxes, &c. I am unable to hold that this is an agreement to deduct rent from wages after the employment has ceased. It is in operation only so long as the employment continues, and it ceases with the employment, for the words "so long as I am in your employment" qualify

<sup>1</sup> Juridical Styles (Heritable Rights), i. 579.

the verb "deduct," and in my opinion limit the agreement to the period of the employment. No. 7.

This is perhaps sufficient for the decision of the case. But we may, I think, also consider the general question which was argued to us. Dec. 7, 1888.  
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The 23d section enacts that nothing contained in the statute shall prevent an employer "from demising to any artificer a tenement at any rent to be thereon reserved, and from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent." The question is, what is the meaning of the word "rent" as it is used in this section? Does it cover the sum stipulated for the occupation of the tenement after the period of removal, and when the right to occupy has ceased?

The words of the statute are, "demising a tenement at any rent to be reserved thereon." To demise is a technical phrase of English law. I take its Scottish equivalent to be, to let on lease, and the parties were agreed that this was its meaning. It therefore appears from the very words of the statute that the rent, and the only rent which may be deducted from wages, is the rent which is reserved on a demise or due under a lease. Money which is not due under a lease is not rent within the meaning of the statute. Rent is the money payment reserved on the demise or payable by the lease for the possession under the demise or lease. There can be no rent where there is no lease, and no rent can become due after the lease has come to an end.

The respondent maintained that the sum deducted from wages satisfied these conditions. It is called rent by the contracting parties. That is not material, for it does not become rent merely because it is so named. The true plea in defence is that it is due under a lease and for the occupation of the subject let, and therefore that it is rent within the meaning of the statute.

But when the agreement is examined it is plain that the money is not due under a lease. It did not begin to become due until the only lease which existed came to an end, and though it may be due in respect of the occupation of the subject which had been let, it is not due in respect of occupation under a lease. It is due because the lease had come to an end, and because the tenant continued in the illegal occupation of the subject. It is due no doubt by contract, but the contract under which it is due is wholly apart from the lease. For it did not come—and could not come—into operation until the lease with which it was associated had terminated. For these reasons I cannot hold the money which was thus payable to be rent in any ordinary or legal sense of that word, or to be rent within the meaning of the Act.

If we pursue the inquiry we can easily determine what it truly is. We are not told the amount of the rent payable by Lowe, but it is plain enough that a shilling a-day was greatly in excess of it. If it were not, the stipulation would not effect its purpose, viz., to enforce removal by making it too costly for the tenant to remain in possession. The stipulation is penal in substance though not in form, and the money due under it is in fact and in law nothing else than liquidate damages for a breach of the contract of lease.

I hold therefore that there had been a violation of the Act. The Legislature permitted the employer to deduct rent according to the ordinary meaning of that term, in order that he might recover from the artificer what was due in respect of his occupation of the tenement under his lease. I do not think that it was intended that the statute should be used as a means of enforcing removal or recovering damages.

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LORD LEE.—I concur, and would only add that there is a narrower ground on which I arrive at the same result.

By the 23d section of the statute it is enacted that nothing therein contained shall extend to prevent any employer making or contracting to make any stoppage or deduction from the wages of any artificer, workman, or labourer employed in any of the enumerated occupations.

My opinion is, that in order to be within that section, and so saved from the operation of the statute, the rent referred to in the contract must be rent due by a person "employed."

The payment in respect of which the deduction referred to in this case was to be made was not rent due by a person employed, but a sum alleged to be due in name of rent by a person who had ceased to be employed as such artificer or workman, and in respect of his having thereby become bound to remove or pay that amount.

I think that such a contract is not saved by clause 23 from the operation of the statute.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Rutherford Clark in its entirety. I think it is plain that the object of the form of regulations adopted at this colliery was if possible to bring this practical arrangement for a charge of a shilling per day within sec. 23 as being "rent." With that view article 4 of the regulations was framed. I think it is plain that the sum is not rent in the sense of sec. 23, but is a deduction intended to cover a sum for the retaining of his house by the miner, when he has no right to do so as a tenant, he having ceased to be in the employment, and therefore having no right to remain. But sec. 23 only refers to an arrangement under which, as part of the contract, the employer provides a house for the workman, and becomes entitled to deduct rent which has become due at the date of the deduction, and nothing more. It does not empower the employer to deduct for future occupation of a house, whether by agreement for lease or otherwise. The consent in the receipt given by the workman in this case, that the employer shall deduct from his wages his "house rent," is a perfectly competent contract under sec. 23. It is nothing more than an arrangement that the house rent which has become due shall be kept by the master at settling time. It means no more. If it did mean more—if it meant a consent to deduction as specified in article 4 of the regulations—it would not fall under sec. 23, and would be illegal under sec. 2. I therefore think that the first two questions should be answered in the affirmative, and the third in the negative.

THE COURT pronounced this interlocutor:—"Answer the first and second questions in the affirmative, and the third question in the negative; sustain the appeal; reverse the determination of the inferior judge, and decern."

JAMES AULDJO JAMIESON, W.S.—WALLACE & BEGG, W.S.—Agents.

## No. 8.

Dec. 10, 1888.  
Her Majesty's  
Advocate v.  
Swan.

HER MAJESTY'S ADVOCATE.—*Wallace, A.-D.*

JAMES SWAN.—*M<sup>r</sup> Lennan—Ross Stewart.*

*Indictment—Relevancy—"Falsely and fraudulently"—Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), secs. 5 and 8.*—The Criminal Procedure Act, 1887, sec. 5, enacts that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be suffi-

cient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime." Section 8 enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' or 'knowingly,' or 'culpably and recklessly,' . . . or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant."

An indictment against J. S. bore,—“You did pretend to J. H. . . . that you were possessed of a sum of money amounting to £1900 . . . and that you were about to receive payment of the said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay and had no intention of paying.”

*Objection to the relevancy in respect that the facts set forth did not constitute a crime repelled (diss. Lord Young), on the ground that under the Criminal Procedure Act, 1887, the words “falsely and fraudulently” were to be read into the indictment as qualifying the word “pretend,” and that when this was done the indictment was relevant.*

*H. M. Advocate v. Dingwall, May 26, 1888, 15 R. (Just. Cases) 69, over-ruled.*

*Indictment—Specification—Relevancy.*—In an indictment the charge against the accused was that he did make certain pretences to an innkeeper, “and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay and had no intention of paying.” *Held* that the indictment was irrelevant, in respect of failure to specify the money or goods constituting the sum of which the innkeeper was to be proved to have been defrauded.

JAMES SWAN was indicted before the High Court of Justiciary on 10th December 1888. The indictment against him bore,—“The charge against you is that, on 7th November 1887, and on various subsequent occasions between said date and October 1888, at the house in Harbour Street, Stranraer, occupied by John Hamilton, publican, you did pretend to the said John Hamilton that you were the son of a farmer in Aberdeenshire, and possessed of a sum of money amounting to £1900 in the Grand Trunk Railway, and that you were about to receive payment of the said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay and had no intention of paying.”

At the first diet at Dumfries the indictment was objected to as irrelevant, in respect that the acts charged were not alleged to have been committed falsely and fraudulently, and did not constitute a crime. This objection was recorded, and reserved for the Court of the second diet.

Argued for the prisoner ;—I. The facts stated did not infer crime. There was no statement that the alleged pretences had been “false and fraudulent.” The fact of fraudulent intention was of the essence of the crime, and ought to have been set forth.<sup>1</sup> Though the old form of indictment had been abolished in favour of a system under which the public prosecutor had to state merely the acts done by the accused which were said to be criminal, it remained necessary, in terms of sec. 5, that the indictment should set forth facts relevant and sufficient to constitute an indictable crime. Here it did not, because there was nothing in it which involved fraud. The word “pretend” did not involve that element. It merely signified to put forward a claim whether truly or falsely, *e.g.*, in the expression to “pretend to knowledge” of a thing. The law never *in dubio* attached a sense to an ambiguous word which gave it a meaning implying crime,

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Lord Justice-General.  
Lord Justice-Clerk.  
Lord Young.  
Lord Mure.  
Lord Adam.  
Lord Lee.  
Lord Kinnear.  
Lord Trayner.  
Lord Well-wood.  
Justiciary Clerk.

<sup>1</sup> H. M. Advocate v. Dingwall, May 26, 1888, 15 R. (Just. Cases) 69.



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but the contrary.<sup>1</sup> It was said that qualifying words must be read into the charge in virtue of section 8\* of the recent statute. But section 8 must be read in the light of section 5, which, while abolishing the use of *nomina juris* in indictments, provided that "it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime," thereby leaving it to be implied that the necessity for setting forth facts which were necessary to constitute a crime still existed.

II. The indictment was not sufficiently specific. The result of the alleged fraudulent representations was not sufficiently stated. The prisoner was entitled to know what the case was which was to be proved, whether it was to be said that he obtained cash, or goods, or board and lodgings. A mere statement of the total money result of the alleged fraud was insufficient.

Argued for the Crown ;—The first question was one of the construction of the Act of 1887. It was said that it did not authorise the omission of words which were of the essence of a criminal charge. But this was an error, as appeared from several examples of charges given in the schedule. Thus, in the specimen charge of uttering a forged bill, the schedule stated, as "you did utter as genuine a bill on which the name of John Jones bore to be signed as acceptor, such signature being forged," words which did not negative the innocence of the accused, and left unexpressed the essential element that he knew of the forgery. So also was it in the specimen charge, "you did utter as genuine a letter bearing to be a certificate of character of you . . .," &c. There it was not stated that the accused knew that the writing did not bear a true signature. Indeed, the only exception to the rule that it was not necessary to use such words as "falsely and fraudulently" or "wickedly and feloniously" was where the use of qualifying expressions was necessary to distinguish between one crime and another, as in the specimen charge of fire-raising, where, because fire-raising might be either wilful or by culpable carelessness, and would be a different crime, according as it was done in the one way or the other, the schedule provided that the indictment should say "and this you did wilfully" or "culpably and recklessly," as the case might be.

As to the decision in the case of *Dingwall*,<sup>2</sup> the reasoning in it was inconsistent with that in the more recent case of *Barrie*,<sup>3</sup> and the Court was here asked to review the judgment in the case of *Dingwall*.

II. As to the second point, the Crown moved for leave to amend the libel.

LORD JUSTICE-CLERK.—I should not be prepared to find this indictment rele-

<sup>1</sup> H. M. Advocate v. Ker, Nov. 26, 1860, 3 Irv. 627 ; M'Kenzie v. Whyte, Nov. 14, 1864, 4 Irv. 570 ; H. M. Advocate v. Smith & Barry, April 9, 1868, 1 Couper, 29 ; Rae v. Linton, Dec. 11, 1874, 3 Couper, 67.

\* The Criminal Procedure Act, 1887 (50 and 51 Vict. c. 35), section 8, enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done, or omitted to be done, 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' or 'knowingly,' or 'culpably and recklessly,' or 'negligently,' or in 'breach of duty,' or to use such words as 'knowing the same to be forged,' or 'having good reason to know,' or 'well knowing the same to have been stolen,' or to use any similar words or expressions qualifying any act charged ; but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant."

<sup>2</sup> 15 R. (Just. Cases) 69.

<sup>3</sup> *Supra*, p. 5.

vant in its entirety, because I think that the statement which it makes as to the result of the pursuer's alleged fraudulent representations is not sufficiently specific. The prisoner is entitled to be informed by the Crown what things, whether money or clothing or food, he is charged with obtaining by fraudulent representations. This indictment only states that the person said to have been defrauded was induced "to give you credit to the amount of £46, 9s. 9d.," and that is quite insufficient.

But I understand that the indictment has been brought before us for the consideration of a different question, and one of general importance. But for that the case is not such a one as would have been brought to the High Court at all, as it is not a case of serious consequence in its own nature. Therefore I think it right to express my opinion upon the relevancy of the earlier part of the indictment, and upon the objection to it that it does not state that the pretences of the prisoner were made "falsely and fraudulently."

The Act of Parliament known as the Criminal Law Procedure Act, 1887, was obviously intended to put an end to the syllogistic form of indictment which contained major and minor propositions, the major setting forth that a certain thing or course of action was a crime, and the minor that the accused was guilty of it, in respect he had at a certain place and time committed certain acts, and had committed thereby the crime set forth in the major proposition. The statute was intended to reduce the charge to a statement of the acts which the prisoner is to be proved to have done, leaving it to the Judge to direct the jury whether these acts, or part of them, being proved, constituted a crime. It provides by its clauses, and especially by the schedule, certain illustrations of the statement which the public prosecutor may make as a good charge. It will be seen by the schedule that where the consequences of the acts the accused did must be of a certain nature in order to there being anything criminal in the acts, these consequences must also be set forth in the statement. That may be done for one of two reasons, either to shew the completion and effect of the crime, or to shew the distinction between one crime and another. Thus, in stating a crime of violence the prosecutor is to state whether the consequence was death or injury to the person assaulted. In the former case the crime is of a higher and different quality from what it is in the latter. Again, in certain cases it is not sufficient to detail the act done, but it is necessary also to detail the intent with which it was done. An example of this is the case of fire-raising. To charge a mere act of fire-raising is not sufficient to inform the accused of what is laid to his charge, and accordingly the prisoner is entitled to be told whether it is intended to be proved that his acts were wilful or merely culpable. The statute by its schedule, therefore, provides for that case, and I shall afterwards refer again to it. Subject to the exceptions I have now mentioned, there is, I think, no instance in which it is necessary to do more than to state the acts which the accused has done. This charge, I find, states the acts done by the accused, and the case is one to which the ordinary rules for the charging of the accused under the Act exactly apply. Section 2 of the Act provides that the public prosecutor (and it is he only, it is worthy of remark, that can indict in the manner specified by the Act) may frame his indictment in the form provided by the schedule. If, therefore, he use a form consistently with the schedule, and does not in so doing fail to observe anything provided by the Act itself, he frames a relevant indictment. Now, I think that in this case the public prosecutor has used a form in accordance with the

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schedule. Not merely so, but he has taken advantage of the provisions of section 8 of the statute. The Legislature seems to have desired by section 8 to make it plain that the absence of the words "wickedly and feloniously," "falsely and fraudulently," and the like, in the schedule was intended, and therefore it is so stated in section 8, and not left to be gathered from the mere fact that the specimen charges in the schedule are given without such words. It is said to be intended by section 8 that these words, these "qualifying expressions," are only to be omitted when they are mere expletives or epithets as distinguished from words essential to a statement of the offence itself. I do not quite follow the meaning of the expression "expletive or epithet" as applied to words which the Act says would, according to the law and practice prior to its date, have been "necessary in order to make the indictment relevant." I do not understand why these words needed to be dispensed with by the Act if they were merely expletive words, and, indeed, in some crimes the whole question of relevancy depended, under the former law, on the presence or absence of these words, and falsehood, fraud, and wilful imposition is an instance of a case in point. The words "falsely and fraudulently" (sometimes used only at the beginning of the narrative, sometimes repeated more than once in stating the charge) were essential to the charge. The presence of them made the statement of the acts done a relevant charge. They were not expletive but essential. Further, though some of the words in section 8 may be said to have been expletive words, it is clear that that was not the reason for which they are now to be excluded, because they are excluded along with others which are not mere adjectives at all, but words which, under the older law, were essential to relevancy. Such expressions as "knowing the same to be forged," or "knowing the same to be stolen," were in their nature expressions on which the relevancy depended. The schedule gives effect to these views. In no case but one (to which I have already alluded) are these qualifying expressions to be found, and that case is the one in which it is necessary to give them in order to state to the accused person what particular crime he is said to have committed. For that reason the charge of fire-raising is to state, "and this you did wilfully," or "culpably and recklessly," obviously because without such words the prisoner would not know whether he was charged with one of two crimes or with the other. That illustration is the exception which proves the rule. In other cases the words "shall be implied" where they would formerly have been essential to relevancy.

I therefore conclude that while this indictment is irrelevant on the special ground I indicated at the outset of my opinion, it is relevant in other respects.

LORD YOUNG.—I concur with the Lord Justice-Clerk in thinking that this indictment is irrelevant, and I suppose in accordance with what will be the opinion of all your Lordships we shall find it so, and that this finding will be accompanied with an expression of opinion upon another point which has been argued to us, and upon which, as we shall dismiss the indictment as irrelevant, I do not think we are entitled to give any opinion.

I assume that this indictment would be relevant if the words "falsely and fraudulently" were inserted before the word "pretend," and the question is whether they are to be held as inserted by the provisions of section 8 of the Criminal Procedure Act, 1887. Upon this question I think there is a good deal of difficulty. When I became a Judge I think I was alone in the opinion that the syllogistic form of indict-

ment, as it has been called, was inexpedient, and that it should be discontinued. No. 8.  
 I remember indicating that opinion upon one occasion, and it drew from my Dec. 10, 1888.  
 brethren the strongest condemnation. I thought the major and minor proposi- Her Majesty's  
 tion and subsumption all out of place. I thought it was an evil that the Advocate v.  
 prosecutor should be required to commit himself to the name of the crime which Swan.  
 he charged, and that if before the trial he committed an error in naming the  
 offence, calling it theft instead of embezzlement, or robbery instead of theft,  
 the ends of justice should thereby be defeated. Accordingly, it is entirely in  
 accordance with my opinion that the syllogistic form should be departed from,  
 and that the Court should reserve to itself to put a name upon the offence if  
 the facts amount to a crime at all. But I had thought that it was so obviously  
 proper that the prisoner should be informed of the whole facts alleged against  
 him, and that these, upon a plain and simple statement of them, should amount  
 to a crime by the law of the country, that it was with a feeling at least akin to  
 surprise that I saw a different view entertained by others, that it was not  
 necessary to set forth what amounts to a crime in law in plain and simple  
 language, but that it was enough to set forth what amounts to no crime at all,  
 and imply words which would make it a crime if read in. The question is—  
 and it was marvellous to have it seriously argued—whether the words “falsely  
 and fraudulently,” admitted to be necessary to the charge, should be omitted or  
 put in, or whether they should be put in the body of the indictment or upon  
 the back of it. I asked in a former case if any reason could be suggested for  
 habitually omitting them. The only suggestion that could be made, and the only  
 suggestion that occurred to me, was, that it was to save printing—the expense of  
 printing the words “falsely and fraudulently.” It is as expensive to print them  
 on the back of the indictment as in the body of it, and if economy was the object  
 —and economy was always exceedingly laudable—one could see many other things  
 in which economy of that kind might be promoted. For instance, the words “The  
 Right Honourable James Patrick Bannerman Robertson” might be omitted, which  
 would save a good deal of printing, what we are really interested in being the words  
 “Her Majesty’s Advocate.” Then it is required by that economical provision of the  
 statute that the procurator-fiscal’s signature should be prefixed with the words “by  
 authority of Her Majesty’s Advocate.” Why not imply that? That is printed,  
 but it is a great object to save the cost of the words “falsely and fraudulently.” I  
 am myself very much disposed to try, even by being ingenious, to read the statute  
 so as to make it in this respect sensible and useful. It may not be fatal to the  
 indictment that words are wrongly spelled, or that there is false grammar, but  
 why persist in wrong spelling or false grammar because the statute says that  
 no objection can be taken on that account? Even if there was no objection to  
 the omission of these words, why appeal to the whole Court to save the expense  
 of printing them in the body of the indictment rather than upon the back?  
 By printing them there we would conform to the rule in England, and, so far  
 as I know, in every civilised country, and in this prior to this Act of Parliament,  
 that we must set forth in the plainest and simplest language possible what  
 amounts to crime. The economy of printing is not to save any possibility of  
 blunder. There is no doubt the words to be implied are printed in the statute.  
 Put them in the indictment and there is no room for objection.

This is a case like that of *Dingwall* where a young man, who had been in a  
 bank in Perth as a clerk, and had been promoted to be under-teller in a branch  
 of the bank in Leith, represented to a piano-seller that he had been employed

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as a teller in the bank at Perth, and had been promoted to a similar position in the bank in Leith, and thereby obtained a piano on the three years' system, and immediately raised money upon it by selling or pawning it. I held that he had there been guilty of a crime, although he made no false or fraudulent representation at all. He used the property in a dishonest, criminal, and punishable manner, and the case was represented as really one of theft. The prosecutor argued the case in the view, which I thought quite a right one, that if a man intending to raise money by selling or pawning a piano hires it on the three years' system, and at once turns it into money, he is guilty of a crime although he has made no false representation at all. It was represented as really a case of theft. I asked why it was not charged as theft, and so submitted to the jury! But it was charged as falsehood, fraud, and wilful imposition, and the falsehood represented to the Court consisted in this, that whereas the accused was only a clerk in a bank in Perth, or assistant-teller, and had been promoted to an assistant-tellership in the bank at Leith, he had said that he was the real teller. I thought there that there was no proper charge of falsehood, fraud, and wilful imposition irrespective of the words "falsely and fraudulently." I do not think that you will find that the serious crime of falsehood, fraud, and wilful imposition is thought to consist in whether a man was the son of a crofter and said he was the son of a farmer, or a teller in a bank, while he was assistant-teller, or such trivial distinction. I am not in favour of lengthening the lash of the criminal law. Publicans and others may be left quite well to take care of themselves and to see that the customer or proposed customer does not deceive them in such a way. The law which punishes the obtaining of goods upon false pretences applies to a totally different case. That was my view in the case of *Dingwall*—a view which I still entertain. In this case I see the greatest difficulty in holding that the indictment is relevant without these words being expressed. I do not think that the schedule has been followed here in framing the indictment. The schedule referring to "Norah Omond" is not a schedule for the crime of falsehood, fraud, and wilful imposition. The schedule does not give forms for particular crimes, but forms without any reference to known crimes, and in this respect it is deficient. I am not for encouraging prosecutors to omit words which are necessary to the criminality of what they charge merely to save printing.

As to the latter part of the indictment, referring to the result of the false representations, I am clearly of opinion that the indictment is irrelevant, and I think the proper course to take is to find the libel irrelevant and to dismiss it.

LORD MURE.—I agree with the Lord Justice-Clerk. In the first place, I think that the indictment is not sufficiently specific in the statement of the result of the prisoner's alleged representations.

On the larger question which has been argued, I am clearly of the same opinion as the Lord Justice-Clerk. The plea to be considered is that stated in the objection taken in the inferior Court, and is that the indictment is irrelevant in respect that the acts charged are not said to have been committed falsely and fraudulently. Now, it appears to me that the objection is met by section 8 of the statute. An indictment in such terms as we have before us would, under the old law, have been irrelevant in respect of the absence of the words "falsely and fraudulently." But section 8 seems to me to make it as clear as words can make it that the indictment is not now irrelevant in consequence of the absence

of these words, because it provides "that it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done, or omitted to be done, 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' or 'knowingly,' or 'culpably and recklessly,' or 'negligently,' or in 'breach of duty,' or to use such words as 'knowing the same to be forged,' or 'having good reason to know,' or 'well knowing the same to have been stolen.'" It is not necessary to use such expressions in framing an indictment in which, according to the former law, they would have been necessary, because the statute goes on not in permissive but in imperative words, that "such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant."

On that single ground I hold the objection to be bad.

LORD ADAM.—I think that our only duty is to construe the statute, and accordingly I express no opinion on the question whether it might have been otherwise or better expressed. I proceed to consider whether the objections to this indictment are well founded. There are two objections. One of them raises a general question, the other refers to the manner in which the result of the alleged false representations in this particular case is libelled at the close of the indictment. Now, on the general objection which relates to the relevancy of the allegation as to the representations made by the prisoner, I could have understood its being enacted that while words which the Legislature held unnecessary to a criminal charge should no longer form part of indictments, still an indictment must contain a statement of all that was necessary to constitute the essential elements of a crime. But it is clear that this Act is not constructed upon that principle. I think it is clear beyond doubt, when we look at the part of the schedule which relates to the charge of uttering, that it is not. The Court is to imply the qualifying allegation "in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant." I think that means that we are to imply not merely superfluous or unnecessary words, but words that would have been essential prior to the passing of the Act. On that matter my opinion is clear. Let me put an illustration. Suppose we had the person who made pretences to Norah Omond placed at the bar charged in the very words of the schedule, every argument I have heard used in this case would have been equally applicable to an objection to that indictment. If so, how could we have so interpreted the Act, with the very words of the schedule before us, as to have held the indictment to be irrelevant? If not, how can we hold this general objection to be good? I can see, therefore, no doubt that "falsely and fraudulently" must here be implied.

But I am of opinion that there is room for doubt upon one point. While I am quite ready to imply a qualifying allegation when necessary, I think that difficulty may arise when more than one of the qualifying expressions could be implied, and the question of what crime is to be regarded as charged will depend upon which of them is to be implied. One example of such a case is that of fire-raising, which may be wilful or culpable and reckless, and will be a different crime according to whether it is the one of these or the other. That particular case is provided for by the statute itself, but I am not certain that it is the only one, and, in the event of others arising, I wish to reserve my opinion.

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In this case I agree in thinking it a fatal objection that the result of the alleged false representations is not relevantly libelled.

On these grounds I agree with the Lord Justice-Clerk.

LORD LEE.—I concur in thinking the indictment irrelevant for want of a specific statement of the result of the alleged fraudulent pretences. Apart from that objection, I think the indictment is otherwise relevant and sufficiently specific. I think section 5 must be read along with section 8, and when that is done, I think the indictment sets forth that the prisoner “did falsely and fraudulently pretend to John Hamilton that you were the son of a farmer in Aberdeenshire, and possessed of a sum of money in the Grand Trunk Railway, and that you were about to receive payment of the said money.” So reading in these words, I cannot doubt that the indictment is relevant. I therefore concur with the Lord Justice-Clerk. I reserve my opinion on the question mentioned by Lord Adam.

LORD KINNEAR.—I agree with Lord Adam both in the opinion he has expressed and in the reservation he made. I should have great difficulty in holding relevant an indictment which would set forth one offence or another according to the words which should be read into it from section 8. I am not satisfied that the instance of fire-raising is the only one to which such a difficulty may apply.

LORD TRAYNER.—On the question of the construction of the Act of 1887 I agree with the Lord Justice-Clerk. There is no room for the objection to relevancy but for the supposed inconsistency between section 5 of the Act and section 8. If section 8 stood alone, there could be no question that the Court are not only entitled but bound to imply the words “falsely and fraudulently.” It is conceded that if these words were read into the indictment, the objection would not be good. But here, as in the case of *Dingwall* (a judgment which is practically being reviewed in this case), it has been stated that what is required is that there shall be set forth facts relevant to constitute a crime. I take that as meaning that the indictment must set forth in itself facts relevant and sufficient to constitute a crime without anything being added. Now, I think it is impossible to read section 5 as it was read by the majority in the case of *Dingwall*. If we did, we should be obliged to say that it is inconsistent with the schedule, an idea which cannot be readily entertained, for we should endeavour to read the various portions of a statute as agreeing with each other. Now, here, I think we can read section 5 and section 8 together with the schedule, and if we do we find that there may be a relevant indictment which does not set forth facts which, taken by themselves, would constitute a crime. Of this the best illustration is that put by myself during the argument, that of the uttering of a cheque altered in the sum it contains. It would be libelled that the accused did utter it as genuine. But an essential of the crime would of course be wanting—the element that he well knew it to be forged or altered—and there would be nothing said against him except what was quite consistent with his innocence. But if section 8 is read along with section 5, you then have what is otherwise lacking. The words will be read into the indictment which have been called, I think improperly, “expletive” words. The law implies that they are to be held as present as matter of statement.

Another view is derived from the object of the Act. It has been said that

the object of it was to simplify procedure. I think it was also to enable the statement of the charge to be made in more popular and easy language. It is more easy for the panel that he be told what it is said that he did in language more intelligible to him than was the case under the former system. The qualifying expressions are not necessary to the panel or the jury. The Judge will take care that unless what the law considers a crime is laid before the jury, the panel will not be convicted.

While, therefore, I agree with all the Court that the statement of the result of the fraudulent pretences is irrelevant, I think that *quoad ultra* the indictment is relevant.

LORD WELLWOOD.—I agree on both points with the Lord Justice-Clerk, and have nothing to add.

LORD JUSTICE-GENERAL.—According to the constitution of the Court I have no voice in the judgment. But it is right that, in accordance with what I understand to be the practice of the Court, I should indicate that my opinion coincides with that of the majority of your Lordships.

THIS interlocutor was pronounced:—"Repel the objections to the relevancy of the libel stated at the previous diet, that the acts charged are not alleged to have been done 'falsely and fraudulently,' but in respect the libel does not sufficiently specify the advantage or benefit which the panel obtained by the use of false and fraudulent pretences, find the libel irrelevant, and dismiss the same."

"Whereupon, on the motion of the Advocate-depute,

"THE COURT deserted the diet against the panel *pro loco et tempore*."

CROWN AGENT—AGENT FOR THE POOR—Agents.

MRS JANE WRIGHT OR M'KENZIE AND MARGARET M'KENZIE, Appellants.  
—J. C. Thomson—Macdonald.

DONALD M'PHEE (Procurator-Fiscal of Police Court, Glasgow),  
Respondent.—Ure.

No. 9.

Dec. 29, 1888.  
M'Kenzies v.  
M'Phee.

*Jurisdiction of Circuit Court—Winter Sitting in Glasgow—Appeal—Act 9 Geo. IV. c. 29, sec. 1—The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 46.—Held that the Winter Sitting of the High Court of Justiciary at Glasgow is, notwithstanding the provisions of the Criminal Procedure (Scotland) Act, 1887, held under the Act 9 Geo. IV. c. 29, and that (following Davidson v. Gray, Jan. 6, 1844, 2 Broun's Just. Rep. 9) therefore it is not competent to hear or dispose of any appeals thereat.*

JANE WRIGHT or M'KENZIE and her daughter Margaret were charged before the Police Magistrate at Glasgow at the instance of the Procurator-fiscal of the Police Court with the crime of theft. The magistrate sentenced the mother to thirty days' imprisonment, and ordered her daughter to be detained for five years in an industrial school.

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They appealed to the Circuit Court of Justiciary at Glasgow held during the Christmas recess of the Court of Session.

The respondent objected to the competency of the appeal on the ground that it was excluded by the provisions of the Act 9 Geo. IV. cap. 29, sec. 1.\*

\* The Act 9 Geo. IV. cap. 29, sec. 1, enacts,—“Whereas, from the great increase of criminal offences in Scotland, it is expedient that provision should be



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Argued for the respondent;—By the provisions of the Act 9 Geo. IV. cap. 29, sec. 1, under the authority of which the Winter Circuit Court at Glasgow was held, the Judges had power to sit “till the whole criminal business to be brought before the Court at that time is concluded, and no longer.” It had been decided under this clause that it was incompetent to appeal any case, even though criminal, to the Winter Glasgow Circuit Court.<sup>1</sup>

Argued for the appellants;—The Act cited, and the decision in *Davidson v. Gray*, did not apply. This Court was not now sitting under authority of that Act, but under the authority of the Criminal Procedure (Scotland) Act, 1887.<sup>†</sup> It was sitting as the High Court of Justiciary, and was empowered to sit till the whole criminal and civil business was disposed of.

LORD JUSTICE-CLERK.—The question of the competency of this appeal has been very properly raised, as it is desirable that the meaning of the Criminal Procedure Act, 1887, should be distinctly ascertained with reference to these appeals. Having given the point the best consideration in my power, I have come to be of opinion that the hearing of appeals at this Winter Circuit is not competent. The question does not now come up for the first time, for in the case of *Davidson v. Gray*, 2 Broun, 9, that question was decided, and the judgment has ever since been acquiesced in, and accordingly no appeals have since been heard at this Winter Court except in one case, which was heard and disposed of with the consent of both parties. I accept that decision as binding, and the real question before the Court now is, whether the Act of 1887 makes any alteration upon the ruling given in that case. I am of opinion that the Act of Parliament (9 Geo. IV. c. 29) under which that decision is given is still in force, and is the Act under which this Court is held. The Act expressly provides by section 1, that from and after the passing of this Act the Circuit Court to be held at Glasgow during the winter recess of the Court of Session “shall

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made for holding additional Circuit Courts of Justiciary, and that means should be taken for facilitating criminal trials in Scotland, be it therefore enacted . . . that it shall and may be lawful for the High Court of Justiciary at Edinburgh, and the said Court is hereby authorised and required on or before the twentieth day of November in every year, to fix by Act of Adjournal a day for holding a Circuit Court of Justiciary at Glasgow, for trying criminal causes, during the recess of the Court of Session in the end of December and beginning of January yearly, and to name two of the Judges of the said High Court to discharge the duty of the said Circuit Court; and such Circuit Court shall be held at Glasgow accordingly, and shall be continued from day to day until the whole criminal business to be brought before the Court at that time is concluded, and no longer.”

<sup>1</sup> *Davidson v. Gray*, Jan. 6, 1844, 2 Broun's Just. Rep. 9.

<sup>†</sup> The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 46, enacts,—“The Lords Commissioners of Justiciary shall hold such sittings for the trial of criminal causes as may be necessary, on the requisition of the Lord Advocate, subject to such orders as Her Majesty in Council may issue ordaining Courts to be held, and every sitting of the Lords Commissioners, whether under the existing law and practice, or under this Act, or under such Order in Council, shall be a sitting of the High Court of Justiciary and the ceremonies of fencing and closing Courts by proclamation of a macer shall be discontinued, and it shall not be necessary for the Lords Commissioners of Justiciary to remain in any town for a longer time than is required for the disposal of the criminal and civil business falling to be disposed of at such sitting.”

be continued from day to day until the whole criminal business to be brought before the Court at that time is concluded, and no longer." I do not find any clause in the Act of 1887 repealing this provision. The first part of clause 46, relied on by Mr Thomson, refers to a Court being held on the requisition of the Lord Advocate, which is just the old practice of fixing High Court sittings anywhere when business made them advisable, but which practice has of late years been only applied to Edinburgh and the district of the Lothians. All the other Courts have been held under the Acts appointing Circuit Courts, or under the Orders in Council and Act of Adjournal following on them of 1881, appointing additional circuits. I do not think, therefore, that the first part of clause 46 has any bearing on the question, for it distinctly recognises that Courts are still to be held under the existing law and practice after the passing of the Act, and makes this alteration only, that these Courts are to be called sittings of the High Court of Justiciary. The intention of the Act on this point I understand to be that a Circuit Court is no longer to be considered a thing of itself, but that the sittings of the High Court of Justiciary all over the country should fall into one arrangement, provided that the High Court does not neglect to appoint those Courts to be held which under the existing law and practice were in use to be held. But while this Court is a sitting of the High Court, it is held under the existing law and practice, and that existing law and practice, as set forth in the Act of 9 Geo. IV. c. 29, is that it is to sit "till the whole criminal business is disposed of, and no longer." It has been said that the Courts which used to be called Circuit Courts have been abolished by the Act of last year. I do not think so, and this is clearly shewn by clause 48,\* and by the dispensing clauses authorising cases in certain circumstances to be remitted to the High Court or to a Court of a neighbouring circuit district. I am therefore of opinion that the Act of Geo. IV. is still in force, and that obeying its very plain terms this Court is held for the hearing of criminal cases only, and that the hearing of civil appeals is not part of the business to be transacted during its sitting.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties, the Lord Justice-Clerk finds that the Winter Sitting of the High Court of Justiciary at Glasgow is held under the Act 9 Geo. IV. c. 29, and that it is not competent to hear or dispose of any appeals thereat."

J. M. & J. H. ROBERTSON—PARTY—Agents.

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\* Sec. 48,—“It shall not be necessary for the High Court of Justiciary to proceed to any town for the purpose of holding any Court in use to be held in such town when there are no cases indicted for the sitting of the Court at such town, or when so many of the persons indicted thereto have pleaded guilty before the Sheriff at the first diet as to make the holding of a special Court inexpedient, and in that event such cases as remain for trial may be ordered to be brought up at another Court, in manner hereinafter provided . . . and any appeal which may have been taken to such Court shall be heard by the High Court of Justiciary in Edinburgh, or may when both parties consent be heard at any sitting of the High Court of Justiciary at any place.”

No. 10. JAMES KIRKLAND GALLOWAY (Procurator-Fiscal of Zetland), Appellant.—  
*R. K. Galloway.*

Jan. 14, 1889.  
 Galloway v.  
 Weber.

JOHN WEBER, Respondent.—*M' Lennan.*

*Public-house—Hotel certificate—Bona fide traveller—The Public-houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), Schedule A, No. 1.*—A resident of the town of Lerwick who had been absent for some months arrived there by steamer early on a Sunday morning, and went home and slept there. At noon of the same day he went to a hotel where he was supplied with refreshments by the waiter, to whom he was unknown, on the mere statement that he had arrived by the steamer, and was a *bona fide* traveller.

*Held* (1) that he was not a *bona fide* traveller; (2) that the waiter had not made sufficient inquiry to justify his regarding him as such; (3) that the master of the hotel must be held, in respect of the actings of his servant, to have been guilty of a breach of his certificate.

HIGH COURT.  
 Lord Justice-  
 Clerk.  
 Lord Adam.  
 Lord Trayner.  
 Justiciary  
 Clerk.

JOHN WEBER, hotel-keeper, Grand Hotel, Lerwick, was charged before the Justices of Peace for the county of Zetland at the instance of James Kirkland Galloway, Procurator-fiscal of Zetland, with a contravention of the Public-houses Acts Amendment (Scotland) Act, 1862, by selling, in contravention of the certificate for the sale of exciseable liquors, at the Grand Hotel foressaid, held by him, to Thomas Nisbet, residing in Union Street, Lerwick, who was neither a lodger in said hotel nor a traveller, one pint of beer or other exciseable liquor.

He pleaded not guilty, and the magistrates after hearing evidence acquitted him.

The Procurator-fiscal craved a case, which was accordingly stated for him by the magistrates as follows;—"The facts, as admitted or proved, are that the said Thomas Nisbet returned home to Lerwick on 9th September 1888, after an absence of seven months. That he was unknown by sight to the accused, or to the waiter Charles Dautschmann after mentioned. That the steamer arrived at Lerwick on the 9th September, at an hour variously stated as between 12.30 a.m. and 2 a.m. on Sunday morning. That Thomas Nisbet on the arrival of the steamer went to his home in Union Street, Lerwick, and went to bed. That by the steamer two commercial travellers came, who were met by the said John Weber's servants, and who lodged in the Grand Hotel that night. That after the arrival of the steamer, the whole occupants of the hotel went to bed. That between 11 a.m. and 12 noon on the said 9th September, Thomas Nisbet proceeded to the Grand Hotel, Lerwick, in company with Robert Tait, Albany Street, Lerwick, who went for the purpose of visiting his sister-in-law Barbara Jaromson, who is a domestic servant in the Grand Hotel, and twice asked Charles Dautschmann, waiter in the said Grand Hotel, to supply him with drink, and was refused. That he thereupon stated that he had come by the steamer, and was a *bona fide* traveller, but did not inform the waiter that he had been at home and slept. That he was thereupon supplied with a pint of beer. Between the arrival of the steamer, the time of which was known to Mr Weber, and the time when the beer was supplied, all the parties had had a night's sleep, and about twelve hours had elapsed. That Robert Tait, who accompanied him, did not ask for, and was not supplied with drink."

The questions of law for the opinion of the High Court of Justiciary were as follows,—“Was Thomas Nisbet a *bona fide* traveller, within the meaning of the Acts, when so supplied with liquor? Was the said John Weber or his servant justified in supplying the said Thomas Nisbet with refreshments, on the faith of the statement made by him? Was the said John Weber properly acquitted by the magistrates?”

The appellant argued ;—The questions fell to be answered in the negative. (1) Nisbet, after the arrival of the steamer at Lerwick, went to his own home, where he slept all night. He could in no sense be said to be *in itinere*. He was therefore not a *bona fide* traveller in the sense of the statute. (2) Weber knew that the steamer had arrived early on Sunday morning, and even though the waiter was ignorant of this, he had not made such inquiry into the circumstances of the case as justified him in regarding Nisbet as a *bona fide* traveller entitled to refreshments. (3) It followed that the acquittal was improper.

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The respondent argued ;—On the first question, the *onus* of proving that Nisbet was not a *bona fide* traveller lay undoubtedly on the appellant,<sup>1</sup> and he had failed to satisfy the magistrates on the point.

They had taken the view that Nisbet's journey must be held to have been uncompleted, and they had good grounds for it. Neither Weber nor the waiter knew Nisbet by sight, and Weber was aware the steamer had just arrived in Lerwick. They could not possibly know that Nisbet resided in Lerwick, and had been to his own home. But even the fact that he had gone home did not prevent his being regarded as a *bona fide* traveller. A person had been held a *bona fide* traveller where he merely went from his house for a walk,<sup>2</sup> where he had walked to drink water at a spa only  $2\frac{1}{4}$  miles from his own home,<sup>3</sup> and where he had merely gone a journey by train.<sup>4</sup> The second question stated involved the further question whether the waiter had been sufficiently careful in his inquiry as to the circumstances of the case. Now, Nisbet affirmed that he was a *bona fide* traveller, and at the same time stated how he was so. No further information could possibly have been elicited by inquiry. The waiter was then justified in accepting the statement, and in supplying the refreshment. But even if he was to be held as having failed to exercise sufficient care, he was merely guilty of an error of judgment,<sup>5</sup> or of wilful disobedience to his master's orders,<sup>6</sup> in neither of which cases could a conviction stand against the master. The acquittal was then proper, and must be given effect to.

LORD JUSTICE-CLERK.—I am clearly of opinion that we must answer the first question in the negative. Nothing can be plainer to me than that Nisbet was not a *bona fide* traveller at the time when he was supplied with refreshment.

The second question resolves itself into one as to whether the waiter, acting for his master, discharged the duty which undoubtedly lay upon him of making reasonable inquiry before he supplied the refreshment on a Sunday to a person admittedly unknown to him, with a view to satisfy himself as to whether that person was or was not a *bona fide* traveller. Here again, I am of opinion that we must answer the question in the negative. All that the waiter was told by Nisbet was that he had come by the steamer, and was a *bona fide* traveller. This latter statement may be left out of view, because it is not a statement of fact, but a mere inference from a fact. The only fact, therefore, which the waiter elicited was that Nisbet had come by the steamer on Sunday morning. It is impossible to avoid the conclusion that if the waiter had continued his inquiry,

<sup>1</sup> Johnston v. Laing, March 25, 1876, 3 Couper, 250 ; Copley v. Burton, June 28, 1870, L. R., 5 C. P. 489.

<sup>2</sup> Dickson v. Linton, Nov. 19, 1886, 14 R. (Just. Cases) 13.

<sup>3</sup> Peplow v. Richardson, Feb. 5, 1869, L. R., 4 C. P. 168.

<sup>4</sup> Copley v. Burton, *supra*.

<sup>5</sup> Copley v. Burton, *supra* ; Mullins v. Collins, Jan. 24, 1874, L. R., 9 Q. B. 292 ; Roberts v. Humphreys, May 28, 1873, L. R., 8 Q. B. 483.

<sup>6</sup> Greenhill v. Stirling, March 19, 1885, 5 Couper, 602, 12 R. (Just. Cases) 37.

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as he ought to have done, he would have ascertained that Nisbet's home was in Lerwick, and that he had gone there and slept there, and had thus completed his journey. Whatever then we may think about the *bona fides* of the waiter—and I do not think that we need assume that he was guilty of wilful breach of the statute—I cannot hold that the inquiry made by him, and the information he received, were a justification for his considering Nisbet a *bona fide* traveller.

Another question has been raised by Mr M'Lennan which goes rather to the third question raised in the case, namely, whether the master of the hotel is liable in a question of this kind for the *laches* of his servant. One or two cases have been quoted in support of the proposition that although the waiter was wrong here he must be held to have acted in breach of his master's instructions, and therefore to have himself committed a fault for which his master is not liable. I cannot assent to such a doctrine. If the master gives his servant express instructions not to do a certain thing, and the servant knowingly and in breach of these instructions does that thing, the master may possibly not be liable, because the servant is not doing it in the employment of his master. But if, as is alleged here, the servant is *bona fide* considering for and in the interests of his master whether a certain person should be supplied or not with liquor, then the mistake of the servant is that of his master.

Having answered the first two questions in the negative, I have no difficulty in answering the third in the negative also.

LORD ADAM.—As regards the first question in the case, it appears from the facts stated that Nisbet arrived at Lerwick, where he resided, by steamer, that he went home to bed, and remained in his own house about twelve hours. In these circumstances, I think it is nothing short of ridiculous to say that his journey had not ceased.

As regards the second question, I am of opinion with your Lordship that no innkeeper, or servant of one, is justified in supplying liquor unless he makes due and proper inquiry. The statement made by Nisbet was that he was a *bona fide* traveller, having come to Lerwick by the steamer. But that means nothing—if every man who has landed from a steamer twelve hours before is to be presumed to be still *in itinere* that might be sufficient. Such an idea, however, is ridiculous. It was the clear duty of the servant to ask some more questions. There was no proper or reasonable inquiry. That being so, I must come to the same conclusion as your Lordship. It follows that I necessarily come to the same conclusion upon the third question.

I had rather not express any opinion as to what is reasonable inquiry, because that is a question of circumstances in every case.

LORD TRAYNER concurred.

THE COURT answered the questions of law in the negative.

THOMAS CARMICHAEL, S.S.C.—JOHN M. RUSK, S.S.C.—Agents.

## No. 11.

Jan. 28, 1889.  
Maxwell v.  
Marsland.

JAMES MAXWELL, Appellant.—*Rhind*.  
ROBERT MARSLAND, Respondent.—*Goudy*.

*Game—Day Trespass Act, 1832 (2 and 3 Will. IV. c. 68)—Son of tenant with permission to shoot rabbits on farm.—Held that a person who had verbal permission from his father, the tenant of a farm, to shoot rabbits, and who shot*

while upon the farm two grouse, was guilty of a trespass under the Day Trespass Act No. 11.

*Observations on the case of Laurie v. M'Arthur* (8 R. (Just. Cases) p. 2, Jan. 28, 1889. Maxwell v. Maraland.

*Day Trespass Act, 1832* (2 and 3 Will. IV. c. 68)—*Conviction.*—Held that the enumeration of "deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies," contained in the first section of the Day Trespass Act, was not inserted for the purpose of stating a number of alternative ways in which a contravention of the statute could be committed, but as shewing to what animals the protection of the Act extended, and that therefore a general conviction following upon such a charge was good, even though the person convicted had a right to kill "conies."

JAMES MAXWELL, residing at Hunthills, Dumfriesshire, was charged, on the 8th December 1888, before the Sheriff-substitute of Dumfries and Galloway, at the instance of Robert Marsland, Esq., tenant of the shootings of Glenae, with a contravention of the Day Trespass Act, 2 and 3 William IV. cap. 68, "in so far as on the 21st November 1888, he did commit a trespass by entering or being in the day-time . . . upon the lands of Hunthills, belonging to Robert Stuart Dalzell, Esq. of Glenae, without leave . . . in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies."

After hearing evidence, the Sheriff-substitute (Hope) found the charge proven, and convicted the accused of the contravention charged.

Maxwell appealed to the High Court of Justiciary.

The material facts as stated in the case were these: The accused, who resided with his father, the tenant of the farm of Hunthills, had a verbal permission from his father to kill rabbits. On the day libelled, the gamekeeper, Adam Lauder, saw him shoot two grouse in a field adjoining the farm-steading.

The question of law for the decision of the High Court was,—“Whether the accused, being a member of his father's household, and having verbal leave from him to kill rabbits upon his farm, and being lawfully upon the lands, is liable to be prosecuted under the Day Trespass Act?”

Argued for the appellant;—He had leave from his father, who was entitled to give it, to kill rabbits on the farm. He had, then, a perfectly lawful title to be on the farm with a gun in his hand.<sup>1</sup> The case of *James v. Earl of Fife*<sup>2</sup> had been overruled by the case of *Laurie, &c., v. M'Arthur*,<sup>3</sup> in which a farm-servant, with the same permission which the appellant had here, was held not to have entered the lands for an unlawful purpose when he set a dog to retrieve a wounded hare. But further, the charge here was alternative, and the conviction a general one of the contravention charged. For all that appeared he might have been convicted of shooting "conies," which, it was admitted, he had a right to do.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK.—Upon the first question, we are to take it to be the fact that the accused had a verbal permission to shoot rabbits. I give no opinion upon the question whether a verbal permission to shoot rabbits is sufficient to take a person out of the operation of the Day Trespass Act as regards the shooting of rabbits. I shall assume that the accused had a sufficient right to shoot rabbits. The case which the Sheriff held to be proved was that having

<sup>1</sup> *Stuart v. Murray*, Nov. 13, 1884, 5 Couper, 526; *Jack v. Nairne*, Feb. 18, 1887, 1 White, 350, 14 R. (Just. Cases) 20.

<sup>2</sup> Jan. 28, 1880, 7 R. (Just. Cases) 9, 4 Couper, 321.

<sup>3</sup> Oct. 29, 1880, 8 R. (Just. Cases) 2, per Lord Young, p. 4, 4 Couper, 346.

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such a right he shot two grouse. I have no doubt that a person who goes out perfectly innocently with a gun for the purpose of shooting crows, or, if he has a right to do so, for the purpose of shooting rabbits, comes within the operation of the Day Trespass Act whenever he shoots at game or any of the enumerated animals which follow the word "game" in the statute, excepting the words "or conies" in the case of a person who has a right to shoot rabbits. It is not necessary that he should when he first goes out have such an intention. The moment he forms such an intention, he is on the land for an unlawful purpose, and is a trespasser in the sense of the Act. The tenant himself, if he kill game upon his lands, is unlawfully there as a trespasser for that purpose.

The only question of difficulty is whether the conviction being a general one is a good conviction. It is maintained that, in so far as the conviction is concerned, the Sheriff might have intended to convict the accused of shooting rabbits. I do not think that is the way in which the statute has been understood. The enumeration of "deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies," was not inserted for the purpose of stating a number of alternatives, but solely as illustrative of what was to be held included in the sanction of the statute. Accordingly before the Ground Game Act of 1880 a general conviction was perfectly competent and quite usual. The Ground Game Act makes this difference: that if the animals of which the person was in pursuit were rabbits, and he had leave to shoot them, he is entitled to an acquittal. But it is by proving this that he is to escape. Therefore I hold that a general conviction is still perfectly competent. Of course in stating the case the Sheriff would be bound to state whether he convicted on the ground that the person accused shot rabbits or not, and the accused would be entitled to appeal on the ground that he had proved that he had permission to shoot rabbits. That this conviction, however, is perfectly justified upon the facts stated in the case I have no doubt. I am accordingly of opinion that the question ought to be answered in the affirmative.

LORD ADAM.—The question is, "Whether the accused, being a member of his father's household, and having verbal leave from him to kill rabbits upon his farm, and being lawfully upon the lands, is liable to be prosecuted under the Day Trespass Act?" The facts which have been found to raise this question are that this person was a farmer's son with leave to shoot rabbits, that he was on the lands with a gun, and when so on the lands shot two grouse. The question is whether the fact that he was entitled to be on the lands to shoot rabbits prevents a conviction for being unlawfully on the lands in respect that he shot grouse? I am clearly of opinion it does not. I think that is decided by the case of *James v. Earl of Fife*. It is said, however, that the authority of that case has been taken away by the case of *Laurie*. I do not think so. I do not think the passages quoted from Lord Young's opinion in that case mean that. It appears to me that Lord Young recognised the previous decision, and distinguished the case from it upon a question of fact. He said,—"I am of opinion, upon the facts stated, that there was no evidence laid before the Sheriff that the respondent either entered or was upon the land for the purpose of going in pursuit of game, and that he was not a trespasser in the sense of the statute." His opinion seems to turn upon this, that he did not think the setting of a dog at a wounded hare was in point of fact being there in pursuit of game. That being so, I am entirely of opinion with your Lordship, and in conformity with the

case of *James*, that a person may have a right to be on lands, and yet if, after entering upon them, he proceeds to commit illegal acts, he may be convicted of being on the lands for an illegal purpose. I have no doubt that the appellant was upon the lands for an illegal purpose when he formed the resolution, which he carried out, of shooting these grouse, and am therefore of opinion that the first question should be answered in the affirmative. No. 11.  
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There was another question referred to which is not stated in the case. It is said there is an alternative libel with a general conviction. I do not think so. I concur with your Lordship in the construction of the Act. The charge under the Act is trespassing in pursuit of game. It is not limited to game proper. There is an enumeration of the animals included in the term. But the charge is one charge. These are illustrations of the different ways in which the offence may be committed. It is quite true that since the passing of the Ground Game Act the word "conies," in the case of a person entitled to shoot rabbits, becomes immaterial in the charge; and if it had been proved to the satisfaction of the Sheriff that this person was truly in pursuit of conies, he could not have convicted him of trespass in pursuit of game.

LORD TRAYNER concurred.

THE COURT answered the question of law in the affirmative, and sustained the conviction.

J. & W. F. CRAIG—WILLIAM OFFICER, S.S.C.—Agents.

JOHN ADAMS, Appellant.—*Low*.  
GEORGE CADENHEAD (Procurator-Fiscal of Aberdeen).—  
*Lord-Adv. Robertson—Kennedy*.

No. 12.  
Jan. 28, 1889.  
Adams v.  
Cadenhead.

*Fisheries Acts—Place for exportation—Inland railway station—Act 31 and 32 Vict. (Salmon Fisheries (Scotland) Act, 1868), c. 123, sec. 22.*—A person who had delivered certain boxes of salmon to a railway company in Aberdeen, addressed to a firm in Paris, for transmission by inland railway to Newhaven in England and by shipment thence to France, was convicted of a contravention of the 22d section of the Salmon Fisheries (Scotland) Act, 1868.\*

The Court *quashed* the conviction, holding that an inland railway station was not a "wharf, quay, or other place for exportation" within the meaning of the section.

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\* Act 31 and 32 Vict. c. 123 (Salmon Fisheries (Scotland) Act, 1868), sec. 22, enacts,—“Any salmon shipped or exported, or brought to any wharf, quay, or other place for exportation between the commencement of the latest and the termination of the earliest annual close time for any district in Scotland contrary to this section shall be forfeited, unless proof be given to the satisfaction of the commissioners of customs of the salmon having been legally captured, and the person so illegally shipping or exporting, or bringing the same for exportation, shall be liable to a penalty not exceeding two pounds for every salmon so shipped or exported or brought for exportation, and no salmon caught by rod and line during the annual close time for net fishing shall be shipped, exported, or brought for exportation under the like penalties; and any officer of customs may, during the aforesaid period, open any parcel entered or intended for exportation, or brought to any quay, wharf, or other place for that purpose, and suspected by him to contain salmon, and may detain any salmon found in such parcel until proof is given to the satisfaction of the Commissioners of Customs of the salmon being such as may be legally exported; and if the salmon, before such proof is given, become unfit for human food, the officer of customs may destroy the same.”



## No. 12.

Jan. 28, 1889.  
Adams v.  
Cadenhead.

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord Adam.  
Lord Trayner.  
Justiciary  
Clerk.

JOHN ADAMS was charged in the Sheriff Court at Aberdeen at the instance of the Procurator-fiscal upon a complaint which set forth "that he did at Aberdeen, between 14th September 1888 and 4th February 1889, being the commencement of the latest and the termination of the earliest annual close time for salmon for any district in Scotland, (1) on 20th September 1888, bring to the Joint Railway Passenger Station, Guild Street, Aberdeen, and did there deliver to the Caledonian Railway Company, for exportation to France, three boxes containing forty-two salmon; (2) on 21st September 1888 bring to said railway station, and did there deliver to the Caledonian Railway Company, for exportation to France, two boxes containing nineteen salmon, contrary to the Act 31 and 32 Victoria, chapter 123, section 22, and that he had thereby rendered himself liable to a penalty not exceeding £2 for every salmon so brought for exportation."

An objection was taken to the relevancy of the complaint on the ground that the railway station, Guild Street, Aberdeen, was not a port or place of exportation in the sense of the 22d section of the statute. The Sheriff-substitute (Dove Wilson) repelled the objection, and upon evidence led convicted Adams of the contravention charged. Adams craved a case.

The Sheriff-substitute stated that he held that the railway station fell under the description contained under the section of a "wharf, quay, or other place" to which salmon might be brought for exportation.

He further stated that he held it proved that the salmon in question had been brought by the accused to the Guild Street Station at Aberdeen in three boxes, addressed to Bigot & Company, Fishmarket, Paris, for exportation to France, by inland railway carriage to Newhaven in England, and by shipment thence to France.

The following question of law was stated:—"2. Whether it was a contravention of the Act to bring to the Joint Railway Passenger Station, Guild Street, Aberdeen, and there deliver the salmon in question to the Caledonian Railway Company for exportation to France by inland railway carriage to Newhaven in England, and by shipment thence to France?"

Argued for the appellant;—The railway station at Aberdeen could not possibly be said to be a "wharf, quay, or other place for exportation" within the meaning of the section. The expression "other place" referred to another place of the same kind as a "wharf or quay."

Argued for the respondent;—The section was contravened by the accused putting the salmon at the Aberdeen station in a course of transit over which he had no further control, and which in the ordinary course would take the salmon out of the country.

LORD JUSTICE-CLERK.—As I read the section of the Act of Parliament under which this charge is brought, the place at which the offence must be committed must be a wharf, quay, or other place for exportation, the offence being committed in one or other of two ways, either by shipping or exporting the salmon, or by bringing them to any wharf, quay, or other place for exportation during the close time. I have no hesitation in holding that the words "or other place" mean a place similar to a wharf or quay, and that the purpose must be manifested to be for exportation by the salmon being brought to such a place. I do not think that the station of Aberdeen is such a place. The offence charged here would be committed by the bringing of the fish to the port of Newhaven in circumstances which upon a proof would be held to establish that they were brought there for exportation, but I do not think that we can hold it to be a relevant complaint under this section that at the station of Aberdeen certain boxes were delivered to a railway company in order to be taken to a wharf, quay, or other place for exportation. The place at which the offence must be com-

mitted must be a place from which immediate exportation may follow. I therefore think we ought to answer the question in the negative. No. 12.

Jan. 28, 1889.  
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**LORD ADAM.**—It appears that the appellant here was convicted of two offences of different dates, the offences being alleged to be contraventions of the 22d section of the Salmon Fisheries (Scotland) Act, 1868. Now, I am clearly of opinion with your Lordship that this section is not intended to apply to inland railway stations, but to shipping ports. That is obvious from the words of the statute. This charge is brought under the second clause of the section which enacts—(His Lordship here quoted the clause). It is said that the Aberdeen railway station is a place for exportation within the meaning of these words. I am very clear that it is not. I think that according to the general rule of construction the words mean wharf, quay, or other places *ejusdem generis*. A railway station is not a place for exportation of the same kind as a wharf or quay. That this is the proper reading of these words is seen from the rest of the section which requires proof to the Commissioners of Customs that the salmon have not been killed during close time. Is it to be expected that this proof is to be given at an inland railway station? I think this provision clearly shews that the statute is intended to apply to shipping ports. I have no hesitation in concurring in the judgment proposed by your Lordship.

**LORD TRAYNER** concurred.

THE COURT pronounced this interlocutor:—"Having considered this case, and heard counsel for the parties, answer the second question in the negative: Sustain the appeal: Reverse the determination of the inferior Judge, and decern."

**MENZIES, COVENTRY, & BLACK, W.S.**—**A. R. PRINGLE, W.S.**—Agents.

**JANE WRIGHT OR M'KENZIE, MARGARET M'KENZIE, AND HENRY M'KENZIE,** No. 13.  
Complainers.—*J. C. Thomson—W. Campbell—Macdonald.*

**DONALD M'PHEE** (Procurator-Fiscal of the Police Court at Glasgow), Jan. 28, 1889.  
AND ANOTHER, Respondents.—*D.-F. Mackintosh—Ure.* M'Kenzies v.  
M'Phee.

*Jurisdiction—High Court—Circuit Court—Suspension—Competency—Fundamental nullity—Act 29 and 30 Vict. c. cclxxiii. (Glasgow Police Act, 1866), secs. 131 and 132.*—A child, who was accompanied by her mother, was found in a clothes market in possession of certain missing articles. The mother and child were both taken to the police-office. No charge was made against them, but they were requested to appear at the police-office next morning, and were allowed to go home. Two police-officers called at the woman's house that evening, and again told her to be with her daughter at the police-office next morning. On obeying the order next morning she was placed at the bar, and for the first time charged, under the Glasgow Police Act, 1866, with the crime of theft of the missing property, and was asked to plead. No information was given to her by the magistrate of her right to an adjournment of the diet in order to prepare for her defence, and no intimation was given to her husband that she was to be charged with theft. She pleaded not guilty, and after evidence led, was convicted and sentenced to imprisonment. A bill of suspension having been presented, the procurator-fiscal objected to its competency on the ground that the jurisdiction of the High Court was excluded by sections 131 and 132 of the Glasgow Police Act, 1866.\*

\* The Glasgow Police Act, 1866 (29 and 30 Vict. c. cclxxiii.), enacts, by section 131, " . . . No proceeding or trial before the magistrate, and no order or

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*Held (diss. Lord Adam)* that the proceedings on which the conviction followed, were contrary to the recognised forms of criminal procedure, and were *funditus* null, and that the High Court had accordingly jurisdiction to entertain the suspension, and conviction *quashed*.

*Jurisdiction—High Court—Circuit Court—Suspension—Competency—Order pronounced under Industrial Schools Act, 1866 (29 and 30 Vict. c. 118), sec. 15—Glasgow Police Act, 1866 (29 and 30 Vict. c. cclxxiii.), secs. 131 and 132.*—A girl, ten years of age, was taken with her mother to a police court and charged with theft under the Glasgow Police Act, 1866. The magistrate sent the child to an industrial school for five years, "in pursuance of the Industrial Schools Act, 1866."\* He pronounced this order without intimation to and in the absence of the child's father, and in the face of her mother's remonstrances.

The Court *repelled* an objection to the competency of a bill of suspension founded on the restrictive clauses (sections 131 and 132) of the Glasgow Police Act, 1866, holding that though the proceedings originated under that Act, the order was pronounced under the Industrial Schools Act, 1866, which contained no exclusion of review by the High Court, and *quashed* the order as, in the circumstances, improper.

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord Adam.  
Lord Trayner.  
Justiciary  
Clerk.

ON 21st November 1888, Jane Wright or M'Kenzie, wife of Henry M'Kenzie, a brassfinisher in Glasgow, and Margaret M'Kenzie, his daughter, were charged before John Gemmell, Esquire, police-magistrate, at the instance of the Procurator-fiscal of the Police Court, under the Glasgow Police Act, 1866, with having stolen from a stand in the City Clothes Market, Greendyke Street, Glasgow, certain articles enumerated in the complaint.

Mrs M'Kenzie was convicted, and sentenced to thirty days' imprisonment, the conviction bearing that after the charge had been read over to her she pleaded not guilty, and that after evidence led she was convicted.

Margaret M'Kenzie was sent to the Lochburn Industrial School for five years, the order bearing to be executed "in pursuance of the Industrial Schools Act, 1866."

On 24th November 1888, Mrs M'Kenzie and her husband and daughter brought this bill of suspension in the High Court of Justiciary against the Procurator-fiscal "and J. Kilpatrick, who acted as fiscal on the occasion libelled." They made, *inter alia*, the following averments:—On the 20th November Mrs M'Kenzie, accompanied by Margaret, who was about ten years old, and two other younger children, went to

sentence of the magistrate thereon or the extract thereof, shall be . . . subject to suspension . . . or to any other form of review or stay of execution unless in manner and on some one or more of the grounds hereinafter mentioned." Section 132 enacts—"Any person who feels aggrieved by any order or sentence of the magistrate may, within fourteen days after its date, appeal to the Circuit Court of Justiciary at the next Circuit Court to be held at Glasgow, in the manner and under the rules, limitations, and conditions contained in an Act passed in the twentieth year of His Majesty King George II., chapter 43, 'for taking away and abolishing heritable securities in Scotland,' on the ground of corruption, malice, or oppression on the part of the magistrate, wilful deviations in point of form from the statutory enactments, incompetency or defect of jurisdiction, but on no other ground."

\* The Act 29 and 30 Vict. c. 118 (The Industrial Schools Act, 1866), sec. 15, enacts—"Where a child, apparently under the age of twelve years, is charged before two justices or a magistrate with an offence punishable by imprisonment or a less punishment, but has not been in England convicted of felony, or in Scotland of theft, and the child ought in the opinion of the justices or magistrate (regard being had to his age and to the circumstances of the case) to be dealt with under this Act, the justices or magistrate may order him to be sent to a certified industrial school."

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buy a mat in the Clothes Market at Glasgow. While there, Margaret picked up four articles of clothing, and while she was leaving, she was stopped by a policeman, but explained to him that she had found the articles lying on the ground, and had picked them up thinking they were useless. Mrs M'Kenzie also explained that she had not seen her daughter with the articles in her possession. The policeman took mother and child to the police-office, where they repeated the same statements. "They were then told that they might go home, but that they were to return to the police-office at nine on the following morning. No charge was made against either of the said complainers, nor were they told that any charge was to be preferred against them on the following day. Nor were they asked to give bail or leave a deposit by way of security for their reappearance, which would have been the appropriate course under section 100 of the Glasgow Police Act (29 and 30 Vict. chap. 273) for the officer on duty to have taken in the case of persons against whom a charge had been or was to be made. Shortly after Mrs M'Kenzie and her children reached home two police-officers called at the house and looked round. On leaving they told Mrs M'Kenzie to be sure and be at the police-office next morning with the girl Margaret. They did not, however, make any charge against the complainers or either of them, nor did they intimate that any charge was to be made on the following day. Nor did they give the complainers any written citation to appear as provided by section 88 of the said Police Act with reference to persons accused of having committed police offences. Mrs M'Kenzie asked whether the officers would not like to see her husband, who would be back shortly from his work; and on their answering in the negative, she asked whether he should come along with them to the police-office next morning. They answered that there was no occasion for his doing so. (5) On her husband's return Mrs M'Kenzie told him what had passed at the market and at the police-office, and also of the visit of the officers and what they had said. . . . (7) Mrs M'Kenzie, with her daughter Margaret, went to the police-office at 9 A.M. on said 21st November as requested, and were put into a large room, where they were kept waiting for some time. They were then conducted to the Police Court. Shortly afterwards, when they were sitting in Court, an officer asked Mrs M'Kenzie for her maiden name, which she gave. Shortly thereafter she and her daughter were called to the bar of the Court. The respondent J. Kilpatrick, acting as procurator-fiscal, then read out from a paper in his hand that the female complainer and her daughter were charged with theft. This was the first intimation given to Mrs M'Kenzie or her daughter that any charge was to be made against either of them. They were then at once asked by the magistrate whether they were guilty, to which they answered that they were not. The complainers believe and aver that the charge, particularly that against the mother, was an afterthought on the part of the respondents. It appears from the police charge-book, and from the act-book of Court, that the mother's name was interlined as an addition to a charge originally framed against the daughter only. (8) No written complaint was then or at any other time delivered to the accused. Nor were they informed by the magistrate that they were entitled to an adjournment in order to prepare for their defence, and to call witnesses in exculpation. Nor did he inquire whether the husband and father of the accused was present, or had been informed that a charge was preferred against the parties. The respondents at once proceeded to lead evidence." Article 9 set forth the evidence which was led. "(10) The further proceedings in the case are accurately reported in the following

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extract from the *Glasgow Evening Citizen* of November 21st 1888:—  
 'Stipendiary Gemmel said there could be no doubt about the child's guilt, but he could not divest from his mind the idea that the child was taken there by her mother for the purpose of stealing. The mother,—  
 "Oh no, sir, I never required to do such a thing. I went to buy a mat, and looked at some, as these women have said." The Stipendiary,—  
 "It was impossible that the child could be going from stand to stand with these articles in her possession without you seeing them." The mother,—  
 "I had three children with me—this one in my arms, and the other at my feet. Margaret was walking behind me, and I could not see what she was doing." The Stipendiary,—  
 "I am not going to convict the child, I am going to send her to an industrial school." The mother,—  
 "Oh no, sir, her father is a most respectable man, and he will go wrong in his mind if you do." The Stipendiary,—  
 "I will send her to an industrial school for five years; and you, I find you guilty of art and part in the theft, and sentence you to thirty days' imprisonment."'

In article 12, the complainers set forth that they were innocent of the crime charged.

"(13) The whole of the proceedings above detailed were most irregular, illegal, and oppressive, and most prejudicial to the complainers. They were also conducted in direct violation of the provisions of the Glasgow Police Act and of the other statutes regulating summary trials, and in particular the Summary Jurisdiction Acts. (14) It was the duty of the respondents, if they intended to make a charge of theft against Mrs M'Kenzie and her daughter, to bring the accused into Court by a warrant of citation with reasonable *inducia* in ordinary form, and to give them a copy of the complaint, so as to certiorate them of the charge to be brought against them, and enable them to prepare for their defence. No warrant of citation was ever applied for by the respondents, nor did they ever give the complainers a copy of the complaint. It was grossly irregular and oppressive on the part of the respondents to take advantage of the voluntary presence in the police-office of Mrs M'Kenzie and her daughter in order to bring a charge against them of which they had had no notice. The respondents were also well aware of the fact that the parties accused were the wife and pupil child of a working-man residing in Glasgow; and they also knew that no steps had been taken to acquaint the husband and father of the proceedings in which he was vitally interested. (15) Upon the respondents stating the charge against the complainers it was the duty of the magistrate to inquire whether the accused had been served with a copy of the charge and duly cited to appear; and if it appeared that this had not been done it was his duty to explain to the accused that they were entitled to an adjournment for the purpose of preparing their defence and calling witnesses in exculpation. The magistrate culpably failed to perform this duty. The complainer Mrs M'Kenzie had never in her life been in a Police Court, even as a witness, and being wholly ignorant of her rights, and thoroughly frightened and taken by surprise, she stated no objection to the proceedings. She was entirely without assistance, professional or otherwise. . . . In regard to Margaret, even if she had been guilty of the offence charged, the order for her detention in an industrial school for five years would have been most unnecessary and prejudicial, and most cruel and oppressive to all the complainers. It was pronounced in absence of the girl's father, and without any intimation to him that such an order was to be pronounced. The complainer Henry M'Kenzie is quite able to take charge of the child at home. He would have explained this to the magistrate, and have strenuously resisted the order if he had had an opportunity of

doing so. In these circumstances the complainers respectfully crave interim liberation for both the said complainers." No. 13.

The complainers pleaded;—1. The sentence complained of should be suspended, and liberation should be granted, with expenses, as craved, in respect,—(1) The trial of the complainers was proceeded with with undue haste, without fair notice of the charge, and in the absence of the husband and father of the accused. *Separatim*, The magistrate culpably failed to inform the accused that they were entitled to an adjournment. (2) There was no legal evidence of the guilt of the complainers, or at least the evidence was altogether insufficient to warrant their conviction. (3) It was illegal and oppressive to sentence the girl to a prolonged term of detention in an industrial school without first communicating with her father. (4) The whole proceedings were irregular, illegal, and oppressive, and the said sentences were excessive, and contrary to natural justice. 2. In the circumstances, the complainers Mrs M'Kenzie and Margaret M'Kenzie are entitled to interim liberation as craved.

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Interim liberation was granted.

The respondents lodged, *inter alia*, the following answers:—" (4) Admitted that Mrs M'Kenzie and her daughter were taken to the Central Police Office, Detective Department; that after the charge was taken they were permitted to return home; that they were not asked to give bail or leave a deposit; that two officers called at Mrs M'Kenzie's house in the afternoon, and that Mrs M'Kenzie was told to appear with her daughter at the police-office the following morning. *Quoad ultra* denied. Explained that the charge was entered in the Police Book in the usual way. . . . (5) Not known, and not admitted. (7) The procedure that took place in the Police Court is stated with substantial accuracy. *Quoad ultra* denied. . . . (8) Admitted that no written complaint was delivered to the accused. *Quoad ultra* denied. Explained that the magistrate asked Mrs M'Kenzie whether her husband was present in Court, and she replied in the negative; further, he asked her whether she desired to call any witnesses in exculpation, and she again replied in the negative. No adjournment was asked by either of the accused."

They in answer 17 further admitted that the order for the detention of the girl Margaret was pronounced in absence of her father, and without any intimation to him that such order was to be pronounced.

The respondents pleaded;—1. In respect of sections 131 and 132 of the Glasgow Police Act, 1866, the present suspension is incompetent, and ought to be dismissed. 2. The complainers' statements are irrelevant, and insufficient to support the prayer of the bill. 3. The whole proceedings having been regular and legal, the suspension ought to be refused. 4. The complainers having been justly convicted on legal evidence of the crime charged against them, are not entitled to suspension.

The respondents objected to the competency of the suspension on the ground that review by the High Court of Justiciary was excluded by sections 131 and 132 of the Glasgow Police Act, 1866.

Argued for the respondents;—These sections undoubtedly gave the complainers a remedy by appeal to the next Circuit Court sitting at Glasgow upon certain grounds. Had they then a second remedy by bill of suspension to the High Court of Justiciary? That depended upon whether the case sought to be brought under review disclosed that in the proceedings in the inferior Court there was a fundamental nullity, or whether the alleged miscarriage of justice amounted merely to an aggravated case of oppression. In the former class of cases,<sup>1</sup> the jurisdiction of

<sup>1</sup> Collins v. Lang, Nov. 3, 1887, 15 R. (Just. Cases) 7, 1 White, 482; Marr v. M'Arthur, May 28, 1878, 5 R. (Just. Cases) 38, 4 Couper, 53; Kidger v. M'Phee,

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the High Court had been sustained, while in the latter the statute had provided a remedy by appeal to the Circuit Court, which excluded the jurisdiction of the High Court.<sup>1</sup> In the present case, there was a good charge with a good instance brought regularly before a competent Court. There was no fundamental nullity. The alleged grounds of suspension disclosed a case of oppression, which was one of the grounds on which the Circuit Court might review the conviction. The case of *Graham v. Linton*<sup>2</sup> was no authority for the Court dispensing with a finality clause. There was no objection to competency in it, and indeed there could have been none, for under the Act then in force there was no such exclusion of review for oppressive sentences. The argument applied equally to the cases of both complainers, for the sections of the Act applied to orders under the Industrial Schools Act, 1866, as well as to convictions, and what was complained of in the child's case was such an order. Further, by the 43d section of that Act the Secretary of State was given power to liberate children from industrial schools. No doubt in *Wilson v. Stirling*,<sup>3</sup> the High Court had interfered to quash an order under the Industrial Schools Act, but in that case there was no charge of crime. Here there was a charge preferred, and tried under the Glasgow Police Act, and it was upon his investigation into the circumstances of that charge that the magistrate proceeded.

Argued for the complainers;—There might be a large jurisdiction in the Circuit Court at Glasgow, but there was a point at which the jurisdiction of the High Court came into existence, and was to be exercised. Wherever there was, as here, a fundamental disregard of the rules of judicial procedure, the interference of the High Court was recognised.<sup>4</sup> The order complained of by the child was not pronounced under the Glasgow Police Act but under the Industrial Schools Act, and was subject to suspension by the High Court in respect there was no exclusion of such review in the latter Act.<sup>5</sup>

At advising,—

LORD ADAM.—This is a bill of suspension and liberation brought at the instance of Jane Wright or M'Kenzie and Margaret M'Kenzie complaining of a conviction, dated 21st November 1888, obtained in the Police Court in Glasgow, by which the first suspender, Jane M'Kenzie, was convicted of the crime of theft, and committed to prison for thirty days, and of an order dated on the same day by which the second complainer, Margaret M'Kenzie, was ordained to be sent to the Industrial School at Maryhill, and there detained for a period of five years. It is pleaded to us that the suspension of this conviction and this order is

Nov. 22, 1888, 26 S. L. R., 65; *Bell v. M'Phee*, July 18, 1883, 10 R. (Just. Cases) 78, 5 Couper, 312; *Gray v. M'Gill*, Feb. 27, 1858, 3 Irvine, 29.

<sup>1</sup> *Mackenzie v. Lang*, Nov. 9, 1874, 2 R. (Just. Cases) 1, 3 Couper, 29; *O'Brien v. M'Phee*, Oct. 30, 1880, 8 R. (Just. Cases) 8, 4 Couper, 375; *Duffy v. Lang*, March 5, 1869, 1 Couper, 238; *Walker v. Lang*, Nov. 25, 1867, 5 Irvine, 506, 40 Scot. Jur. 89; *De Belmont v. Lang*, June 28, 1871, 2 Couper, 95, 43 Scot. Jur. 522.

<sup>2</sup> *Graham v. Linton*, Nov. 24, 1856, 2 Irvine, 558.

<sup>3</sup> *Wilson v. Stirling*, March 9, 1874, 2 Couper, 518.

<sup>4</sup> *Gray v. Macgill*, *supra*, per Lord Ivory, p. 41; *Wright v. Dewar*, March 9, 1874, 2 Couper, 504, per Lord Cowan, 513; *Graham v. Linton*, *supra*, per Lord Deas, p. 564; *Devany v. Anderson*, Dec. 16, 1854, 1 Irvine, 588; *Gallacher v. Auld*, May 28, 1886, 13 R. (Just. Cases) 56, 1 White, 130; *Ritchie v. Pilmer*, Dec. 20, 1848, John Shaw's Just. Rep. 142; *Robertson v. Mackay*, July 21, 1846, Arkley's Just. Rep. 114; *MacKean v. Wilson*, Dec. 9, 1848, John Shaw's Just. Rep. 132; *Moncreiff on Review in Criminal Cases*, 248.

incompetent on the ground that the proceedings complained of were proceedings under the Glasgow Police Act of 1866, and that an appeal to this Court of any kind is declared to be incompetent by the provisions of that Act. In my view it is quite necessary to consider separately in this question of competency the case of the mother and the case of the daughter.

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Taking then the case of the mother first, the complaint bears to be brought under the Glasgow Police Act of 1866. It sets forth that Jane M'Kenzie, now in custody, stole from the City Clothes Market certain articles therein enumerated, and so on. That is followed by the conviction, which bears that after the charge had been read over to her she pleaded not guilty, and that after evidence had been led she was convicted and sentenced to thirty days' imprisonment, and it is that sentence which is brought under our review. The sections of the Act founded on which are said to preclude appeal are the 131st and 132d sections of the Glasgow Police Act. Now, it is not denied that we have in this case a good instance; it is not denied that the Judge had jurisdiction to try the case; neither is it denied that the complaint was a relevant complaint, and that the sentence was a competent sentence. *Prima facie*, therefore, it appears to me that under the provisions of these two sections of the Act, appeal to this Court, not being a Circuit Court, is incompetent. But it is said on the part of the complainer that her averments disclose a case which shews a fundamental nullity in the proceedings and the sentence; and no doubt if that be so there is plenty of authority for saying that the complainer is entitled to come here for redress. But the respondents say that the averments in the bill of suspension amount only to what is oppression in a legal sense of the term, and that as suspension on the ground of oppression on the part of the magistrate is one of the grounds of appeal to the Circuit Court at Glasgow, there is therefore a special Court appointed for the consideration of appeals upon that ground, and that there being a special remedy by appeal to the Circuit Court of Justiciary that excludes the jurisdiction of this Court. That I understand to be the argument upon the other side. Now, if the respondents' view of the averments in this case is well founded I think there is plenty authority for saying that the appeal here is incompetent. I think the cases of *Duffy v. Lang*, 1 Coup. 238, and *Mackenzie v. Lang*, 3 Coup. 29, are quite sufficient to sustain that contention. That therefore requires us to look at the averments on which this bill of suspension is founded. If we are to sustain the competency of the suspension it would be necessary, it appears to me, to proceed upon facts either admitted or proved. We cannot sustain the competency of the suspension upon mere averment. But as the view which I take of the case is that the appeal is not competent, in considering the case I must assume the truth of the averments as made in this bill of suspension; and so considering them, as I have said, in my view the suspension is incompetent. Looking to these averments, and taking what may be called the principal view of this case, it seems to be this:—The child Margaret seems to be about nine or ten years of age. It is said that on the 20th November, the day before the trial and conviction, Mrs M'Kenzie went with this child and two other younger children, one five years old and the other younger, to buy a mat in the Clothes Market at Glasgow; that while there the child Margaret picked up some four articles which are said to have been stolen, and on leaving the market she was stopped by a policeman; that the mother then came up, and the girl stated that she had found them lying on the ground and had picked them up; that they were taken to the police-office,



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and the same explanation given, and the facts recorded in the police books as usual ; but nothing more was done then except that the mother was told to bring back her daughter next morning at nine o'clock. No charge of theft was made against either mother or daughter. It is said that during the afternoon of the same day two policemen came to the house, and again told them to be at the police-office next morning at nine o'clock ; and upon being asked if it would be necessary that Mrs M'Kenzie's husband should go, the answer was No. These seem to be the facts of the case—at all events the facts of the case as averred with reference to what took place prior to the proceedings on the trial. The material facts that are set forth as to what took place on the 21st November are in articles 7 and 8, and I may read them. Article 7 is,—“Mrs M'Kenzie, with her daughter Margaret, went to the police-office at 9 A.M. on said 21st November as requested, and were put into a large room, where they were kept waiting for some time. They were then conducted to the Police Court. Shortly afterwards, when they were sitting in Court, an officer asked Mrs M'Kenzie for her maiden name, which she gave. Shortly thereafter she and her daughter were called to the bar of the Court. The respondent J. Kilpatrick then read out from a paper in his hand that the female complainer and her daughter were charged with theft. This was the first intimation given to Mrs M'Kenzie or her daughter that any charge was to be made against either of them. They were then at once asked by the magistrate whether they were guilty, to which they answered that they were not. The complainers believe and aver that the charge, particularly that against the mother, was an afterthought on the part of the respondents. It appears from the police charge-book, and from the act-book of Court that the mother's name was interlined as an addition to a charge originally framed against the daughter only.” Then in article 8 it is said,—“No written complaint was then or at any other time delivered to the accused. Nor were they informed by the magistrate that they were entitled to an adjournment in order to prepare for their defence, and to call witnesses in exculpation. Nor did he inquire whether the husband and father of the accused was present, or had been informed that a charge was preferred against the parties. The respondents at once proceeded to lead evidence.” Then there is set forth in subsequent articles what took place at the trial, and the evidence led, and so on ; but I do not think that is material, because whether it was sufficient to support the charge or not it is the merits of the case of which the Court had to judge. In article 14 there are set forth the allegations upon which this suspension is rested. It is said there,—“It was the duty of the respondents, if they intended to make a charge of theft against Mrs M'Kenzie and her daughter, to bring the accused into Court by a warrant of citation with reasonable *induciae* in ordinary form, and to give them a copy of the complaint, so as to certiorate them of the charge to be brought against them and enable them to prepare for their defence. No warrant of citation was ever applied for by the respondents, nor did they ever give the complainers a copy of the complaint. It was grossly irregular and oppressive on the part of the respondents to take advantage of the voluntary presence in the Police Court of Mrs M'Kenzie and her daughter in order to bring a charge against them of which they had had no notice. The respondents were also well aware of the fact that the parties accused were the wife and pupil child of a working-man residing in Glasgow ; and they also knew that no steps had been taken to acquaint the husband and father of the proceedings, in which he was vitally interested.” Then the 15th article is this—“Upon the respondents stating

the charge against the complainers, it was the duty of the magistrate to inquire whether the accused had been served with a copy of the charge and duly cited to appear; and if it appeared that this had not been done, it was his duty to explain to the accused that they were entitled to an adjournment for the purpose of preparing their defence and calling witnesses in exculpation. The magistrate culpably failed to perform this duty. The complainer Mrs M'Kenzie had never in her life been in a Police Court, even as a witness, and being wholly ignorant of her rights, and thoroughly frightened and taken by surprise, she stated no objection to the proceedings. She was entirely without assistance, professional or otherwise."

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The ground upon which suspension is sought in this case is the alleged neglect of duty of the magistrate and illegality of the proceedings set forth in these articles. Now, the first of these appears to be that the accused was brought into Court without a warrant of citation being served upon her and a copy of the complaint so as to certiorate her of the charge to be brought against her, and to enable her to prepare for her defence. It humbly appears to me that it is not necessary in proceedings in a Police Court that a warrant of citation or a complaint should be served upon the prisoner before trial. I mean by saying necessary, that I think it is a question of circumstances whether that should be done, but I think there is no illegality in proceeding to try a prisoner without having a citation and a copy of the complaint served upon him beforehand. I think that is settled, and is in conformity with the practice in many cases, and it was the subject of discussion in the case of *Graham v. Linton*, 2 Ir. 558, which was a case where a married woman, who was a licensed broker in Edinburgh, was apprehended on a Monday morning on a warrant granted on the Saturday previous. She was tried summarily, and was convicted and sentenced to forty days' imprisonment. The conviction was set aside as being in the circumstances oppressive. I quite agree with Lord Deas in that case that there are many cases in which it would be highly improper to proceed to trial without a citation and without a complaint being served. But then, in my humble opinion, it is a question of circumstances whether in a particular case that course should be followed or not. There is another case of *M'Kean v. Wilson*, John Shaw, p. 132, where it was held that it was not necessary that a complaint should be served before trial. Now, looking to these authorities, I think that it is competent and not illegal for a magistrate to proceed to try a case without citation and without service of the complaint, and that it is a question of circumstances whether that should be done in each particular case. It does not appear to me that where that course is not followed by the magistrate it infers a nullity of the proceedings. It may be, and I agree if the facts here are true, which we must assume, that in this case it was a grossly irregular and oppressive proceeding on the part of this magistrate to take advantage of this woman going to the police-office. But in my opinion that does not involve nullity. It merely involves oppression in the legal sense of the word as being unfair and unjust towards a prisoner to put her upon her trial in such circumstances. That is my view of the nature of the averments in article 14.

Then in article 15 it is said it was the duty of the magistrate to inquire into these matters, and if it appeared that this had not been done, to explain to the accused that they were entitled to an adjournment. That the magistrate should in many cases give that intimation to a helpless prisoner at the bar I have no doubt whatever, and that, if he fails to do it, in many cases it is unfair and oppressive

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towards the prisoner, and he is entitled to relief; but I can find nothing to shew it is the duty of a magistrate to do that. I think there is no duty in this sense that it is illegal for him not to do it, and if it does not amount to illegality—if in these proceedings the magistrate is acting within the powers given to him by the Act—I do not see how it can infer nullity of the proceedings however oppressive it may be. Upon these grounds I am of opinion that the averments in this case do not amount to any averment of nullity of the proceedings. Assuming the averments to be true, I think it was a case of oppression on the part of the Judge in a legal sense, and upon that ground the accused may be entitled to relief.

The first case to which we were referred upon the part of the suspenders was the case of *Gray v. Macgill*, 3 Irv. 29. That was a case under a previous Glasgow Police Statute, but having clauses as to review somewhat similar to those under consideration in this question. The proceedings in that case were of a somewhat similar nature to what took place here, and it would be probably impossible to get a harder case than that of the prisoner who was tried in that case. The suspender, Thomas Gray, a child of eight years of age, was in bed in his father's house in Glasgow. Two police-officers came to the house, and without any warrant took him in custody to the police-office. He was there summarily placed at the bar of the Police Court, and without any previous explanation to himself or to anyone interested in him, and without any complaint having been served upon him, he was charged with the crime of theft. He was too young to understand the complaint or procedure of the Court, and had not the assistance of his father, although he was accompanied to the office by his mother and sister. The charge was that he along with two other boys had been guilty of the theft of a small sum of money. These proceedings were certainly about as bad, to use the word, as the proceedings said to have been taken here—taking a child out of his father's house in the morning, placing him immediately at the bar, trying him without a complaint being served upon him, and convicting him. It is material to observe how the Court dealt with that case. The opinion is delivered by Lord Ivory. He commented severely upon the proceedings, but in the judgment of the Court he says—"As to the general character of these proceedings. The complainer is a child. His father was known—a householder in Glasgow. The boy is suddenly dragged into Court, tried and punished with reckless haste. I would also abstain, however, from resting my judgment on this ground. But on the whole, and especially (1) on the objection as to the 'evidence and partial admission' on which the conviction bears to proceed—(2) on the defects in the subscription of the sentence—(3) on what I think to be the want of basis for summary procedure—I hold that there are good grounds for vacating and quashing the sentence without touching upon any ground connected with what are properly the merits of the case." That sentence was quashed upon grounds which clearly inferred nullity. Lord Ivory held, and the Court followed him, that the conviction proceeded upon what was in fact no evidence at all. That was the first ground. The second ground was that the sentence was no sentence because it was signed out of Court a considerable time after the sentence had been carried into execution. But although what Lord Ivory called the general character of the proceedings very much resembled those in this case, he purposely abstained from putting his judgment upon that.

The next case to which we have been referred is the case *Marr v. M'Arthur*, 5 R. (Just. Cases) 38. That was a case in which a person was convicted of playing the air "Boyne Water." The Court, of which I was a member, came to the

conclusion that the complaint set forth no crime at all. It necessarily followed that the whole proceedings were null. Another case was very similar, and went upon the same grounds. That was the case of *Kidger*, 26 S. L. R. 65, where a man was convicted of posting a bill on his own house. The next case was *Collins v. Lang*, 1 White, 482. That was a case of a different description. The accused was convicted upon a complaint upon which he had been charged at a previous diet when the diet was deserted *pro loco et tempore*. The Court held that the complaint was dead owing to the desertion of the diet, and accordingly that the accused had been convicted upon no complaint. That also was a case of fundamental nullity, and not a case of oppression. The last case to which we were referred was *Bell v. M'Phee*, 5 Coup. 312, and that again was a case of a different description. That was a case where the prisoner was charged on an alternative libel, the charge being followed by a general conviction so that nobody could tell of what offence the prisoner had been guilty. On the face of it the sentence in that case was clearly null.

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I think these are all the cases to which we were referred, and I think they bring out the distinction strongly between those objections which go to fundamental nullity and those which go to oppression on the part of the Judge. That being my opinion in this case, I am of opinion that this suspension is incompetent, because the Police Act has provided a special Court, viz., the Circuit Court at Glasgow, to which cases of this description shall be committed. While that is my opinion, I should in this case be quite prepared to sustain the suspension to the effect of continuing the interim liberation. I think that rests on a different ground. It does not touch the merits of the sentence. If we were to continue the interim liberation until the Circuit it would leave it open to the Judges to whom the statute has committed the review of such cases as this to consider the case on the merits. I think this would be a competent and a right proceeding. That is all I have to say about the mother's case.

As I have said, the girl's case is quite different. No doubt it originated in a proceeding under the Glasgow Police Act, but the order complained of is an order pronounced under the Industrial Schools Act. I find no exclusion of appeal to this Court under that Act, and therefore I think it is quite competent to bring up what is alleged to be an oppressive order on the part of the magistrate to have it considered in this Court. I do not know whether the respondents' counsel would wish to say anything upon the merits of this case, but he can do so after we have disposed of the question of competency. Upon these grounds I am of opinion that this bill of suspension as regards the mother is incompetent, and as regards the child that it is competent.

**LORD TRAYNER.**—The objection stated by the respondents to the competency of this suspension is based upon the 131st and 132d sections of the Glasgow Police Act, 1866, which excludes review of sentences or orders pronounced by a Glasgow Police Magistrate, except by way of appeal to the Circuit Court of Justiciary at Glasgow, and upon certain grounds.

I think these clauses have no application to any order, sentence, or proceeding except such as may be pronounced or taken under the Glasgow Police Act. Accordingly, they have no application, in my opinion, to the order pronounced for the detention of the complainer Margaret M'Kenzie in an industrial school, which did not proceed under or in virtue of any power conferred by the Police Act (for that Act confers no power on the magistrate to issue such an order),

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but, as the order itself bears, "in pursuance of the Industrial Schools Act." The jurisdiction of this Court to review orders pronounced under the Industrial Schools Act is nowhere excluded, and therefore the objection stated to the competency of this part of the present suspension falls to be repelled.

The objection to competency, in so far as it relates to Jane Wright or M'Kenzie, stands in a different position. *Ex facie* of the proceedings she was charged, convicted, and sentenced under and in terms of the Police Act, and the review clauses referred to will apply unless it appear that the proceedings complained of are of a character not covered or provided for by these clauses.

Now, the case presented by the complainer is, that she was never formally cited to the Police Court to answer any charge; that she was requested to attend at the police-office with her daughter without being told for what purpose; that being voluntarily present she was placed in the dock, and then for the first time charged with theft, without any previous intimation that such a charge, or any charge, was to be preferred against her; that she was not informed of her right to ask and obtain a continuation of the diet in order to obtain assistance in her defence, or to procure exculpatory evidence; and that these proceedings were adopted in the case of a person whose honesty had never before been impugned, and who was the wife of a respectable law-abiding citizen, whose address was well known to the police. The respondents maintain that, assuming the complainer's averments to be true, they amount to oppression on the part of the magistrate, but that oppression only gives right to an appeal to the Circuit Court. I think the respondent may very safely admit that, assuming the complainer's averments, the magistrate was guilty of oppression—I should say gross oppression. But it does not follow that the jurisdiction of this Court is excluded in every case where the conduct of the magistrate can be described as oppressive. What is undoubtedly oppressive may be something more. In every case where a magistrate pronounces a sentence on a plainly irrelevant charge (as in *Collins'* case), or on an erroneous view of the law (as in *Kidger's* case), he acts in a sense oppressively, because illegally. In such cases, however, the jurisdiction of this Court is not excluded by the review clauses of the Police Act. These clauses are open to construction, and I construe the words "oppression on the part of the magistrate" as meaning only any failure in duty on his part, or any straining or abusing of his powers which in the particular circumstances bears with undue or unreasonable weight against the accused. But what the complainer now complains of is something very different from this. She not merely complains of the magistrate's sentence, but of what took place before the case reached the magistrate. Her case is not a case of oppression merely, but is that the whole proceedings which culminated in the magistrate's sentence were illegal and *funditus* null.

Taking the case as averred, I am of opinion that the objection to the competency should be repelled. I think the proceedings complained of as set forth by the complainer were not merely oppressive, but lawless—that is, they were not in accordance with, but were opposed to, the principles and practice of criminal law known and recognised in the law of Scotland.

LORD JUSTICE-CLERK.—I agree with both your Lordships that there is no ground for the contention that the jurisdiction of this Court is limited to its sittings in Glasgow as regards the case of the complainer Margaret M'Kenzie. She was not dealt with under the Glasgow Police Act at all. On the contrary, the magistrate declined to deal with her case under the Glasgow Police Act,

and proceeded under the Industrial Schools Act. There is no provision in that Act restricting the powers of this Court to give redress against irregular or oppressive proceedings, and there can therefore be no objection to the competency of suspension in that case. No. 13.  
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The case of Jane M'Kenzie is different. She was tried and convicted under the Glasgow Police Act undoubtedly. The difference of opinion which your Lordships' judgments on her case disclose places upon me a considerable responsibility. I recognise to the full the restricting quality of the clause in the Glasgow Police Act by which review, otherwise than by appeal to this Court sitting in Glasgow, is excluded. I hold it to be quite clear that if the authorities of police in Glasgow do, in the course of proceedings formally permissible by law, act oppressively, the remedy, and the only remedy—except through the State—is an appeal to this Court at its next sitting in Glasgow, and that the Court sitting here is bound to regard the restriction of the *locus* of review contained in the Police Act, however anomalous such restriction may be. In my view the question whether this Court, sitting here, can entertain this suspension, must be considered upon the footing that it is only when proceedings are not merely oppressively conducted within the law, but are without the law, that the Court sitting in Edinburgh can take up and consider the complaint of the person alleged to have been wronged. A mere oppressive use of legal powers will not make a suspension competent before this Court sitting here. All that I accept as having been conclusively settled by the cases which were quoted by the respondents.

The real question in this case is, whether the proceedings do not disclose something more than mere oppression in the use of permissible procedure. In considering that question it is important to keep clearly in view what the facts are which are averred and not disputed. They are these:—The complainer's child, when with the complainer in the City Clothes Market in Glasgow, was found to be carrying some articles which were missed from stalls in the market. A policeman having been called, mother and child accompany him to the police-office. No charge is made or notified to them, but they are told they may go home. No bail is asked, but they are requested to be at the police-office on the following morning. That evening two officers call at their house. They do not state any charge, nor inform the complainer Mrs M'Kenzie that any charge is to be made against her, or give any indication that it is otherwise than as the mother of a child of tender years which might be charged with a crime that she is invited to come. She asks them whether they will see her husband, or whether he should accompany her and her child to the police-office, but is told that this is unnecessary. Next morning mother and child go to the police-office. The mother receives no communication of any kind as to what is going to happen till they are called into Court. Then for the first time a charge of theft is read out against her, and the case then proceeds in ordinary course, there being nothing informal or contrary to law in that procedure, after the case is entered upon by the magistrate.

These are the material facts, shortly stated. I have thought it necessary to state the facts which seem to be admitted as substantially correct, because it is very important that the assumed facts which form the basis for judgment on the competency of this suspension should be clearly and sharply defined. These, then, being the facts of the case as regards what was done, the question is, Is the High Court of Justiciary sitting in Edinburgh deprived by the Glasgow

No. 13. Police Act of its jurisdiction to deal with such a case promptly and at once under a suspension? It is said,—“There is a regular complaint, a regular trial, a regular conviction, and a regular sentence. It may be that though all the proceedings were regular in form there has been oppression under cover of the forms. But if so, jurisdiction to deal with the case is restricted to the High Court sitting on appeals at Glasgow.” I cannot assent to that view. If suspension is competent, as it admittedly is, where procedure goes outside statutory powers, I hold that suspension is competent where the proceedings of the police in prosecuting a law-abiding citizen on a serious charge are outside of the fundamental principles of the law of the land. I hold what is alleged to have been done in this case by the police, as public prosecutors, to amount to a travesty of legal procedure, “a mere farce,” to use the words of Lord Neaves in the case of *Mackenzie v. Lang*, under colour of administration of powers conferred by law. In *Marr’s* case the power of this Court was sustained notwithstanding the restricting clause, because, to use Lord Adam’s words, what was done was “outwith the statute.” Holding, as I do, that what was done in this case was “outwith all law,” that the police proceeded not merely oppressively but in an absolutely lawless manner, that they did what it could never be permissible to do unless some statute specially authorised it, and which it is impossible to believe that the Legislature of any constitutionally governed country would embody in a statute, I must sustain the competency of this suspension. I hold proceedings to be null in which I find that in their initiation there was an absolute disregard of the commonest principles of justice by springing suddenly, at the very moment of the trial, a charge of serious crime against a person who up to that time had not been given the slightest notice that she was to be under accusation as a criminal at all, but, on the contrary, was, as I think, directly led to understand that she was only brought there as a guardian of a child.

I hold that the police and the prosecutor of police thus acting, “the fundamental rules of all judicial procedure were transgressed,” to use the words of Lord Cowan in the case of *Wright*. I feel certain that had the experienced magistrate who tried the case known the circumstances in which Mrs M’Kenzie stood at the bar of the Court, he would not have allowed the prosecutor to proceed with the case then and there. He would, I feel sure, have held, to use Lord Ivory’s words in *Gray v. M’Gill*, that “in the straining after a more than ordinary measure of despatch or repression the principles of substantial justice ought never to be lost sight of.” In this case the blot in the proceedings arises not in the conduct of the magistrate, but of the officials of his Court who had charge of the proceedings. But that conduct is as much a part of the proceedings as what afterwards followed, and I think these words of Lord Ivory are in every respect applicable.

I know of no case the least like this one. I know of no case of a person being at once tried for a serious crime, who up to the moment of the commencement of the trial has never been informed that he is charged with a crime, or is accused of it even. The nearest case to it is that of *Ritchie v. Pilmer*, in which a man cited as a witness was informed that he would be charged with the crime, and was tried half an hour afterwards. The Court held such procedure to be so flagrantly unjust that “no sentence could be sustained which had followed thereon.” That is, in my judgment, to hold that there was a fundamental nullity in the proceedings as being contrary to every principle of just administration of the law. This case is much more flagrant. For Mrs M’Kenzie was

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not even allowed half an hour to think over the fact that she was charged with a serious crime, and to compose herself to conduct her own defence. She was allowed no time at all. At the same moment at which she knows for the first time that she is to be accused of serious crime her trial begins. No person even of the strongest nerve could be expected to be in a fit state to watch the case and conduct his own defence in such circumstances, still less a woman who came there as this mother did in charge of her child, and as a guardian only.

On these grounds I concur with Lord Trayner in holding that it is competent to sustain this suspension, the facts averred and not disputed disclosing a case, in my opinion, *ab initio vitiosum*, and contrary to every principle of law and justice.

The Court having called upon counsel for the respondents to speak to the merits of the suspension in the case of the child Margaret M'Kenzie, it was argued for the respondents;—There was no irregularity of procedure. The charge was properly entered in the police books against her when she was taken to the police-office on the 20th November, and both her parents were sufficiently certiorated that she was to be dealt with in reference to this offence on the morning of the 21st.

Counsel for the complainers was not called upon.

**LORD JUSTICE-CLERK.**—It is certainly new to me that it is the practice, as we are told, for magistrates in Glasgow when a child of a law-abiding citizen is brought before them for the first time on a charge of theft to send that child to an industrial school for five years upon the result of inquiries by detectives, not communicated in open Court or upon oath as information for their guidance, and that without intimation to the father, or opportunity given to him to make explanations with regard to reports about him. If that is the practice it is high time that the Court should interfere to stop it. The object of such an Act as the Industrial Schools Act is to provide for the case of children who are not expected to be dealt with in their own homes. It was intended to provide for exceptional cases, and it cannot be said that a case is exceptional into which full and proper inquiry has not been made.

**LORD ADAM.**—We can only, as it appears to me, deal with this case upon facts admitted by the respondents. The facts which I hold to be substantially admitted are these—that the policemen, when they called on the afternoon of the 20th, warned the mother that a charge of theft might be made, but did not say that it was unnecessary that the father should be there. I am ready to dispose of the case on that footing, and upon the footing that the father knew of what had taken place that day in the police-office, knew that the mother and daughter were to go to the Police Court next morning, and had reason to believe that a charge of theft would be brought against the child. But it appears to me that there was not a suggestion until the proceedings in the Police Court were about to close that this child should be taken from its father's house and sent to an industrial school. The first mention of an industrial school appears in the report of the proceedings quoted from the newspapers in article 10 of the bill of suspension. "The further proceedings in the case are accurately reported in the following extract from the *Glasgow Evening Citizen* of November 21st, 1888—'Stipendiary Gemmell said there could be no doubt about the child's guilt, but he could not divest from his mind the idea that the child was taken there by her mother for the purpose of stealing.' The mother—'Oh no,

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sir, I never required to do such a thing. I went to buy a mat, and looked at some, as these women have said.' The Stipendiary—'It was impossible that the child could be going from stand to stand with these articles in her possession without you seeing them.' The mother—'I had three children with me—this one in my arms, and the other at my feet. Margaret was walking behind me, and I could not see what she was doing.' The Stipendiary—'I am not going to convict the child, I am going to send her to an industrial school.' The mother—'Oh no, sir, her father is a most respectable man, and he will go wrong in his mind if you do.' The Stipendiary—'I will send her to an industrial school for five years, and you, I find you guilty of art and part of the theft, and sentence you to thirty days' imprisonment.'" So far as appears, this was the first hint by anyone concerned in the proceedings that the child was to be sent to an industrial school. The Magistrate pronounced the order in the absence of the proper guardian of the child, and in the face of the remonstrance of the mother. It humbly appears to me that this was a proceeding of a most oppressive kind, and if such proceedings are common in the Police Court of Glasgow the sooner they are put a stop to the better.

LORD TRAYNER.—I agree that this order cannot be sustained. The Industrial Schools Act is intended to provide for the case of children who have no guardians or whose guardians are neglecting them. But it is a new idea to me that children of law-abiding citizens, whatever their position in life, may be sent to an industrial school in this way. It is admitted that the order was pronounced in the absence of the girl's father, and without intimation to him that such an order was to be pronounced. We cannot sustain such an order.

THIS interlocutor was pronounced:—"Repel the objection stated to the competency of the bill: Pass the bill: Suspend the conviction and sentence and the order complained of *simpliciter*, and decern."

J. & J. GALLETLY, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

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HER MAJESTY'S ADVOCATE.—*Robertson, A.-D.—A. O. Mackenzie.*  
LOUIS LE BOURDAIS AND JOSEPH LE BOURDAIS.—*J. C. Thomson—M'Clure.*

*Indictment—Destroying a ship with intent to defraud insurers—Relevancy—Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), secs. 8 and 60.*—The master and mate of a vessel were charged on an indictment which set forth that, certain insurances having been effected on the vessel, and these insurances being still in force, they did bore one or more holes in the vessel, and did attempt to force out her bow ports in order that she might sink, and did spread oil over her in order that she might be set on fire, and "did thus attempt to sink and destroy the said barque with intent to defraud the insurers liable under said insurances."

Objection was taken to the relevancy on the ground that the indictment failed to set forth knowledge on the part of the accused that the vessel had been insured, without which fraudulent intent could not be inferred.

*Held (per Lord Justice-Clerk)* that the allegation of an attempt to destroy the vessel "with intent to defraud" the insurers implied knowledge of the insurances, and that the qualifying words "you well knowing that the ship had

been so insured" were to be implied by virtue of section 8 of the Criminal Procedure (Scotland) Act, 1887,\* and that the indictment was relevant.

*Opinion* that in the event of the prosecutor failing to prove fraudulent intent, it would be competent for the jury to convict the accused of an attempt to sink the ship maliciously, the word "maliciously" being in that event read in to qualify the acts charged, and a conviction of a part of what was charged in an indictment, if in itself an indictable crime, being competent by section 60 of the Criminal Procedure (Scotland) Act, 1887.†

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ON 27th December 1888 Louis le Bourdais and Joseph le Bourdais were charged before the High Court at Glasgow, on an indictment which bore, "and the charge against you is, that the insurances set out in the schedule appended hereto having been effected on the British barque 'Gylfe' of Quebec, freight thereof, and cargo for a voyage from Quebec to any port in the United Kingdom, so far as ship and freight were concerned, and to the Clyde as regards the cargo, which insurances were all in force on the dates after mentioned; and the said barque having left St John's, Newfoundland, on 16th August 1888, in course of said voyage from Quebec, to proceed to Port-Glasgow, being a port in the United Kingdom and on the Clyde, with a cargo of timber, you, Louis le Bourdais, being master in charge of said barque, and you, Joseph le Bourdais, being chief mate of said barque, did, on 18th, 19th, or 20th August 1888, on board the said barque on the high seas, while the said barque was on said voyage, bore one or more holes in said barque below water-mark, thereby causing her to leak, and did on several occasions on said dates, and on 21st August 1888, attempt to force out the bow ports of said barque, all in order that the said barque should sink, and you did on said last-mentioned date, in order that the said barque should be immediately thereafter set on fire, spread over the cabin floor, decks and other parts of said barque, paraffin or other inflammable oil, and you did thus attempt to sink and destroy the said barque with intent to defraud the insurers liable under said insurances respectively, or otherwise you did, times and place and in manner foresaid, by wilful breach of your duty, attempt to sink and destroy the said barque, contrary to the Act 17 and 18 Vict. cap. 104, sec. 239."

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Counsel for the panels took objection to the relevancy of the indictment.

Argued for the accused;—The charge was that the accused attempted to destroy the vessel with intent to defraud the insurers. That was a charge

\* The Act 50 and 51 Vict. c. 35, sec. 8, enacts—"It shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' or 'knowingly,' or 'culpably and recklessly,' or 'negligently,' or 'in breach of duty,' or to use such words as 'knowing the same to be forged,' or 'having good reason to know,' or 'well knowing the same to be stolen,' or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant.

† The Act 50 and 51 Vict. c. 35, sec. 60, enacts—"Where in an indictment two or more crimes or acts of crime are charged cumulatively, it shall be lawful to convict of any one or more of them, and any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such crime, and where any crime is charged as having been committed with a particular intent, or with particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation."

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of attempt to commit fraud. But the indictment failed to set forth any facts relevant to infer fraudulent intent. It failed to set forth that the insurances upon the vessel were known to the accused; and without such knowledge there could be no fraudulent intent. The only acts alleged against the accused were that they bored holes in the vessel below water-mark and attempted to force out the bow ports in order that she might sink, and spread oil upon the decks in order that she might be set on fire. There was nothing to infer fraud in all that. Nor would the indictment be in any way improved by words being supplied under section 8 of the Criminal Procedure (Scotland) Act, 1887. It would not be relevant to say that they did "falsely and fraudulently" bore holes. The word "maliciously" might be supplied, but that would not make a relevant charge of fraud. Such an act would be one of barratry, which is one of the perils insured against, and the owners would be entitled to recover in respect of it without the intervention of any fraud. The case of *Brown*<sup>1</sup> was distinguishable, because in that case the intention and interest on the part of the prisoner to benefit the owner and to do so by fraudulent representation was set forth. The indictment might be relevant as one of malicious mischief, and it was not disputed that by the operation of sec. 60 of the Criminal Procedure Act it might be used as an indictment to that effect, instead of being rejected because it did not relevantly set forth facts to infer the more serious crime charged, viz., the attempt to defraud. But the words "with intent to defraud" ought to be struck out of the indictment as not supported by any relevant averment of facts, and the case sent to trial upon the charge of attempting to destroy the ship and upon that charge only.

Counsel for the Crown were not called upon.

LORD JUSTICE-CLERK.—It does not seem to me that it is necessary to call for a reply here. On the other hand, it was quite right that the objection should be brought forward, as it is very desirable that parties should know how they stand under the new Procedure Act.

The aim of the clauses of the Criminal Procedure Act of last year which relate to libelling is to simplify indictment. The Legislature thought it wise to get rid of the complicated forms in use, and to limit the indictment to a statement of the facts alleged to have been done, in the view that the privilege of proceeding by indictment is given to the public prosecutor only, he acting for the public interest; and that in bringing a prisoner to the bar, the public prosecutor does so on his official responsibility, and undertakes to prove the acts alleged to have been done to have also been done contrary to the common law of the country, where the indictment is at common law, or contrary to the special statute libelled on where the offence charged is a statutory one. In the case of a statutory charge, it is also the duty of the public prosecutor to state specifically the statute and sections under which the prosecution is instituted.

In the present case the prisoners are charged alternatively at common law and under a particular statute, and an objection is stated as regards the common law charge, that the prosecutor should have set forth the facts in such a manner as to qualify the acts alleged to have been done as having been criminally done.

Now, section 8 of the Act of last year (50 and 51 Vict. cap. 35) seems to give very striking illustrations of the kind of allegations which are to be implied

<sup>1</sup> *Brown*, Nov. 8, 1886, 1 White, 243.

and therefore may be omitted. For example, in the case of uttering a forged document, it is of the essence of the crime that the person who utters it should do so "knowing the same to be forged." A person may utter a forged writing knowing nothing about the forgery, and that is no crime. Suppose a clerk to cash a forged cheque at the request of his employer, he cannot be held guilty of forgery unless it be proved that he was privy to the forgery by previous knowledge. The new statute authorises the public prosecutor in indictments for forgery to omit the words "knowing the same to be forged," and leaves these words to be implied. The public prosecutor is bound, however, to prove such knowledge on the part of the accused, and it is the duty of the Court, with the assistance of counsel, to see that no prisoner is convicted of uttering forged documents without proof of such knowledge.

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Now, the phrase in the clause applicable to forgery is given as a specimen of the kind of qualifying allegation which may be omitted. The clause does not give the words applicable to every case where it applies, but a sufficient number are given to shew how it is to be applied, and then the following words are added, "or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case," &c.

In this case it is not disputed that the words omitted would have been sufficient under the old law to make the charge relevant. These words are, "you well knowing that the ship had been so insured," and without that fact being proved it is clear that there could be no conviction of the first crime charged. But what the prosecutor alleges in this indictment is an attempt to sink and destroy the ship with intent to defraud the insurers, and it appears to me that these words sufficiently set forth the intent, and that the allegation of knowledge of insurances having been effected must be implied under the directions of section 8. It would be impossible for anyone to have an intent to defraud insurers without knowing that there were insurances. Here there is a distinct allegation of the intention to defraud insurers, and I hold that the words "you well knowing that the ship had been so insured" were properly omitted in accordance with that section.

I wish to add a word as regards what has been pleaded to the effect that there can be no conviction under the first charge unless knowledge of the insurance is proved. I think that under section 60 of the Criminal Procedure Act, even assuming that the prosecutor fails to prove insurances or knowledge of them, it will be still competent to convict the prisoners of an attempt to sink the ship maliciously should the attempt to sink be proved by evidence. That section provides that "where in an indictment two or more crimes or acts of crime are charged cumulatively, it shall be lawful to convict of any one or more of them, and any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such crime, and where any crime is charged as having been committed with a particular intent, or with particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation." There is no doubt that to bore a hole in a ship in order to sink or destroy it is an offence at common law if the word "maliciously" is implied, as section 8 declares it may be. The great advantage of the recent Act is that after evidence led, which of course is limited to the facts charged, the question whether the acts proved were done criminally can be left to the jury on direction by the Judge as to what they must find to have been the quality of those acts before they

No. 14. can convict under the indictment. I have no difficulty in repelling the objection and holding the libel relevant.

Jan. 28, 1889.  
Her Majesty's  
Advocate v.  
Bourdais.

THE following was the interlocutor:—"The Lord Justice-Clerk, having heard parties, repels the objection and finds the charge relevant under the Criminal Procedure (Scotland) Act, 1887."

Evidence having been led, the jury by a majority found the panels severally guilty of the first charge of the indictment as libelled.

SENTENCE of ten years' penal servitude was pronounced upon each of the panels.

R. & J. NEILL, Writers—PROCURATOR-FISCAL OF RENFREWSHIRE—Agents.

No. 15.

Mar. 4, 1889.  
Skene v.  
Falconer.

THOMAS SKENE, Appellant.—*J. C. Thomson—Law.*  
JAMES GENTLE FALCONER, Respondent.—*C. J. Guthrie.*

*Vaccination—Vaccination Act, 1863 (26 and 27 Vict. c. 108), secs. 8, 18, 26—Failure to transmit certificate of vaccination—Continuing offence—Competency of second complaint.*—The Vaccination Act, 1863, enacts by section 8 that the father of every child shall within six months after its birth cause it to be vaccinated, and shall transmit to and lodge with the registrar of births, &c., a medical certificate of successful vaccination.

Section 18 enacts that "the registrar of each district shall once in every six months transmit to the inspector of poor . . . a list of . . . such persons as have failed to transmit or lodge a certificate of vaccination in terms of this Act, and on the receipt of such list the inspector of poor shall lay the same before the parochial board . . . and thereupon the parochial board shall issue an order to the vaccinator appointed by them to vaccinate the persons named in such list, and notice in writing of such order shall be given to such persons, or if children, to their father or mother or the persons having care of them, and in pursuance of such order the vaccinator shall vaccinate the persons named therein" within a certain period, "and if any such person . . . shall refuse to allow such operation to be performed he shall for every such offence be liable to a penalty. . . ."

*Held* that the name of a person who has failed to transmit a certificate of vaccination of his child must be placed on the registrar's list during each successive period of six months for which such failure may subsist, and that the offence is committed on each occasion on which the order to have the child vaccinated, following on such list being laid before the parochial board, is disobeyed.

A person charged with a contravention of section 18 of the Vaccination Act, 1863, by refusing to allow his child to be vaccinated by the vaccinator appointed by the parochial board after an order made by the board under that section, objected to the competency of the complaint on the ground that he had a year previously been convicted under the same section of refusing to allow the same child to be vaccinated. *Held* that the objection to the competency was bad.

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord Adam.  
Lord Trayner.  
Justiciary  
Clerk.  
Sheriff of  
Aberdeen-  
shire.

JAMES GENTLE FALCONER, residing in the parish of Old Machar, was charged before the Sheriff Court at Aberdeen with an offence within the meaning of the Vaccination Act, 1863.\* The complaint set forth that

\* The Vaccination Act, 1863 (26 and 27 Vict. c. 108), section 8, enacts that "the father of every child born in Scotland after 1st January 1864 . . . shall within six months after the birth of such child cause such child to be vaccinated by a medical practitioner, and upon and immediately after the successful vaccination of such child, the medical practitioner

Falconer was guilty of a contravention of the Act "in so far as the said James Gentle Falconer having failed to transmit to the registrar of births, deaths, and marriages of the Aberdeen district of the said parish of Old Machar, in terms of the said Act, a certificate of vaccination of Margaret Sim Falconer, a child aged twenty-one months or thereby, born in the said Aberdeen district of the said parish of Old Machar, and of which child the said James Gentle Falconer is the father, the said parochial board did issue an order to John Gregory, bachelor of medicine and master of surgery, a vaccinator appointed by them for the said district, to vaccinate the said Margaret Sim Falconer, and gave notice in writing of the said order to the said James Gentle Falconer, said order and notice having been both dated and made on 19th October 1888, the said James Gentle Falconer did, on 2d November 1888, refuse to allow the operation of vaccination to be performed on the said Margaret Sim Falconer, who was then residing with the said James Gentle Falconer, at No. 11 Erskine Street, Aberdeen, although the said John Gregory then attended to perform the same in terms of the said order, whereby the said James Gentle Falconer is liable to a penalty not exceeding twenty shillings, and failing payment to be imprisoned for any period not exceeding ten days."

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who shall have performed the operation shall deliver to the father . . . of such child . . . a certificate under his hand according to the form of schedule A hereto annexed, that such child has been successfully vaccinated, and such certificate shall within three days after the date thereof be transmitted to and lodged with the registrar for the district by the father, . . . and such certificate, if registered, shall without further proof be admissible as evidence of the successful vaccination of such child in any information or complaint which shall be brought against the father for non-conformity with the provisions of this Act."

Sec. 17 enacts,—“In every case where there is not transmitted to the registrar a certificate of the vaccination of any child born within his district . . . within the period and in the manner . . . herein prescribed, the registrar of the district shall intimate such failure to the father or mother, or person having care of such child . . . by a notice transmitted through the post-office; and if a certificate as hereinbefore provided is not exhibited by such father . . . to the registrar within ten days from the despatch of such notice, the father . . . so failing shall forfeit a sum not exceeding twenty shillings . . . and the further sum of one shilling to be paid to the registrar in respect of such notice . . . and failing payment of either of such sums, such father . . . shall be liable to be imprisoned for a period not exceeding ten days.”

Section 18 enacts,—“The registrar of each district shall once in every six months transmit to the inspector of the poor of the parish or combination in which such district is situate, a list of the names and addresses of such persons as have failed to transmit or lodge a certificate of vaccination in terms of this Act, and on the receipt of such list the inspector of the poor shall lay the same before the parochial board of such parish or combination, and thereupon the parochial board shall issue an order to the vaccinator appointed by them to vaccinate the persons named in such list, and notice in writing of such order shall be given to such persons, or if children, to their father or mother or the persons having care of them, and in pursuance of such order the vaccinator shall vaccinate the persons named therein, or any of them, at any time not less than ten nor more than twenty days after the date of such notice, unless such persons shall previously have been vaccinated, and a certificate of their vaccination or insusceptibility shall have been transmitted to the registrar; and if any such person, or the parent or person having the care of any such child, shall refuse to allow such operation to be performed, he shall, for every such offence, be liable to a penalty not exceeding twenty shillings, and failing payment, to be imprisoned for any period not exceeding ten days.”

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Falconer objected to the competency of the complaint on the ground, as stated in the case for appeal, that he was convicted on 28th December 1887 of an offence under the same section of the statute, in respect of the same child.

The Sheriff-substitute (Dove Wilson) sustained the objection, and dismissed the complaint.

The inspector of poor took a case for appeal, the question of law therein stated being "whether the objection to the competency was rightly sustained."

Argued for the appellant ;—The respondent was in the position of being upon the list kept by the registrar of persons who had failed to transmit a certificate of vaccination. That list was to be transmitted to the inspector of poor every six months, and on each such occasion a person who had not got his name removed from that list was liable to prosecution. Such a person could not (as the respondent practically contended), by suffering punishment once, in respect of being upon the list, be thereafter free from the obligation. He was bound to get his name removed from the list by performing the obligation which the statute laid upon him, or for "every such offence" he was liable to punishment. The 26th section of the statute clearly shewed that the inspector of poor was bound to take proceedings against anyone who persistently took no step to have his name removed from the list of persons in default.\*

The case of *Pilcher*<sup>1</sup> referred to on the other side was not in point, because it was decided on the Act 16 and 17 Vict. c. 100, which was in force in England at the date of that case, and which was different in its terms from the Scottish Act of 1863. The later case of *Allen*<sup>2</sup> decided on the subsequent English Act, 30 and 31 Vict. c. 84 (sec. 31), was, however in point by way of analogy. It was held under that Act that a parent might be proceeded against from time to time as long as his child remained unvaccinated.

Argued for the respondent ;—The offence could not be committed unless there were clearly a violation of a statutory provision. That could not be made out on a strict construction of section 18. Indeed that section could not bear a strict construction, for it provided that on a list being sent to the inspector of poor of persons who had failed to transmit vaccination certificates, the parochial board should direct their vaccinator to vaccinate "the persons named in such list." There was no provision in the statute for declaring a continuing offence. But where in a statute a continuing offence was intended to be declared, that was expressed in unmistakable language. Of that the Education Act of 1872 was an example. The language of the statute, then, not making it clear that a continuing offence was intended to be created, failure to transmit the certificate could only be held to occur once in one particular period of six months. If a person's name was once entered in one particular period of six months the statute was satisfied, and the name ought not to be entered on the list made up in the next six months. The reading pro-

\* Section 26 of the Act enacts,—“It shall be competent to raise such proceedings for enforcing any penalties incurred in contravention of this Act at any time during which the person against whom such proceedings are taken is in default ; and the Sheriff by whom such penalty shall be found due by virtue of this Act shall award such penalty to the funds for the support of the poor of the parish . . . in which the offence shall have been committed, and shall order the same to be paid over to the inspector of poor, or other officer of the parochial board for that purpose.”

<sup>1</sup> *Pilcher v. Stafford*, 1864, 33 L. J. Mag. Ca. 113.

<sup>2</sup> *Allen v. Worthy*, 1870, L. R. 5 Q. B. 163.

posed on the other side would not work in practice, for if the meaning of the Act was that the name should occur again and again, that would only happen when the person in question remained in the particular parish. There was no provision for communicating to the inspector of a parish to which a defaulter might remove, the information that no certificate had been transmitted.

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At advising,—

**LORD JUSTICE-CLERK.**—This case does not to my mind present any real difficulty. Section 18 of the Vaccination Act for Scotland is rather loosely expressed but its meaning is, I think, quite plain. The statute, in the first place, enacts that any person who fails to have his child vaccinated, or to produce a certificate of unfitness for vaccination, is liable to prosecution. Then by section 18 it is provided that the registrar of each district is once in every six months to transmit to the inspector of poor the names and addresses of such persons as have failed to transmit a certificate in terms of the Act. Of course children cannot so transmit the certificate, and the plain meaning of the Act is that those whose duty it is to look after the children are to send the certificates. The registrar is to make out a list of those in default. That is to be laid before the parochial board by the inspector of the poor. Then an order is to be issued by the board appointing a vaccinator to vaccinate such persons. Notice of such order is to be given to such persons, or if children, to their father or mother or persons having care of them, and in pursuance of the order the vaccinator is to perform the operation, and if any person refuses to allow him to do so, such person is liable to a penalty. I see nothing in this section to justify the registrar in excluding from his list any person still resident in his district whose name appears in the register who is not entered as having been vaccinated. It is said that persons may leave the district, and that no provision is made for such cases. That merely shews that the machinery provided by the Act of Parliament is not absolutely certain in its action. It could scarcely be so. Every conceivable case could not be provided for. But in so far as it is certain there is nothing in this section to indicate that it is not to be carried out to the uttermost. That being so, I think that it is the duty of the registrar in making out his list every six months to include the name of every person not certified as vaccinated, or unfit, without regard to the question whether such person was included in former lists, and that if any person's name so appears in the registrar's list the parochial board are bound to issue the order to vaccinate, and if they do so and the person, or parent or guardian, refuses to allow the operation to be performed, then the penalty is incurred.

I must therefore move your Lordships to answer the question in this case in the negative, and to remit the cause back to the Sheriff-substitute.

**LORD ADAM.**—This complaint is brought under the 18th section of the Vaccination Act of 1863. The only objection stated to it is an objection outwith the complaint altogether, namely—that the accused had been convicted for the same offence in respect of the same child on the 28th December 1887. The validity of this objection depends upon the construction of the 18th section of the statute, and I concur with your Lordship that upon the construction of that section it very clearly appears that the accused here was not convicted of the same offence upon the 28th December 1887. The section is to my mind quite intelligible though not very well expressed. It lays a duty



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upon the registrar of each district once in every six months to transmit to the inspector of the poor a list of the names and addresses of "such persons as have failed to transmit or lodge a certificate of vaccination in terms of this Act." I do not understand that it is contended on the other side that the complainer here was not in that position. I have not heard it said that he was not one of those persons who had failed to transmit or lodge a certificate of vaccination in terms of the Act. Therefore, in my view, the registrar had no alternative but to put him in that list. That list is to be sent to the inspector of poor. He is to lay it before the parochial board and the board is to issue an order to their vaccinator to vaccinate the persons "named in such list," the clear meaning being the unvaccinated persons named in such list. All this having happened by force of the statute, the vaccinator is to proceed to vaccinate such persons. Then these words follow—"And if any such person, or the parent or person having the care of any such child, shall refuse to allow such operation to be performed, he shall, for every such offence, be liable to a penalty not exceeding twenty shillings, and failing payment, to be imprisoned for any period not exceeding ten days." It is to me clear that that order may be pronounced every six months, and the offence committed every six months. In my humble opinion the offence is committed every time the order is disobeyed. It is, in my judgment, a misreading of the statute to regard the two offences as the same offence. I therefore think the Sheriff-substitute wrong in sustaining as a bar to all further proceedings the conviction for refusal to obey a previous order. But further we have the words used in the section "every such offence." I think these words imply the possibility of more than one such offence. If it had been otherwise the words used would have been "for such offence."

LORD TRAYNER.—I think the question raised by this case is a difficult question, but I have come to be of opinion with your Lordships that the Sheriff-substitute is in error in sustaining as he has done the objection to the competency of the complaint.

Section 18 of the Act of 1863 has not been very carefully revised, and it contains, on a literal reading of it, a provision of a very startling kind. It appears upon the face of the clause that the registrar is to transmit a list of the names and addresses of the persons who have failed to lodge certificates of vaccination to the inspector of poor, and that the parochial board, on the same being laid before them by the inspector, is to issue an order to vaccinate "the persons named in such list." This may be read, undoubtedly, as meaning the persons who have failed to transmit to the registrar the certificate of vaccination; not the child or children to whom the desiderated certificate would apply. But the real meaning of the section is discoverable when it is considered what the certificate when sent to the registrar would bear. The certificate required by the Act would, if duly transmitted, bear the name of the child who had not been vaccinated, or whose vaccination had been postponed. That name—the name of the child—will therefore appear in the list made up by the registrar. The list will contain not merely the name of the defaulting parent or guardian, but the name of the child in regard to whom there has been default. On such a list being transmitted by the registrar, the parochial board is to order the vaccination of the "persons named in said list"—that is, is to order the vaccination of the persons named in that list who are there reported as not having been vaccinated, or rather, of whose vaccination no certificate has been lodged with

the registrar. I think the section bears the meaning I have thus put upon it. No. 15.  
Any other meaning would render the clause ineffectual in the attainment of the  
end sought thereby to be attained, and if that be so, we are bound to put such  
a meaning on the clause (if the words of the clause will bear it) as will make  
the clause effectual, rather than a meaning which will make the clause nugatory.

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The registrar is directed by the Act to transmit his list to the parochial board every six months, and the parochial board is thereupon to order the vaccination of the child. Every such order must be obeyed, until the child's name, as well as its defaulting guardian's name, is removed from the list, and the disobedience of every such order incurs the statutory penalty. I think this is a more reasonable view of the statute than that which the Sheriff-substitute has taken. In coming to this conclusion I do not attach much weight, if any, to the use of the words "every such offence," which I regard rather as words of style than as an express direction as to the accumulation of offences and penalties.

Lord Chief-Justice Cockburn's remarks in *Pilcher's* case (33 L. J. Mag. Cas. 113) would have had more force and weight in the present question if the Act he was interpreting when he decided that case had been the same as that now under consideration, but that Act contained no clause equivalent to that under which this complaint is brought.

THE COURT answered the question in the negative, and remitted the cause to the Sheriff-substitute to proceed in terms of law.

HAGART & BURN MURDOCH, W.S.—R. C. GRAY, S.S.C.—Agents.

WILLIAM CHALMERS (Salmon-Fishery District Board of the River Tay), No. 16.  
Appellant.—*Ure*.

CHARLES BAIN, Respondent.—*Craigie*.

Mar. 4, 1889.  
Chalmers v.  
Bain.

*Poaching—Possession of salmon in close time—Salmon-Fisheries Act, 1868* (31 and 32 Vict. c. 123), sec. 21—*Fishing*.—The Salmon-Fisheries (Scotland) Act, 1868, sec. 21, provides,—“Any person who shall . . . have in his possession any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district, shall be liable to a penalty . . .”

*Held* that “annual close time” in the Salmon-Fisheries Act, 1868, means the period during which net-fishing for salmon is prohibited, and not the period during which fishing by rod and line is also prohibited.

*Held*, therefore, that a complaint which charged a contravention of sec. 21 of the Salmon-Fisheries Act, 1868, in respect that the accused had, on 29th November 1888, “in their possession salmon . . . taken within the limits of the said Act between the commencement of the latest and the termination of the earliest annual close time for any district in Scotland,” was relevant, although on the day libelled it was lawful to fish for salmon in the Tweed district by rod and line.

CHARLES BAIN and Edward Irvine were, on 26th December 1888, charged before the Justice of Peace Court of Perthshire at the instance of William Chalmers, solicitor, the person authorised to prosecute on behalf of the Salmon-Fishery District Board for the River Tay, with an offence against section 21 of the Salmon-Fisheries Act, 1868.\*

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord Adam.  
Lord Trayner.  
Justiciary  
Clerk.  
J.P. Court of  
Perthshire.

\* The Salmon-Fisheries Act, 1868 (31 and 32 Vict. c. 123), sec. 21, enacts,—“Any person who shall buy, sell, or expose for sale, or have in his possession any salmon taken within the limits of the Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district, shall be liable to a penalty . . . and the bur-

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The complaint set forth that the accused had contravened that section, "in so far as upon Thursday, the 29th day of November 1888, or about that time, the said Charles Bain or Bayne and Edward Erwin or Irvine had in their possession salmon, or fish of the salmon kind, taken within the limits of the said Act, between the commencement of the latest and the termination of the earliest annual close time then in force for any district in Scotland, and that in East High Street, Crieff, and had in their possession on such occasion a bag containing two salmon, or fish of the salmon kind, which were seized in terms of said Act."

Irvine did not appear, but Bain appeared and pleaded not guilty. The record of the proceedings bore, that "after hearing a statement by Mr McCosh on behalf of the accused, to the effect that no valid offence was alleged, in respect that the alleged contravention took place when the district of the River Tweed was open for rod and line fishing, the Justices sustained the objection, and dismissed the complaint."

Chalmers took a case. This question of law was stated, viz.:—"Whether the words annual close time in section 21 of the Salmon-Fisheries (Scotland) Act, 1868, include the extension of time for rod-fishing?"

Argued for the appellant;—Annual close time in the section libelled meant annual close time for net-fishing. In the Tweed district that period lasted from 14th September to 15th February, and therefore covered 29th November, the day libelled. Close time meant the time when the nets were off, and the Salmon-Fisheries Act, 1862, used language which implied that, for it implied that rod and line fishing might be carried on in close time.\* The annual close time would not amount to 168 but only to 62 days if the contention of the respondent were to prevail.† The

den of proving that any such salmon was caught beyond the limits of the Act shall lie on the person selling or exposing the same for sale or having the same in his possession."

\* The Salmon-Fisheries Act, 1862 (25 and 26 Vict. c. 97), sec. 6, enacts that "the Commissioners shall have the powers and perform the duties hereinafter specified,—that is to say (subsec. 5), to determine, subject to the provisions of this Act, at what dates the annual close time for every district shall commence and terminate, and at what periods subsequent to the commencement and prior to the termination of the annual close time it shall be lawful to fish for and take salmon with the rod and line; provided that the number of days during which such annual close time shall continue shall be the same as regards every district."

† The Salmon-Fisheries Act, 1862, enacts (sec. 7),—The annual close time for every district shall continue for 168 days, and the weekly close time, except for rod and line fishing, shall continue "from six o'clock on Saturday night to six o'clock on Monday morning"; and (sec. 8) the annual close time shall be applicable to every mode of fishing for or taking salmon in any river, lake, or estuary, or in the sea, except by means of the rod and line, for the periods in each district to be fixed by the Commissioners subsequent to the commencement and prior to the termination of the annual close time, during which it shall be lawful to fish for and take salmon by means of the rod and line.

The Salmon-Fisheries Act, 1868 (31 and 32 Vict. c. 123), enacts (sec. 9),—"Any district board . . . may resolve to petition the Secretary of State . . ." (subsec. 1) "to vary the annual close time in such district, provided that such annual close time shall always be 168 days." And sec. 15 enacts that "every person who" (subsec. 1) "fishes for, takes, or attempts to take, or aids, or assists in fishing for, taking, or attempting to take salmon during the annual close time by any means other than rod and line," shall be liable to a penalty.

By schedule C there is given a form of bye-law of close time by the Commissioners, determining that the annual close time shall commence and terminate on certain dates, both days inclusive; and that "it shall be lawful to fish for

Justices had been misled by their reading of the cases of *Wilsone v. Harvey* No. 16. and *Chalmers v. McGlashan*.<sup>1</sup> In these cases there were, no doubt, dicta by Lord Young favourable to the respondent's contention, but these were unnecessary to the judgments. Mar. 4, 1889.  
*Chalmers v. Bain.*

Argued for the respondent;—The section founded on was so expressed that a conviction could not be obtained on such a charge. The Lord Justice-Clerk (Moncreiff) in *Chalmers'* case said,—“I agree in thinking that the clause is unworkable, for it involves the assertion of an absurdity,” and went on to point out that it did not carry out what was, presumably, its intention. But apart from that, the whole question here raised had been discussed in that case and in that of *Wilsone*, and it had been decided that no conviction could be obtained under section 21 so long as the fish might have been lawfully taken in any district. Now, the Tweed was open for rod and line fishing on 29th November. It would be a good defence if it were proved that the salmon were taken by rod and line. The complaint therefore was irrelevant.

**LORD JUSTICE-CLERK.**—The sole question in this appeal is whether the prosecutor in this complaint has stated a relevant case under the Salmon-Fisheries Act. The complaint is that on 29th November 1888 the accused “had in their possession salmon, or fish of the salmon kind, taken within the limits of the said Act, between the commencement of the latest and the termination of the earliest annual close time then in force for any district in Scotland, and that in East High Street, Crieff, and had in their possession on such occasion a bag containing two salmon, or fish of the salmon kind, which were seized in terms of the said Act.” Now, the question whether that is a relevant charge turns upon the answer to this other question, what is “annual close time”? For it is conceded that if the expression “annual close time” does not cover 29th November 1888 then the complaint would not be relevant. It is not suggested by the respondent that there is any other ground on which the complaint must be held to be irrelevant except that, according to his contention, the 29th November is not “close time.” What, then, does annual close time mean? I am satisfied, after considering the provisions of the Act of 1862, that annual close time means the period beginning in autumn and terminating in spring when no fishing for salmon is permitted otherwise than by rod and line only. I think that the terms of the Act itself make that clear. Thus in section 6 we find that the Commissioners under the Act “shall have the powers and perform the duties hereinafter specified; that is to say (subsec. 5), to determine, subject to the provisions of this Act, at what dates the annual close time for every district shall commence and terminate, and at what periods subsequent to the commencement of the annual close time it shall be lawful to fish for and take salmon with the rod and line; provided that the number of days during which such annual close time shall continue shall be the same as regards every district.” Again section 7 declares that the annual close time shall continue for 168 days, which would be impossible if the extra time allowed for rod and line fishing were excluded from the close time. Lastly, section 8 shews that annual close time applies to every mode of fishing except rod and line, for it provides that “the

and to take salmon with the rod and line” from a date within to another date also within such close time.

<sup>1</sup> *Wilsone v. Harvey*, Nov. 13, 1884, 5 Couper, 518, 12 R. (Just. Cases) 12; *Chalmers v. McGlashan*, Feb. 2, 1886, 1 White, 1, 13 R. (Just. Cases) 17; cf. *Blair v. Shepherd*, April 12, 1871, 2 Couper, 28.

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annual close time shall be applicable to every mode of fishing for or taking salmon in any river, lake, or estuary, or in the sea, except by means of the rod and line, for the periods in each district to be fixed by the Commissioners subsequent to the commencement and prior to the termination of the annual close time, during which it shall be lawful to fish for and take salmon by means of the rod and line."

Now, whatever may have been said *obiter* in other cases, I have no hesitation in holding that the words of the statute indicating what is the annual close time are not affected either as to the commencement or as to the termination of it by considerations as to whether or not rod and line fishing is legal. Permission for rod and line fishing is indeed an exceptional favour granted to the angler, entitling him to fish within, it may be, the annual close time, but by that method only. Such exceptional permission is only necessary because of the establishment of the close time, and it allows rod-fishing during the close time. I think that that is sufficient for the decision of the question. But there was a question raised by the respondent in argument which is indeed not, properly speaking, one of relevancy, but requires to be noticed. The respondent raised the question whether or not it would be a good defence if the accused proved that the fish were caught by rod and line. It is not necessary to give any opinion on that point now. It will be for the Judge who tries the case, when he hears it, to give his decision. But I need not conceal my own view, which is that it would be a good defence if a person accused under such a complaint were to prove that the salmon were taken by rod and line.

This appeal is, on the grounds I have stated, well founded, and we must sustain it, and remit the cause to the Justices to proceed.

LORD ADAM.—The accused were charged with a contravention of section 21 of the Salmon-Fisheries Act, 1868, in so far as they had in their possession on 29th November 1888 salmon taken within the limits of the Act, "between the commencement of the latest and the termination of the earliest annual close time then in force for any district in Scotland." On the face of it that appears a relevant complaint. But it appears from the case that "after hearing a statement by Mr M'Cosh on behalf of the accused to the effect that no valid offence was alleged, in respect that the alleged contravention took place when the district of the River Tweed was open for rod and line fishing," the Justices dismissed the complaint. Now, it is obvious that the material date is 29th November 1888. It is admitted that on that date the Tweed district was open for rod-fishing, and that being so, it is said that the complaint is irrelevant, and indeed it would be so if that were the proper interpretation of the phrase the "annual close time." If annual close time means simply the time during which all net-fishing is prohibited, then the complaint is relevant, but if it means the time during which rod-fishing also is prohibited, then the complaint is irrelevant. Now, I do not propose to go over a second time the various sections to which your Lordship has alluded in order to answer the question, what is annual close time in the sense of the Salmon Fisheries Act, 1868, libelled on? I shall only say that I think it clear, beyond doubt, that the expression means that period when net-fishing is prohibited.

If we come to that conclusion, it follows from it that the complaint is relevant. If so, the question whether it is an answer to such a complaint as is before us, that the salmon was taken by rod and line, is a question which may

arise on the defence. It may arise in this case or it may not. It is not necessary to anticipate what may be a good defence; I reserve my opinion upon it. I have no hesitation in concurring with your Lordships in holding that the "annual close time" is the time during which net-fishing is prohibited.

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Mar. 4, 1889.  
Chalmers v.  
Bain.

LORD TRAYNER.—I concur in the view which your Lordships have taken of the expression "annual close time," and therefore I concur in thinking that the complaint is relevant.

THE COURT answered the question in the affirmative, and remitted the cause to the Justices.

THOMSON, DICKSON, & SHAW, W.S.—J. B. M'COSH, Perth—Agents.

JOHN CAIRNS, Appellant.—*J. Wilson.*

THOMAS LINTON (Procurator-Fiscal of Edinburgh Police Court),

Respondent.—*D.-F. Mackintosh—Boyd.*

No. 17.

Mar. 4, 1889.  
Cairns v.  
Linton.

*Jurisdiction—Sheriff of Edinburgh—Citation out of Jurisdiction—Endorsement of warrant of Judge of Police Court—Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. c. cxxxii.), secs. 333 and 5.—Held that under sections 333 and 5 of the Edinburgh Municipal and Police Act, 1879,\* the warrant of the Judge of Police in Edinburgh is sufficient for citing or apprehending any person resident in another county who is charged with an offence which may be tried by him, if such warrant be endorsed by the Sheriff of the county of Edinburgh or Midlothian, or any one of his Substitutes.*

*Unsound meat—"Possession as or for human food"—Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. c. cxxxii.), sec. 261.—A farmer in Perthshire despatched from Crieff Junction in the ordinary course of business the carcass of a bull addressed to the Dead Meat Company, Fountainbridge, Edinburgh. The carcass arrived at the Dead Meat Market, and in consequence of its appearance was examined by the manager of the market and condemned as unfit for human food. The farmer was charged with and convicted of a contravention of the 261st section of the Edinburgh Municipal and Police Act,† in respect he had unsound beef in Edinburgh, "in his possession as or for human food."*

On appeal, the Court (*dub.* Lord Trayner) *quashed* the conviction, holding that facts had not been proved sufficient to infer that the accused had the carcass in Edinburgh in his possession either actually or constructively as or for human food.

\* The Act 42 and 43 Vict. c. cxxxii., enacts, sec. 333,—“When any person charged with having committed any crime or offence which may be tried by the Judge of Police is beyond the burgh, the Judge of Police shall grant warrant for apprehending or citing the offender . . . and any such warrant shall be sufficient within Scotland . . . if such warrant be endorsed by the Sheriff or by the Sheriff of the county where the same shall be executed . . .”

Sec. 5 enacts,—“The word ‘Sheriff’ shall mean the Sheriff of the county of Edinburgh or Midlothian, or any one of his Substitutes, excepting where specially provided to the contrary.”

† The Edinburgh Municipal and Police Act, 1879, sec. 261, enacts,—“Every person who shall sell, or expose to sale, or have in his possession, as or for human food, the carcass or any part of the carcass of any animal which shall appear to have died of or been killed in consequence of disease, or any butcher meat, fish, poultry, or other article of provision of an unsound or unwholesome description, or in a state unfit or unsuitable for human food, shall be liable to a penalty not exceeding twenty pounds, and the articles shall be forfeited and disposed of as the Judge of Police shall direct.”

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Mar. 4, 1889.  
Cairns v.  
Linton.

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord Adam.  
Lord Trayner.  
Justiciary  
Clerk.

ON 5th April 1888 John Cairns, residing at Gleneagles, Perthshire, was charged before the Judge of the Police Court at Edinburgh at the instance of the Procurator-fiscal upon a complaint which set forth that, "contrary to the Edinburgh Municipal and Police Act, 1879, section 261, upon the 30th of March 1888, he had in his possession, as or for human food, in Fountainbridge Street, Edinburgh, 596 pounds weight of butcher meat, *videlicet*, beef of an unsound and unwholesome description, and in a state unfit and unsuitable for human food: And the said accused being beyond the burgh of Edinburgh, it is therefore craved that warrant be granted for summoning the said accused to answer to this complaint; and for citing witnesses for both parties." Of the same date, the Judge granted warrant to officers of police for summoning the accused to answer to the complaint, and for citing witnesses for both parties; and the Sheriff-substitute of the Lothians and Peebles (Rutherford) granted his concurrence to the execution of the warrant by indorsation.

On 6th April the accused was summoned at Gleneagles to appear before the Judge of Police at Edinburgh to answer to the complaint.

The accused objected to the jurisdiction of the Court, but the objection was repelled by the Judge of Police, who, after evidence led, found the complaint proved, convicted the accused, and fined him £7 sterling, with the alternative of seven days' imprisonment.

Cairns took a case, in which the facts held to be proved were set forth as follows:—"That the appellant was a farmer, residing at Gleneagles, in the parish of Blackford and county of Perth. That on the 23d March 1888 he had a bull which was suffering from illness; that he called in the veterinary surgeon at Auchterarder, who is also inspector under the Local Authority for that district of the county of Perth; that the veterinary surgeon saw this bull on the 23d and 25th days of March 1888, and expressed an opinion that it was suffering from 'fardle bound' (an affection of the stomach), and treated it accordingly; that he advised that the animal be at once slaughtered in case it should die from the disease. That the said veterinary surgeon did not see the carcase after the animal had been slaughtered. That the bull was slaughtered by a butcher from Auchterarder, who dressed the carcase and removed part of the membrane from the interior of the animal. It was also proved that the parts so removed were those which would have shewn the symptoms of pleurisy most distinctly, that being a disease from which the animal was proved to have been suffering when slaughtered. That the carcase was dressed in presence of the appellant and the butcher in the usual manner as or for human food, and thereafter despatched by the appellant for sale in the ordinary course of business, from Crieff Junction, on the 29th of March aforesaid, addressed to 'The Dead Meat Company, Fountainbridge, Edinburgh.' That it arrived at the said market on the day following, and upon being taken out of its wrappings was, in consequence of its appearance, sent by the manager of the said market to the slaughter-houses, where, having been examined, it was at once condemned as unsound and unfit for human food—traces of disease being still quite apparent on the carcase when examined."

The questions of law were,—(1) Had the Police Court of Edinburgh jurisdiction in this case? (2) Do the facts proved warrant the conviction complained of?"

Argued for the appellant;—(1) The Judge of the Police Court had no jurisdiction here, in respect the appellant was cited upon an invalid warrant. He was "beyond the burgh," and the warrant was not endorsed by the Sheriff of the county of Perth, in terms of the 333d section of the Edinburgh Municipal and Police Act, 1879. It was true that the warrant was

endorsed by the Sheriff-substitute of the Lothians and Peebles in terms of the 5th section, but if such endorsement were given effect to it would be favouring the anomaly that the Sheriff of Edinburgh had jurisdiction over the length and breadth of Scotland. (2) On the merits, there was no "possession" proved on the part of the accused in Edinburgh of unsound meat "as or for human food." He parted with possession of the carcase after he had despatched it from Crieff Junction. There was no room in a criminal case for the "constructive" possession recognised in civil cases. A different result might have been reached if he had been charged under the Public Health (Scotland) Act, 1867, which by section 26 made the "custody" of unsound meat an offence.

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Argued for the respondent;—The citation was valid. Sections 333 and 5 of the Act read together made the warrant of the Judge of Police valid if it was endorsed either "by the Sheriff of the county of Edinburgh or Midlothian, or any of his Substitutes, or by the Sheriff of the county where the same was executed." If effect were given to the appellant's objections the first part of this clause would be rendered nugatory. Though at first sight the statute might seem ambiguous, it was plain that the object of the clause in question was to render the proceedings as summary as possible. (2) On the merits. The question was as to whether the carcase, which was undoubtedly dressed in the appellant's presence for human food, was in his "possession" on the day libelled. It was not necessary for him to have actual tangible possession as long as he had the power of dealing with it as he pleased. It was in the consignee's hands in Edinburgh on his behalf, although he had sent it away from his premises in Perthshire. The consignee was really acting as his agent or servant.

LORD ADAM.—This is a case stated by the Judge of the Police Court of Edinburgh. The complaint against Cairns is that, contrary to the Edinburgh Municipal and Police Act, 1879, section 261, upon the 30th of March 1888 he had in his possession as or for human food in Fountainbridge Street, Edinburgh, and at some other place or places within the limits of the Edinburgh City Police to the prosecutor unknown, five hundred and ninety-six pounds weight of butcher meat, *videlicet*, beef of an unsound and unwholesome description, and in a state unfit and unsuitable for human food. The section of the Act referred to, omitting the words which do not apply to this case, enacts that "every person who shall sell or expose for sale, or have in his possession, as or for human food . . . any butcher meat, fish, or poultry, or other article of provision of an unsound or unwholesome description, or in a state unfit or unsuitable for human food, shall be liable to a penalty not exceeding £20."

After stating the facts the case set forth that the Judge found the complaint proved, convicted the appellant, and fined him £7 sterling, with the alternative of ten days' imprisonment. Two questions are stated for our consideration—(1) Had the Police Court of Edinburgh jurisdiction in this case? and (2) Do the facts proved warrant the conviction complained of?

Now, with reference to the first question the answer depends upon whether the appellant was duly and sufficiently cited to the Court. If he was duly cited, then there is no ground for questioning the jurisdiction. The proceedings bearing upon this question are set forth in an appendix and made part of the case. They are the complaint, the citation of the defender, and the minutes of procedure. The complaint sets forth that the accused is beyond the burgh of Edinburgh, and craves that warrant be granted for summoning the accused and for citing witnesses. On 5th April 1888 warrant was granted to summon the



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accused and cite witnesses. Of the same date the Sheriff-substitute of the Lothians and Peebles granted his concurrence to the execution of this warrant by indorsation. Then we have the citation, which bears that the accused John Cairns, Gleneagles, Blackford, county of Perth, was regularly summoned by an officer of police on 6th April 1888 to answer the complaint. It is obvious upon the face of these proceedings where the objection, if it is a sound one, lies. The citation of the accused, who is resident in the county of Perth, is done under the authority and warrant of the Sheriff-substitute of the Lothians and Peebles. I think there can be no doubt that that is not in conformity with the usual law and practice in Scotland with reference to citations, because it implies that the warrant of the Sheriff of the Lothians and Peebles is of authority in the county of Perth. So far as I know, this is altogether unknown in our practice. The jurisdiction of a Sheriff is limited solely in the ordinary case to his own county. The question here accordingly is whether or not this proceeding, which is contrary to the usual practice, is justified by the provisions of the 333d section of the Edinburgh Police Act, and the answer in my view depends entirely upon the construction of that section. Omitting superfluous words, that section bears, "when any person charged with having committed any crime or offence which may be tried by the Judge of Police, is beyond the burgh, . . . the Judge of Police shall grant warrant for apprehending or citing the offender . . . and any such warrant shall be sufficient within Scotland . . . if such warrant be endorsed by the Sheriff or by the Sheriff of the county where the same shall be executed, and such warrant may be executed by a sheriff-officer, messenger-at-arms, or constable." Now, we have the warrant here by the Judge of the Police Court, and there is no question about its regularity. The question is whether it be sufficient under this Act that it be endorsed by the Sheriff-substitute of the Lothians and Peebles. The words of the Act are "if such warrant be endorsed by the Sheriff or by the Sheriff of the county where the same shall be executed." In section 5 the Sheriff is said to mean the Sheriff of the county of Edinburgh or Midlothian or any of his substitutes. So that the 333d section will read thus,—“Such warrant shall be sufficient . . . if such warrant be endorsed by the Sheriff of the county of Edinburgh or Midlothian or any of his Substitutes, or by the Sheriff of the county where the same shall be executed.” I think no one can doubt that that is the literal meaning of the clause, and that the warrant shall be sufficient if endorsed either by the Sheriff of Edinburgh or by the Sheriff of the county. Taking the clause in its literal sense it would appear to be sufficient to justify these proceedings. But it is said, and in my opinion with a great deal of force, that the clause must be read with reference to the existing law and practice, with regard to the power and authority of the Sheriff within and beyond his own district. And, as I have said, in the ordinary case no Sheriff has jurisdiction out of his own territory, or power to cite out of his own territory, and, if we sustain the literal meaning of the statute, it comes to this, that we are sustaining the authority of the warrants of the Sheriff of Edinburgh over the length and breadth of Scotland. I certainly cannot come easily to such a reading. But on the other side it is said with equal force that in construing a statute you must give effect, so far as is possible, to all the words of it, and if that be so, it is clear to my mind that if we do not sustain this citation we are giving no effect to the words “endorsed by the Sheriff of Edinburgh.” The words “the Sheriff of the county where the same shall be executed” would necessarily

include the Sheriff of Edinburgh, when the execution is within his jurisdiction. **No. 17.**  
 Therefore if we take the view of the statute urged by the appellant we render **Mar. 4, 1889.**  
 the first part of this clause altogether without meaning. I quite feel the force of **Cairns v. Linton.**  
 the appellant's argument, but on the whole matter, though with a great deal of  
 doubt, I think we ought to read this clause in its literal meaning, and to hold  
 that the warrant is valid if endorsed either by the Sheriff of Edinburgh or by  
 the Sheriff of the county where the same is executed. I have therefore come to  
 be of opinion that the Judge of the Police Court in Edinburgh had jurisdiction  
 in this case, and that the first question ought to be answered in the affirmative.

The question remains upon the facts. The facts as set forth seem to be shortly  
 these. On 23d March 1888 the appellant had a bull suffering from illness. He  
 sent for the inspector and had the bull examined. The inspector pronounced  
 it to be suffering from a disease called "fardle bound" and advised that it  
 should be slaughtered. What followed is thus set forth:—"That the said  
 veterinary surgeon did not see the carcass after the animal had been slaughtered.  
 That the bull was slaughtered by a butcher from Auchterarder, who dressed the  
 carcass and removed part of the membrane from the interior of the animal. It  
 was also proved that the parts so removed were those which would have shewn  
 the symptoms of pleurisy most distinctly, that being the disease from which  
 the animal was proved to have been suffering when slaughtered. That the  
 carcass was dressed in presence of the appellant and the butcher in the usual  
 manner as for human food, and thereafter despatched by the appellant for sale  
 in the ordinary course of business from Crieff Junction on the 29th of March  
 aforesaid, addressed to the Dead Meat Company, Fountainbridge, Edinburgh."  
 If it had been necessary in this case that the guilty knowledge of the appellant  
 must be held to be proved, it might or might not be that the facts stated would  
 have been sufficient to infer knowledge that the meat was unfit for human food.  
 But it seems to me that that is not the only fact that must be proved here. I  
 think it must also be proved that the meat was in the possession of the appellant  
 at Fountainbridge, Edinburgh. If that is not so, it appears to me that no con-  
 viction can follow. The facts upon that part of the case immediately follow.  
 It is stated that the carcass "arrived at the said market on the day following,  
 and upon being taken out of its wrappings was, in consequence of its appearance,  
 sent by the manager of the said market to the slaughter-houses, where, having  
 been examined, it was at once condemned as unsound and unfit for human food  
 —traces of disease being still apparent on the carcass when examined." It  
 appears to me in the first place very clear that the meat was not in the actual  
 possession of the appellant in Fountainbridge, Edinburgh. The last time it  
 appears to have been in the actual possession of the appellant was when for-  
 forwarded by him from Crieff Junction, in the county of Perth. The only  
 person in whose possession it was in Edinburgh, so far as appears from the facts  
 stated, was the manager of the Dead Meat Company. I am far from saying  
 that it may not be possible that although not in the actual possession of the  
 appellant it may notwithstanding have been constructively in his possession,  
 sufficiently to warrant a conviction under this statute. It might be in the hands  
 of a shopman of his or a mere servant. But it humbly appears to me that, if  
 that was to be the case made against the appellant, facts should have been  
 proved to the Judge going to shew that this meat, although not in the actual  
 possession of the appellant, was yet constructively so, so as to warrant a con-  
 viction. I find no facts stated which would lead to this inference. It rather

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appears that the facts lead to a contrary inference, because it would appear that the manager of the Dead Meat Company assumed that he had the full control of the meat after it came into his possession. He did what was proper and right. He sent the meat to be examined, and it was condemned. That indicates that this manager had the entire control. It may be that the appellant may have thought that those in Edinburgh would be better able to judge of the soundness of the meat than himself, and may have sent it with no intention that it should be exposed for human food without examination. That is the state of the facts as stated, and I am unable to concur in this conviction. I therefore think we should answer the second question in the negative.

LORD TRAYNER.—On the first question I agree with Lord Adam. It seems to me impossible to hold that the accused was not duly summoned if we give effect to the words of the 333d section of the Edinburgh Police Act. I concur in thinking it an unusual clause, and I doubt whether the Legislature intended to confer upon the Sheriff of Edinburgh the power to cite in every part of Scotland. But we have no concern with that. I think we are bound to give effect to the plain words of the statute.

Upon the second question I also agree with Lord Adam, but not without hesitation. I have great doubt whether the possession on the part of the manager of the Dead Meat Company was not constructively such possession on the part of the accused as would make him responsible, but my doubt is by no means so strong as to induce me to take a different view, and I therefore concur in thinking that the second question should be answered in the negative.

LORD JUSTICE-CLERK.—I concur with your Lordships upon both points. I think that in dealing with a statute we are bound to take the literal meaning of the words, and the literal meaning of the section in question is that the warrant of the Judge of the Police Court in Edinburgh is to be sufficient beyond the burgh, if endorsed by the Sheriff of Edinburgh or any of his Substitutes, or by the Sheriff of the county in which it is executed. And, whether the Legislature intended it or not, one can see that there is great convenience in the Sheriff of the jurisdiction where the burgh is situated having authority to assist the Police Magistrate in making citations throughout the country. Such a provision does, no doubt, to a certain extent, give jurisdiction to the Sheriff beyond the limits of his county, but it is conceivable that reasons of public convenience might render that expedient, and a Sheriff being looked upon as an official of a superior grade might very well have such a jurisdiction conferred upon him, a jurisdiction which applies only to the bringing up of the accused for trial.

As regards the question on the merits, I think the view which Lord Adam has stated is a perfectly sound one. If the manager of the Dead Meat Company had authority to do what the facts set forth shew that he did do, I think it is plain that the meat was in his possession and not in the possession of anyone else, because he seems to have had full control over it and power to deal with it as he pleased.

The phrase used in the statute with regard to possession is, as applicable to this case, a peculiar one. The phrase is "shall sell, or expose for sale, or have in his possession as or for human food." The meat was never sold or exposed for sale. Was it, then, in the possession of anyone "as or for human food"?

These words rather seem to indicate that to constitute a contravention of the statute something must be done which commits the person doing it to having overtly dealt with the meat as being presented to the public as being for human food. For example, if a contractor was caught in the act of delivering diseased carcasses at a butcher's door, it might very reasonably be held that he had them in his possession "as or for human food." But the case here is different. There was no overt act. There can be no doubt that, had the carcass been found on the premises of the appellant, there could have been no ground for saying that he had it in his possession "as or for human food." The carcass was quite innocently in his possession, he having killed the animal by advice of the veterinary surgeon. Nor did the sending of it to Edinburgh imply, in my opinion, that his possession was of this character. I think there is great force in what Lord Adam has pointed out, namely, that the appellant sent it to parties in Edinburgh who were judges of such matters, and whose duty and interest it was to inspect the carcass on arrival, and to withhold it from the market if it were in bad condition. It is also to be noted that the appellant did not have this animal slaughtered by his own servants, but by a butcher from Auchterarder, which indicates that he acted *in bona fide* and did not think the animal had any other disease than that from which the inspector had pronounced it to be suffering, which was not a complaint tending to make it unfit for human food.

Upon the whole matter I think we should sustain the appeal upon the ground that the case does not set forth facts sufficient to infer that the accused had the meat in question "in his possession as or for human food."

THE COURT pronounced this interlocutor:—"Answer the first question in the case in the affirmative, and the second question in the negative: Sustain the appeal: Reverse the determination of the inferior Judge, and decern."

THOMAS M'NAUGHT, S.S.C.—W. WHITE MILLAR, S.S.C.—Agents.

RICHARD GRANT, Complainer.—*Rhind.*

ALEXANDER GRIGOR ALLAN (Procurator-Fiscal of Elginshire at Elgin), Respondent.—*D. Robertson, A.-D.*

No. 18.

June 3, 1889.  
Grant v.  
Allan.

*Sentence—Sentence proceeding upon an illegal previous conviction.*—A boy, nine years of age, was charged with theft aggravated by two previous convictions. He pleaded guilty, and was sentenced. One of these previous convictions had been obtained against him when he was five years of age.

The Court *quashed* the sentence, holding that the previous conviction in question was null, and ought not to have been under the consideration of the Judge in giving sentence.

RICHARD GRANT, nine years of age, son of James Grant, carter, Bishopmill, Elgin, was charged in the Sheriff Court of Elginshire at Elgin, at the instance of the procurator-fiscal upon a complaint which set forth that he "did, on 9th April 1889, from Lesmurdie House, St Andrew's, Lhanbryd parish, Elginshire, occupied by Charles James Johnston, manufacturer, steal a football, and the said Richard Grant has been previously convicted of the crime of theft before the Police Court of Elgin on 12th September 1885 and 20th January 1887 respectively."

He pleaded guilty, and was convicted and sentenced to ten days' imprisonment, and to detention for five years thereafter in a reformatory.

HIGH COURT.  
Lord Justice-  
Clerk.  
Lord M'Laren.  
Lord Kinnear.  
Justiciary  
Clerk.

## No. 18.

June 8, 1889.  
Grant v.  
Allan.

With the consent and concurrence of his father, he brought a suspension of the conviction and sentence.

He produced a certificate of birth, from which it appeared that at the date of his conviction on 12th September 1885 he was only five years of age.

Argued for complainer;—The previous conviction was null, as a child of five years of age could not be guilty of theft. It followed that the present conviction and sentence, which proceeded partly upon it, must be set aside.

Argued for the respondent;—Even if the previous conviction in question were left out of account, the sentence was quite justified by the circumstances of the case.

LORD JUSTICE-CLERK.—To all appearance the best thing that could happen to this boy is that he should be sent to a reformatory. But before we arrive at that result we must take a very strong course, which I am not prepared to take, and that is to hold that a conviction of a boy five years of age who has pled guilty to a charge of theft is a conviction which can be considered by the Judge who tries the case in determining what sentence is to be pronounced.

This boy when he was five, or at the utmost six years old, seems to have been convicted of theft. In my opinion that was an utterly illegal conviction, and if it had been brought before us at the time by suspension it would have been quashed. But in considering what sentence was to be pronounced in this case, the Sheriff, we must assume, took into consideration the fact that there were two previous convictions for theft standing against the boy. Apparently his attention was not drawn to the fact that one of these was obtained when the boy was only five, and I think we must assume that he took that conviction into consideration. I am of opinion that no sentence which followed upon such consideration can be allowed to stand. It may be quite true that if you put that conviction out of view there is still nothing improper in the sentence pronounced, but to put it out of view now, and to consider whether the sentence pronounced is otherwise a proper sentence, would be to make us the judges of what ought to be done in a case where we have neither the power nor the materials necessary. It is absolutely impossible for us to say what the Sheriff would have done had he left this conviction out of account. I am therefore of opinion, though I regret the result, that this conviction must be quashed.

LORD M'LAREN.—I concur in the judgment proposed. We are familiar with cases in which convictions proceeding upon evidence have been set aside in consequence of essential irregularities in procedure. One illustration which occurs to my mind is afforded by a case where a conviction was quashed because the Magistrate had admitted evidence not given upon oath. The admission of such evidence is fatal to a conviction, because it is impossible to say how far the mind of the Judge may have been affected by it. In the present case the prisoner pleaded guilty, and there was accordingly no account of the crime or of the previous history of the prisoner, except what is contained in the complaint and the two extract convictions which accompanied it. These were the materials which the Sheriff had upon which to form his opinion as to what would be a proper measure of punishment. It is here that the difficulty arises, for he had before him, and thought he was bound to take into account, two convictions, when in reality there was only one which he could consider. I look upon the case as precisely similar to one in which the complaint sets out

two convictions, and there is produced an extract of one only. In that case if the prisoner pleads to the whole, and the Judge in his sentence deals with the case as one of a person twice previously convicted, there being no evidence of more than one conviction, it is plain that an error is committed. We must assume that the Judge took all the materials before him into account. No. 18.  
June 3, 1889.  
Grant v. Allan.

It appears to me that in the present case the sentence is affected by an error in *essentialibus*, the Judge having treated this as the case of an habitual offender, while it was really the case of a boy against whom only one previous conviction was established, and as we cannot review the sentence it follows that the conviction must be quashed.

LORD KINNEAR.—I agree with your Lordship. We can know nothing of the considerations upon which the Sheriff proceeded in giving this sentence except what appears upon the face of the complaint and the two convictions which were before him. We know that one of these at least ought not to have been obtained, and ought not to have been taken into consideration. We cannot estimate to what extent it was taken into consideration. The result is that the sentence cannot be sustained.

THE COURT pronounced this interlocutor:—"Pass the bill; suspend the conviction and sentence and order for detention in the reformatory complained of *simpliciter*: Ordain the complainer Richard Grant to be instantly set at liberty, and decern."

W. OFFICER, S.S.C.—CROWN AGENT—Agents.

ROBERT WILSON (Procurator-Fiscal of Lanarkshire at Hamilton),  
Appellant.—*D. Robertson, A.-D.*

JOHN M'GUIRE AND ANOTHER, Respondents.—*Law.*

No. 19.

June 20, 1889.  
Wilson v.  
M'Guire.

*Rape—Bail—Bail (Scotland) Act, 1888 (51 and 52 Vict. cap. 36).—Observed, per Lord Justice-Clerk, that in a charge of rape bail should only be allowed in very exceptional cases, and not at all where the Lord Advocate objects and states on his responsibility that his investigation of the case does not disclose any facts tending to shew that it should be dealt with as exceptional.*

THIS was an appeal by Robert Wilson, Procurator-fiscal of the Sheriff Court of Lanarkshire at Hamilton against a deliverance of the Sheriff-substitute of Lanarkshire at Hamilton (Birnie), admitting John M'Guire and Francis O'Brien, who had been charged with the crime of rape, to bail, and fixing the amount thereof at £50. HIGH COURT  
(GLASGOW).  
Lord Justice-  
Clerk.  
Justiciary  
Clerk.

Argued for the Procurator-fiscal;—This was a case in which no bail at all should have been granted. The precognitions shewed that the rape was of a most brutal character, the woman upon whom it was alleged to have been committed being a deformed imbecile between thirty and forty years of age, who was only able to utter inarticulate sounds which those alone who knew her well could understand. The amount fixed by the Sheriff-substitute was quite insufficient to secure the attendance of the accused at their trial. It was obvious that if the precognitions disclosed what should turn out to be the facts of the case, and a conviction was obtained, a very severe sentence must follow. The accused, in a case of this class, with the aid of their friends, would do their utmost to raise the amount fixed by the Sheriff-substitute, and then leave the country. The amount of bail then, if granted at all, should be increased.

Argued for the panels;—The question whether bail should be allowed or not had been properly decided by the Sheriff-substitute in granting

**No. 19.** bail. The procurator-fiscal had no right to assume that the precognitions disclosed the facts which would be proved against the accused. As to the amount of bail, the sum was ample in every respect to secure the attendance of the accused at their trial. In point of fact it was too large, as the prisoners were quite unable to raise the amount and obtain any benefit or assistance in the preparation of their defence.

June 20, 1889.  
Wilson v.  
M'Guire.

**LORD JUSTICE-CLERK.**—I am of opinion that bail should not be allowed in any case where the public prosecutor charges the prisoner with the crime of rape, unless there be very exceptional circumstances, and certainly not where the Lord Advocate objects to its being granted, and states on his responsibility that his investigation of the case does not disclose any facts tending to shew that it should be dealt with as exceptional. If in any such case there were exceptional circumstances, the Lord Advocate could himself take these into consideration and consent to bail, but I should regret its being established as a precedent in principle that bail is to be allowed in ordinary cases of rape. In this case I am of opinion that the sum of bail fixed by the Sheriff-substitute was quite inadequate. The public prosecutor has, by this appeal from the deliverance of the Sheriff-substitute, raised the question not only of the amount of the bail fixed, but whether bail should have been granted in the circumstances at all. He says it should not have been granted, and represents that the case is a very serious one. As there do not seem to me to be any circumstances to justify the Sheriff-substitute in granting bail, I shall reverse his deliverance and refuse bail.

THE following interlocutor was pronounced:—"The Lord Justice-Clerk having considered this appeal, and heard counsel for the parties, recalls the interlocutor appealed against, and refuses bail in this case."

CROWN AGENT—WILLIAM CHALMERS, W.S.—Agents.

**No. 20.** **ALLAN WYLIE, Complainer.**—*A. J. Young.*  
**JOHN THOM (Procurator-Fiscal for Burgh Court of Linlithgow),**  
**Respondent.**—*Goudy.*

July 4, 1889.  
Wylie v.  
Thom.

*Complaint—Deviation from statutory form—Trafficking without certificate—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), sec. 17.*—A B was charged under the 17th section of the Public-Houses Acts Amendment (Scotland) Act, 1862,\* with trafficking in liquor in L. "without having a certificate, empowering him the said A B to keep premises in L. for the sale of exciseable liquors therein." He was convicted, and in a suspension he averred (and it was admitted) that while he held no certificate for the premises, he was managing them for a person in whose name there was a current certificate, and who had prior to the date of the conviction granted a trust-deed for behoof of creditors.

The Court *suspended* the conviction, holding that as the charge, which was in effect one of trafficking without having obtained a personal certificate, had not been framed in the form prescribed by the 17th section of the Public-Houses Acts Amendment (Scotland) Act, 1862, under which it was brought,

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\* The Act 25 and 26 Vict. cap. 35, provides, by section 17,—“Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of the Act, shall be guilty of an offence.”

and which made it an offence to traffic without having obtained a certificate "in that behalf," the complainer had been debarred from pleading his employer's certificate, and had thus been prejudiced.

No. 20.

July 4, 1889.  
Wylie v.

Thom.

HIGH COURT.

Lord Justice-

Clerk.

Lord M'Laren

Lord Kinne

Justiciary

Clerk.

This was a suspension brought by Allan Wylie, Linlithgow, of a conviction obtained against him before the Magistrates of the burgh of Linlithgow for a contravention of the Public-Houses Acts Amendment (Scotland) Act, 1862.

*The facts of the case are fully set out in the opinion of Lord M'Laren.*  
*At advising,—*

**LORD M'LAREN.**—This case comes before us under a bill of suspension of a conviction obtained before the Magistrates of the burgh of Linlithgow for a contravention of the Public-Houses Acts Amendment (Scotland) Act, 1862.

Under the provisions of the statute the conviction is not subject to review on the merits, but is liable to be set aside in respect of such deviation from the statutory forms as may have prevented substantial justice from being done.

We have no record of the evidence, but we must consider what are the admitted facts of the case for the purpose of seeing whether the complaint is framed in conformity with the statutory enactments so as to raise a question of criminality upon those facts.

In the present case the complaint sets forth that Allan Wylie, hotelkeeper, Linlithgow (the complainer in this Court), did on a certain day, within the premises occupied by him, traffic in spirits and other exciseable liquors (I pass over the statement of the particulars of the sale) "without having a certificate authorising and empowering him, the said Allan Wylie, to keep premises in Linlithgow for the sale of exciseable liquors therein, contrary to the provisions of the seventeenth section" of the said Act.

It is the fact that there was a current certificate applicable to the Palace Hotel at Linlithgow in which the offence is said to have been committed.

The certificate was in the name of William Tod, the landlord of the Palace Hotel, and it was current at the date of the alleged offence. It is not suggested that Tod had done anything to forfeit the benefit of his certificate.

The suspender states that in September 1888 he was entrusted by Tod with the management of the hotel, Tod being then in a delicate state of health, and unable to continue in the personal management of his business.

Whatever may have been the reason for devolving the management of the hotel on Wylie, such devolution could in no way impair the force of the certificate granted to Tod, or render Wylie liable to a prosecution for selling spirits without a licence, because it is not open to question that a licensed victualler who has obtained a certificate in his own name may lawfully carry on his business through a manager.

Thereafter Mr Tod fell into embarrassed circumstances, and after consulting with his creditors granted a trust-deed in favour of Mr James Craig, C.A., with a view to the payment of his debts out of the proceeds of the trust-estate.

The theory of the prosecution is, that that proceeding divested Tod of his estate, and that his licence, and the certificate on which it was obtained, either became the property of Tod's creditors or lapsed altogether.

This is not the view on which Tod himself or his creditors acted. The



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creditors apparently were willing that the spirit business should be carried on as formerly under the management of Wylie, and the business was so carried on without objection until notice was given by the authorities of their intention to institute a prosecution unless Wylie should be able to obtain a transfer of the licence into his own name.

If it were necessary to consider whether the prosecutor was well-founded in his view of the effect of the trust-deed, I should most probably differ with him in his view of the law applicable to this point.

A trust-deed granted for the benefit of creditors is not a matter with which the public authorities are concerned. Such deeds do not usually displace the trader from the management of his business.

Indeed the chief reason of preference for a private trust over a sequestration is that it does not involve the sacrifice of a going business, and very often the deed provides for the business being carried on by the truster under supervision.

I am unable to see how the granting of such a deed can have the effect of depriving the licensee of the benefit of his certificate. In this respect the position of the trustee for creditors is not materially different from that of a manager, because he is accountable to the truster, and his powers come to an end when the purposes of the trust are fulfilled.

For reasons which I shall presently state, this point does not directly arise for decision, but it is to be kept in view in considering the form and language of the complaint.

The complaint is founded on the 17th section of the Act of 1862. Now, the offence as declared by that section is, the "trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of the Act."

Comparing the statutory definition of the offence with the description of the offence in this complaint, it is evident that there is a material variation of phraseology, because in the complaint the accused is charged with trafficking in spirits "without having obtained a certificate authorising and empowering him, the said Allan Wylie, to keep premises in Linlithgow aforesaid for the sale of exciseable liquors."

It is not necessarily an objection to a complaint that it does not merely echo the words of the statutory enactment provided the meaning be identical with that of the enactment declaring the nature of the offence.

But in this case the variation is material. Under a complaint in the statutory form it would be open to the accused to put forward the certificate granted to his employer Tod as being "a certificate in that behalf" in terms of the statute. Under the actual complaint the accused could not found on his employer's certificate, because the charge against him is in effect that he trafficked in exciseable liquors without having obtained a personal certificate.

We do not know what were the precise grounds on which the Magistrates of Linlithgow convicted the complainer of an offence, but it is sufficient for the disposal of this case that the Magistrates may have convicted Wylie for the supposed offence of trafficking without having obtained a personal certificate.

For these reasons I am of opinion that the complaint does not set forth an offence in terms of the Public-Houses Amendment Act of 1862, and that this is a deviation from the statutory forms which is prejudicial to the accused, and which has prevented substantial justice from being done.

If the Court is of this opinion it follows that the conviction should be **No. 20.**  
quashed.

The LORD JUSTICE-CLERK and LORD KINNEAR concurred.

July 4, 1889.  
Wylie v.  
Thom.

THE COURT pronounced this interlocutor:—"Pass the bill; suspend the conviction and sentence complained of *simpliciter*, and decern."

PARTY—DOUGLAS & MILLER, W.S.—Agents.

NEIL FERGUSON, Appellant.—*A. S. D. Thomson.*  
JAMES STEWART CARNOCHAN (Procurator-Fiscal of Burgh Court at Stranraer), Respondent.—*Ure.*

**No. 21.**  
July 8, 1889.  
Ferguson v.  
Carnochan.

*Breach of the Peace—Cursing and swearing.*—Under a complaint for a breach of the peace, it was proved that the accused, in his house, which was situated in a street in a burgh, had, early on Sunday morning, for a considerable period, used loud language, and oaths and imprecations, which had been heard by two constables at a distance of thirty yards from his house.

The Court *sustained* a conviction, holding that the acts proved amounted to a breach of the peace, as being acts calculated to cause reasonable apprehension to the lieges.

THIS was an appeal by Neil Ferguson, public-house keeper, Stranraer, upon a case stated against a conviction of the offence of breach of the peace obtained before the Burgh Court of Stranraer, upon a complaint at the instance of the Procurator-fiscal of that Court.

HIGH COURT.  
Lord Justice-  
Clerk.  
Ld. M'Laren.  
Lord Ruther-  
furd Clerk.  
Justiciary  
Clerk.

The following facts, *inter alia*, were set forth in the case as proved:—"That shortly before three o'clock on the morning of Sunday, 7th April 1889, a light was seen, and the appellant was heard making a noise and disturbance, and using loud language within his premises in Charlotte Street, Stranraer, same being a licensed public-house, by two constables on duty, who were going past said premises on their rounds on the morning in question.

"The noise continued for some time, but at first was not so great, and the constables, on returning about an hour afterwards, found the noise still continuing, and which they heard in Castle Street, at a part thereof about thirty yards off, and which consisted of cursing and swearing against Lord Stair, and sending him to hell, apparently in a dispute on Home Rule. The constables could not swear that it was the appellant who was cursing and swearing, but they had no doubt that it was his voice, as they knew his voice. There was no other disturbance in said street except at the premises above referred to. The premises are situated in the centre of Charlotte Street, with an hotel opposite, and private dwelling-houses and a shop next thereto.

"The question of law for the opinion of the High Court of Justiciary is—Whether the appellant, on the facts so proved, is guilty of the crime charged?"

Argued for the appellant;—There was no breach of the peace here. The alleged disturbance consisted simply of loud talking in a private house, and did not cause alarm to any person in the house or outside of it.<sup>1</sup>

Argued for the respondent;—A breach of the peace might take place

<sup>1</sup> Ritchie v. M'Phee, Oct. 25, 1882, 5 Couper, 147, 10 R. (Just. Cases) 9; Simon v. Reid, March 20, 1879, 4 Couper, 420; Armour v. Macrae, March 9, 1886, 1 White, 58; Buist v. Linton, Nov. 20, 1865, 5 Irvine, 210; Galbraith v. Muirhead, Nov. 17, 1856, 2 Irvine, 520; Banks v. M'Lennan, Nov. 16, 1876, 3 Couper, 359, 4 R. (Just. Cases) 8.

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in a private house.<sup>1</sup> The noise was long-continued, and was such as was calculated to cause alarm to the lieges in a populous part of the town. Actual alarm did not require to be proved. In the cases cited by the appellant, the decision turned upon the charge being defective in one or other of these respects. They were not in point.

At advising,—

LORD JUSTICE-CLERK.—There are two points in this case. The first is, whether the offence charged having taken place in the accused's own premises can constitute a breach of the peace. That point is ruled by the case of *Matthews and Rodden*, which decides, and I think soundly, that a breach of the peace may be committed in a private house.

The second point is, whether the facts disclosed are such that a breach of the peace can be inferred from them. I am of opinion that they are. Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges, not necessarily alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking up of the social peace. The words "to the alarm of the lieges" in a charge of breach of the peace mean that what is alleged was likely to alarm ordinary people, and if continued might cause serious disturbance to the community. In this case what is found proved is that the appellant was making a noise and disturbance and using loud language within his premises at an early hour upon a Sunday morning. He was heard by two constables. About an hour afterwards the constables being again near the premises heard it still continuing, and from a distance of thirty yards were able to hear specific shouts directed against a particular individual accompanied by imprecations. I am of opinion that if a person at three o'clock on a Sunday morning uses loud language and oaths and imprecations so as to be heard at a considerable distance in the street of a town, he commits a breach of the peace, and therefore that the Magistrates had before them facts sufficient to justify them in finding the accused guilty. The facts in this case are almost identical with those in the case of *Matthews and Rodden*, with the exception that in that case there was fighting. But as fighting inside of a house can affect persons outside only in so far as it causes noise in the street, I take it that the case of *Matthews and Rodden* would have been held equally relevant without the allegation of fighting.

LORD M'LAREN.—The question is, whether the facts found to be proved support the conviction, and that involves the consideration of what elements of fact are necessary to constitute the crime of breach of the peace. The clearest case of breach of the peace consists in engaging in hostilities either in the street or in a private ground, for I agree that it makes no difference whether the offence be committed in a public or private place, provided the lieges be alarmed. But breach of the peace is not confined to acts of this description. Breach of the peace means breach of public order and decorum, accompanied always by the qualification that it is to the alarm and annoyance of the public. Articulate noises and cries not calculated to be offensive to anyone have been held not to amount to breach of the peace. On the other hand, where the brawling is of such a kind as to be offensive and alarming, it is not necessary that those who hear it should be alarmed for themselves. It is enough that offensive language should be uttered

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<sup>1</sup> *Matthews and Rodden v. Linton*, Feb. 27, 1860, 3 Irvine, 570.

in a noisy and clamorous manner so as to cause reasonable apprehension in the minds of those who hear it that some mischief may result to the public peace. No. 21.

I am quite satisfied that the language used here, heard in the public street in Stranraer, with the aggravation that it was used at night, and accompanied by noisy conduct, was calculated to be particularly disturbing, and that facts have been proved sufficient to justify the Magistrates in convicting. July 8, 1889.  
Ferguson v. Carnochan.

LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Dismiss the appeal: Affirm the determination of the inferior Judges, and decern."

R. BROATCH, L.A.—PETER PEARSON, S.S.C.—Agents.

ROBERT HOGGAN, Appellant.—*Rhind—Baxter.*

GEORGE MURE WOOD (Procurator-Fiscal of the Justice of Peace Court at Edinburgh), Respondent.—*Gloag—Gillespie.*

No. 22.

July 18, 1889.  
Hoggan v. Wood.

*Public-house—Breach of certificate—Dominoes played for a stake—"Unlawful game"—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 25), Schedule A, No. 2.*—The Form of Certificate for Public-houses in Schedule A, No. 2 of the Public-Houses Acts Amendment (Scotland) Act, 1862, bears that the person licensed shall "not suffer or permit any unlawful games within his premises."

A publican was convicted of the offence of having permitted a number of persons "to play at dominoes for a stake, an unlawful game," within his premises. The Court *quashed* the conviction, holding that the game of dominoes was not "unlawful" in itself, and did not become so by being played for a money stake.

ROBERT HOGGAN, publican, Jock's Lodge, Midlothian, was charged at the instance of George Mure Wood, Procurator-fiscal, before the Justice of Peace Court of the county of Edinburgh, with having been guilty of an offence against the laws for the regulation of public-houses in Scotland, "in so far as, upon the 8th day of May 1889, or about that time," he "did permit or suffer a number of persons unknown to the prosecutor to play at dominoes for a stake—an unlawful game—within his premises at Jock's Lodge aforesaid, contrary to the terms and conditions of his certificate." High Court.  
Lord Justice-Clerk.  
Ld. M'Laren.  
Lord Rutherford Clark.  
Justiciary Clerk.

The accused was convicted, and took a case, in which it was, *inter alia*, set forth that he had permitted certain persons on the date above mentioned to engage in a match or handicap at dominoes within his licensed premises for two bottles of whisky, which were purchased out of the entry-money of the competitors.

The question of law for the opinion of the Court was,—“Whether the playing of the game of dominoes for stakes or prizes in the appellant's said licensed premises in the circumstances stated is an unlawful game, and contrary to the terms and conditions of his certificate?”

Argued for the appellant;—By the terms of his certificate, which was in the form of Schedule A, No. 2,\* appended to 25 and 26 Vict. cap. 35 (which superseded the earlier form of certificate provided by 16 and 17

\* The Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), Schedule A, No. 2, "Form of certificate for public-houses," contains the following proviso,—“Provided that the said shall be licensed and empowered . . . on the terms and conditions following—that is to say, that the said do not suffer or permit any unlawful games therein” (*i.e.*, within his licensed premises).

No. 22.  
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Vict. c. 67), the publican was prevented from permitting the playing of "an unlawful game." At common law no game was unlawful, and "an unlawful game" must therefore be one made so by statute. There was no statement of what was an unlawful game in the Public-House Acts Amendment Act, nor in the Act 9 Geo. IV. c. 58, nor in any of the licensing statutes. Nor was there any definition of an "unlawful game" in any text-books or writers of authority on Scotch law. In the Act of 1621, c. 14,\* however ("anent playing at cards or dice"), "carding and dicing, &c." was prohibited, and though that statute was not yet in desuetude, the game of dominoes was neither the one nor the other, and the facts stated here shewed that it was played merely as a game of skill, and that there was no wagering nor betting on the game. It was contended on the other side that a game played for money's worth was unlawful, and the law of England was invoked in support of this contention. The cases in England, however, did not apply to Scotland. No doubt gambling or keeping a house for that purpose, or permitting it in a licensed house, would be unlawful in Scotland, both at common law<sup>1</sup> and under the Betting Acts, 1874.<sup>2</sup> There was, however, nothing of that sort here. The parties each contributed a small sum, which went to make up the prize for the winner. Such competitions were common all over Scotland, and were perfectly innocent. A game could not become unlawful because of the element of gain to be derived from it in such circumstances as the present.

Argued for the respondent;—In Scotland there were no unlawful games, *i.e.*, unlawful in themselves, for the statutes against golf and football were in desuetude, and the Statute 1621, c. 14, did not, if read aright, forbid any game, but forbade gambling by certain instruments, *viz.*, cards and dice. But some meaning must be given to the phrase "unlawful games" used in the certificate. What was it that would render a game, lawful in itself, unlawful? Playing it for money, for gaming was by the common law of Scotland unlawful, and to keep a house for gaming was by the common law unlawful, the illegality depending upon the illegality of the practices, *i.e.*, the gaming carried on there. The undernoted English cases shewed what it was that constituted gaming. They shewed that, although the game was a game of skill and the stake trifling, yet the offence was committed.<sup>3</sup>

At advising,—

LORD JUSTICE-CLERK.—We heard a very excellent and elaborate argument

\* The Act 1621, cap. 14, provides,—“That no man shall play at cards or dyce in any common house, town, hostellerie, or cookes houses, under the penalty of forty pounds money of this realm, to be exacted of the keeper of the said inns or common houses for the first fault, and losse of their liberties for the next. Moreover, that it shall not be lawful to play in any other private man's house but where the master of the family playeth himself. And if it shall happen any man to winne any sums of money at carding or dycing attour the sum of an hundred merks within the space of twenty-four houres . . . the super-plus shall be consigned within twenty-four houres thereafter in the hands of the thesaurer of the kirk . . . to be employed alwayas upon the poor of the paroche where such winning shall happen to fall out,” &c.

<sup>1</sup> Greenhuff and Others, Dec. 19, 1838, 2 Swinton, 236.

<sup>2</sup> 37 and 38 Vict. cap. 15.

<sup>3</sup> The Queen v. Ashton, Nov. 25, 1882, 1 Ellis and Blackburn, 286; Bew v. Harston, July 2, 1878, L. R., 3 Q. B. Div. 454; Patten v. Rhymer, May 26, 1860, 29 Law Journal, Mag. Cases, 189; Jenks and Others v. Turpin and Another, June 24, 1884, L. R., 13 Q. B. Div. 535; Dyson v. Mason, Jan. 28, 1889, L. R., 22 Q. B. Div. 351.

upon this case, but in the view I take of it the point is a very simple and a very clear one. No. 22.

It appears that the Scotch Public-House Statutes do not, as the English statutes do, contain any prohibition of "gaming," but only a prohibition of "unlawful games," and accordingly no person can be prosecuted in Scotland under these statutes in respect of any game which he permits upon his premises unless it be a game which is "unlawful" either by statute or at common law. July 18, 1889.  
Hoggan v. Wood.

The contention of the respondent, as I understood it, was that any game, if played for a stake, became thereby an unlawful game. I am unable to come to any such conclusion. To play a game for a bet or wager may be "gaming," but I am unable to see, without any statutory enactment to that effect, that a game which is in itself lawful becomes an "unlawful game" because it is played in connection with some wager or stake. We were referred to a number of cases decided under the English statutes, and particularly to a case in which it was held that the playing of the game of "puff and dart" for a stake constituted "gaming." But that case does not settle that the game of "puff and dart" is an unlawful game, it only settled that putting a stake on such a game was "gaming." And the Scottish statute is so expressed that unless it can be shewn that a game is unlawful it cannot be prohibited under that statute, although the playing of it may constitute "gaming."

I wish to add, however, that if a publican permits anything like regular gambling to be carried on within his premises, that is an offence which can be dealt with otherwise.

**LORD M'LAREN.**—I am of the same opinion. I am quite satisfied that the game of dominoes is not unlawful. I am not certain that by the law of Scotland there are any unlawful games. All that I will say is that the Public-Houses Act prohibits the playing within public-houses of unlawful games, if there be any.

**LORD RUTHERFURD CLARK** concurred.

**THE COURT** answered the question of law in the negative, and quashed the conviction.

**MENZIES, BRUCE-LOW, & THOMSON, W.S.**—PARTY—Agents.

**MARIA GRAY, Complainer.**—*W. G. Millar.*

**DAVID DEWAR (Procurator-Fiscal of Burgh of Dundee), Respondent.**—*Salvesen.*

No. 23.

July 18, 1889.  
Gray v. Dewar.

*Application of Summary Jurisdiction Acts—Prosecution in forms prescribed by local Police Act—Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), secs. 3 and 6, subsec. (b)—Dundee Police and Improvement Consolidation Act, 1882 (45 and 46 Vict. c. clxxxv.)—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), sec. 17.—The Summary Jurisdiction Act, 1881, sec. 3, enacts,—“The provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3d section of the Summary Procedure Act, 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily, . . . provided that, where there is a general or local Police Act in force, it shall be optional in police prosecutions either to use the forms pre-*

No. 23. scribed by such Act or the forms provided by the Summary Jurisdiction Acts." By sec. 6, subsec. (b), of the same Act it was provided that in proceedings under July 18, 1889. the Summary Jurisdiction Acts where the fine does not exceed £20 the alternative imprisonment shall not exceed two months. Gray v. Dewar.

On a complaint brought in Dundee, under the form prescribed by the Dundee Police and Improvement Consolidation Act, 1882, the accused was charged and convicted of a second offence of shebeening, and sentenced by the magistrate to pay a fine of £15 or to be imprisoned for three months, in terms of sec. 17 of the Public-Houses Acts Amendment (Scotland) Act, 1862.

The Court *suspended* the sentence, holding that the above provisions of the Summary Jurisdiction Act of 1881 applied to the complaint, and that, therefore, the period of imprisonment adjudged was illegal, in respect that it should not have exceeded two months.

HIGH COURT.  
Lord Justice-  
Clerk.  
Ld. M'Laren.  
Lord Ruther-  
furd Clark.  
Justiciary  
Clerk.

ON 26th June 1889 Maria Gray, Todburn Lane, Dundee, was charged at the instance of the Procurator-fiscal of the burgh of Dundee with a complaint in the form of the Dundee Police and Improvement Consolidation Act, 1882, in so far as "she had trafficked in whisky, or other exciseable liquor, in her house without having obtained a certificate in that behalf, contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, particularly section 17 thereof."\* She was convicted and, as it was a second offence, she was adjudged to forfeit and pay the sum of £15 of penalty, and in default of immediate payment thereof to be committed to prison for the period of three calendar months.

She brought this bill of suspension, and argued;—The 3d section of the Summary Jurisdiction Act of 1881 made the provisions of the Summary Jurisdiction Acts applicable to this case, and its application was not restricted by the provision in the section, that in any general or local Police Act in force it should be optional in police prosecutions to use the forms contained in that Act.† That being so, the sentence here was con-

\* The Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), sec. 17, enacts,—“Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of this Act shall be guilty of an offence, and on being convicted thereof shall, for each offence, forfeit and pay the full penalties provided in the 30th section of the said first recited Act (the Act 9 George IV. cap. 58) . . . and in default of immediate payment thereof shall be imprisoned for the entire periods respectively prescribed by the said 30th section of the said first recited Act.”

The Act 9 Geo. IV. cap. 58, sec. 30, enacts that “For the second offence the offender shall forfeit the sum of £15, with the expenses of conviction, to be ascertained on conviction; and in case such penalty and expenses shall not be paid within the space of four days next after such second conviction shall have taken place, then the offender shall suffer imprisonment, upon his own charge and expenses, for a period of three calendar months.”

† The Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), sec. 3, enacts,—“The provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3d section of the Summary Procedure Act, 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily or under the provisions of the Summary Jurisdiction Acts, . . . provided . . . that where there is a general or local Police Act in force it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts.”

The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 3, enacts,—“The provisions of this Act may be applied to . . . (2) All proceedings to be taken before any Sheriff, Justices, or Justice, or Magistrate in

trary to the provisions of the 6th section of the Act, which provided that where the amount adjudged to be paid exceeded £5, and not £20, the period of imprisonment should only be two months.\* The matter was foreclosed by authority.<sup>1</sup> It was impossible for the Court to reduce the sentence without entering upon the merits of the case, as the amount of sentence was discretionary in the Judge in the Court below within certain limits.

Argued for the respondent;—This prosecution was brought under the private Dundee Act of 1882, and not under the Summary Jurisdiction Acts at all. The provision in section 3 of the Summary Jurisdiction Act of 1881 excluded the application of those Acts. The sentence was in conformity with the provisions of section 17 of the Public-Houses Acts Amendment (Scotland) Act, 1862, and should be sustained. In any event, the sentence might be limited to two months in the discretion of the Court.

**LORD JUSTICE-CLERK.**—It appears from the preamble of the Summary Jurisdiction Act of 1881, which sets forth that in England power has been given to magistrates to mitigate penalties, that one of the objects which the Act was passed to effect was to confer upon the Courts of summary jurisdiction the power to mitigate and modify punishments in summary proceedings.

The 3d section of the Act provides that “the provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3d section of the Summary Procedure Act, 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily.” The section then goes on to provide that certain specified classes of cases shall fall within its provisions, and contains the proviso that “where there is a general or local Police Act in force, it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts.” It is said that if a prosecutor adopts the forms of a general or local Police Act he thereby renders nugatory, and is entitled to render nugatory, the provisions in favour of accused persons to be found in the Summary Jurisdiction Acts. That is a result at which we could not arrive without the very clearest warrant in the words of the statute. I find no such warrant. I do not think that because the prosecutor is permitted to use the forms prescribed by other Acts, it is therefore to be implied that the use of these forms shall take away from persons brought before Courts of summary jurisdiction privileges given to them by the Act. It would be anomalous and extraordinary if it lay with the prosecutor, by his choice of one particular form of procedure as distinguished from another, to settle what power the magistrate shall have in the matter of punishment.

Scotland for the prosecution of any person who has committed, or is charged with having committed, any offence or act for which, under the provisions of any Act of Parliament, he is liable, upon summary conviction before any Sheriff, Magistrate, Justices, or Justice, to be imprisoned or fined, or otherwise punished.”

\* Section 6 of the Act 44 and 45 Vict. cap. 33, enacts,—“In all proceedings under the Summary Jurisdiction Acts . . . (b) where a warrant of imprisonment is granted, whether in default of payment of a penalty, or . . . when the amount adjudged to be paid . . . exceeds £5 but does not exceed £20, the period of imprisonment shall not exceed two months.”

<sup>1</sup> Linton v. Wilson or Sherry, June 4, 1887, 1 White, 410, 14 R. (Just. Cases) 46; Nicol v. McNeill, July 13, 1887, 1 White, 416, 14 R. (Just. Cases) 47.

**No. 23.**

July 18, 1889.  
Gray v. Dewar.



No. 23. If it be the case then that the proceedings, notwithstanding the form which is adopted, are under the Summary Jurisdiction Acts, sec. 6 of the Act of 1881 applies, and that section, taken along with sec. 3, provides that both in the case of past and future Acts of Parliament which contain provisions for imprisonment in default of payment of a penalty, the period of imprisonment shall have a certain specified relation to the amount of the penalty.

July 18, 1889.  
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But I do not think that this question is open. I think the case of *Linton v. Sherry* has decided it. In that case a similar prosecution to this was brought under the forms of a Police Act before a Sheriff-substitute, and the Sheriff-substitute, acting upon his interpretation of the Summary Jurisdiction Acts, modified the penalty which the Police Act made imperative. The prosecutor appealed, and maintained that the prosecution having been brought under the forms of the Police Act, and not of the Summary Jurisdiction Acts, the Sheriff-substitute had no power to modify the penalty. The Court unanimously refused the appeal without calling on counsel for the respondent, and held that the Sheriff-substitute had power to modify the penalty. I think that decision is expressly in point. For the reasons already stated, my opinion coincides with the result at which the Court arrived in that case. I therefore move your Lordships to suspend the sentence.

LORD M'LAREN.—It is easy to see without going beyond the words of the statute itself that the Summary Jurisdiction Act of 1881 was enacted as part of a general scheme of policy which the Legislature was then engaged in carrying out. The preamble refers to the provisions of the relative English statute, and throughout the clauses of the Act of 1881 two general purposes can be read, the establishing uniformity of procedure in the inferior Courts, and the establishing of a system of sentences in which the period of imprisonment should bear some definite relation to the amount of the unpaid penalty. But for the clause which refers in terms to police prosecutions, I apprehend there could be no doubt that this statute is of universal application to summary prosecutions. I think that so much was decided in terms in the case of *Nicol*, although there the speciality as to the meaning of the exception with regard to police prosecutions did not arise. That is the exception upon which the respondent founds. The question is, whether the clause gives an option to use what are colloquially called the "forms" of the local Acts—I mean those parts of the schedules of the local Acts which prescribe the *formulae* of complaints, interlocutors, and sentences—or whether the expression the "forms" of the local Acts includes all that relates to the declaration of the offence and its punishment, as well as matters incidental to the prosecution. This is a pure question of construction, and I think that whether we look at the meaning of the language or to the probabilities of the case, we must arrive at a conclusion favourable to the view maintained by the complainer. Looking to the language of the section, if it had been intended to except police prosecutions in general from those provisions of the Act which relate to sentences and the mode of their enforcement, it would have been very easy to do that by appropriate words; but then the proviso would not have been that it should be optional to use the "forms" of these Acts, but that it should be optional to use the "powers" of these Acts or to proceed "under" these Acts. I cannot hold that the use of the word "form" here is unintentional, and I see no reason for giving it a larger construction than the extent naturally suggests. Then as to the probabilities of the case, it seems

to me that if it had been intended to treat police prosecutions exceptionally, not only as to forms, but also as to substance, it would have been necessary to deal in some way with the subject of those prosecutions in those provisions relating to punishment which are the chief feature of the Act. And while it is conceivable that the Legislature might have meant to legalise a different scale of punishment in the case of Police Courts from that existing in Sheriff and other Courts, it is in the highest degree improbable that the difference would take the shape of empowering police magistrates to impose heavier sentences than the Sheriffs could impose. The absence of any separate provisions applicable to police cases in the clause which regulates the duration of sentences strongly confirms me in the opinion that it was not intended that in the matter of sentences there should be any difference between the powers of police magistrates under local Acts and the powers that were to be exercised by a proper Court of summary jurisdiction.

I agree that this point is in substance and almost in terms decided by the case of *Sherry*.

I am also of opinion that we must suspend the sentence *simpliciter*, because it is impossible for us to know what lesser sentence the Magistrate might have given if he had known that he had the power to mitigate the penalty and the period of imprisonment.

LORD RUTHERFURD CLARK.—I think it important to follow decisions, so that the law should be fixed and known. I think that the case of *Sherry* is conclusive of the case which we have heard, and that we must follow that decision. It follows that the sentence must be suspended. On the question whether we can modify the punishment, I quite concur with your Lordships.

THE COURT quashed the conviction, and suspended the sentence.

ROBERT D. KER, W.S.—PARTY—Agents.

July 18, 1889.  
Gray v. Dewar.

1841





# CASES

DECIDED IN

## THE COURT OF SESSION, &c.,

1888-89.

### WINTER SESSION.

REV. CHARLES W. EDMONSTONE AND ANOTHER (Lumsden's Trustees),  
Pursuers (Respondents).—*Murray—C. J. Guthrie.*  
SIR WILLIAM S. SETON, BART., AND OTHERS, Defenders (Reclaimers).—  
*Sir Charles Pearson—Low.*

No. 1.

Oct. 16, 1888.  
Edmonstone  
v. Seton.

*Right in Security—Real Burden—Obligation ad factum præstandum—Obligation to purchase and transfer consols.*—Held that a bond and disposition in security binding the grantor to purchase and to transfer to the grantee the capital stock or sum of £5000 3 per cent Consolidated Bank Annuities, and until such purchase and transfer to pay to the grantee the interest payable on that amount of stock, was effectual to make these obligations real burdens on the lands conveyed.

By two bonds and dispositions in security, dated in 1849 and 1858 respectively, the Rev. Henry Thomas Lumsden, heritable proprietor of the lands of Guisway or Cushnie in Aberdeenshire, acknowledged to have borrowed, from the trustees of a marriage-settlement between him and his wife in the English form, two sums of £5000 and £3500 respectively 3 per cent Consolidated Bank Annuities then standing in their names as trustees in the books of the Bank of England, which had accordingly been transferred to his name in the books of the bank. After narrating the loan in question, the first of the two deeds proceeded,—“Therefore I do hereby bind and oblige myself, and my heirs, executors, and representatives whomsoever, at any time during my life or after my death, when required in manner after provided for by the said Sir Archibald Edmonstone, &c. [the trustees] or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor . . . to purchase and transfer, or procure to be transferred in the books of the said Governor and Company of the Bank of England, unto and into the names or name of the said Sir Archibald Edmonstone, &c. . . or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor, the capital stock or sum of £5000 three pounds per centum Consolidated Bank Annuities, and that upon or within the day or time to be specified in the notice to be given to or left for me in manner after mentioned: As also I do hereby bind and oblige myself and my foresaids from time to time, and at all times hereafter, until the said sum of £5000 three pounds per centum Consolidated Bank Annuities shall be actually so purchased and transferred into the names or name of the said Sir Archibald Edmonstone, &c. . . or the survivors or survivor of them, or their or his assigns, or the executors or administrators of such survivor as aforesaid, to well and truly pay, or cause to be paid, unto the

1st DIVISION.  
Lord Kinnear.  
B.

No. 1.

Oct. 16, 1888.  
Edmonstone  
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said Sir Archibald Edmonstone, &c., or the survivors or survivor of them, or their or his foresaids, such sum and sums of money as shall be equal to the interest and dividends which from time to time, until such purchase and transfer as aforesaid shall be actually made, would have accrued due and become payable on or in respect of the said capital stock transferred into my name as aforesaid, if the same had not been so transferred, but had been left standing in the names of the said Sir Archibald Edmonstone, &c. . . . in the said books of the Governor and Company of the Bank of England, and on the respective days and times at which the same interest or dividends would respectively have become due and payable."

In security of these obligations the granter of the deed disposed of his estate of Cushnie to the trustees. There was this further provision in the deed:—"Provided always, as it is also hereby expressly provided and declared, that if I, or my heirs, executors, or administrators, shall make default in making the transfer of the said capital stock or payment of interest or dividends aforesaid, or any of them, or any part or parts thereof, respectively upon or within the respective days or times hereinbefore mentioned for transfer or payment thereof respectively, or which shall be specified in any notice given to or by me under or by virtue of the conditions hereinbefore contained, then, and in any of such cases, it shall be lawful for the said Sir Archibald Edmonstone, &c., or the survivor or survivors of them, or his or their foresaids, to recover payment of such a sum as will at the time be sufficient to purchase the foresaid capital stock or sum of £5000 three pounds per centum Consolidated Bank Annuities, and as will replace the whole dividends or interests which may then be due thereon, and all costs, charges, damages, and expenses, which they, the said Sir Archibald Edmonstone, &c., or the survivors or survivor of them, or their or his foresaids, shall or may incur, sustain, or be put unto by reason or on account of default being made in making the transfer and payments aforesaid, or any of them, or any part or parts thereof."

The second bond and disposition in security, dated in 1858, dealing with the £3500 loan, was in similar terms.

Mr Lumsden died on 19th November 1867 leaving a widow but no children. Up to the time of his death he had regularly paid and accounted for the interest or dividends on the stocks above mentioned, but they had not been re-transferred to the trustees. By his will, dated 25th February 1867, he directed that the trust-funds, which included the stocks, should, subject to his wife's liferent, be divided among the several legatees therein mentioned. The estate of Cushnie he had by disposition and settlement disposed, on 28th October 1867, to his wife, in the event of her surviving him, in liferent for her liferent use allanarly, and to a series of heirs in fee. Mrs Lumsden died in 1886.

This action was raised in July 1887 by the Rev. C. W. Edmonstone and William Trotter, the surviving trustees under the marriage-settlement of the spouses, and William Trotter, the executor under Mr Lumsden's will, against Sir William S. Seton and others, the heirs of entail called in the destination of the lands of Cushnie, to have it found and declared that by the two bonds and dispositions before mentioned valid securities had been created over the estate of Cushnie for the obligation to purchase and re-transfer into the names of the trustees the stocks which had been borrowed, or the two sums of £5000 and £3500, or a sum equal to the value of the stocks, either at the date of the bonds or of citation, or for an annual payment of the sums of interest due thereon until the stocks should be re-transferred. There were other alternative conclusions, which need not be specified.

The defenders pleaded, *inter alia*;—(2) The said two bonds are not

effectual incumbrances upon the said estate, in respect that they are truly obligations *ad factum præstandum*, or otherwise are obligations for the payment of an indefinite and unascertained amount. (3) The obligation undertaken by the granter of the said bonds being of a personal nature, is primarily enforceable against his moveable estate, and the holders of his moveable estate have no right of relief against his heritable estate.

On 31st January 1888 the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Finds that the bonds and dispositions in security libelled in the summons create good and effectual securities over the lands thereby disposed, and that the heirs or gratuitous disponees of Henry Thomas Lumsden take the said lands under burden of the said securities without relief against his executors," &c.\*

No. 1.

Oct. 16, 1888.  
Edmonstone  
v. Seton.

\* "OPINION.—The first question is, whether the two bonds and dispositions in security libelled in the summons are good charges upon the lands thereby disposed. The late Mr Lumsden had borrowed from his marriage-contract trustees two sums of £5000 and £3500 3 per cent Consolidated Annuities standing in their names in the books of the Bank of England. These sums were accordingly transferred from their names to his, and by the bonds in question he binds himself, and his heirs, executors, and representatives, when required, in a certain manner, or if not required during his life, then within six months after his death, to purchase and transfer, or procure to be transferred to the trustees, the like sums of £5000 and £3500 3 per cent consols, and in the meantime to pay to them the amount of the interest which would have become due and payable to them upon the transferred stock if it had been left standing in their names. In security of these obligations he disposes his lands of Cushnie or Guisway and others; and in case the granter or his heirs or executors shall make default in transferring the stock or in paying interest, each of the bonds contains a provision that in that case it shall be lawful for the trustees to recover payment of such a sum as will at the time be sufficient to purchase the stock and replace the interest which may be due.

"The defenders maintain that these are not effectual securities upon the lands, because the obligations secured are *ad factum præstandum*, or otherwise are obligations for payment of an indefinite and unascertained amount. The primary obligation to purchase and transfer a certain amount of Government stock is in form an obligation *ad factum præstandum*. But it results in the payment of money; and it does not appear to be very material to the question whether it is in form an obligation to pay or an obligation to transfer.

"There can be no doubt that an obligation *ad factum præstandum* may be made a real burden on land, and the only question in either view is, whether it is sufficiently definite to satisfy the rule of law that no indefinite or unknown burden can be created on land.

"On this question I am of opinion that the defenders' plea is not well founded. An obligation to assign a definite proportion of the National Debt is not, in my judgment, an indefinite obligation in the sense of the rule upon which they rely. I do not think that the cases cited of *Stein's Creditors* and *Tod v. Dunlop* are apposite. But even if it were to be held that an obligation to transfer the specified amount of Government stock when required to do so is too indefinite to be well secured on land, the same objection would not apply to the obligation which is immediately prestable to pay annuities equal to the interests payable in respect of such stock. It is said that the undertaking to pay interest is merely accessory, and that the validity of the security must depend upon the character of the principal obligation alone. But the amount of the interest is in no way affected by the considerations which are said to make the principal obligation uncertain. It is not the interest upon an indefinite or variable capital sum that is to be paid, but a sum equal to the interest which the Government pays upon £5000 or £3500 of 3 per cent Consolidated Annuities. In other words, it is an annuity equal to three per cent upon each of these specified sums. The obligation to pay such annuities is perfectly definite, and there appears to be no reason why it should not be made a burden upon land."



## No. 1.

Oct. 16, 1888.  
Edmonstone  
v. Seton.

The defenders reclaimed.

Argued for them ;—(1) The obligation to purchase and transfer the stocks which it was sought to enforce against the defenders was an obligation to pay an indefinite sum of money, and being so could not be effectually made a real burden upon land.<sup>1</sup> Assuming that it was an obligation *ad factum præstandum*, it was not such an obligation as was *inter naturalia* of the right of possession, and so could not be the subject of a real burden. (2) The obligation to pay interest was accessory to the obligation to pay the capital sums, and could not be validly imposed as a real burden any more than the other. It was not an obligation of a continuing nature, but only lasted so long as the capital remained unpaid.

The respondents were not called upon.

LORD PRESIDENT.—The Lord Ordinary has not disposed of the whole conclusions of the summons, but the finding in his interlocutor is that “the bonds and dispositions in security libelled in the summons create good and effectual securities over the lands thereby disposed, and that the heirs or gratuitous disponees of Henry Thomas Lumsden take the said lands under burden of the said securities without relief against his executors.” The view I take of the case depends upon a very simple principle. There are two obligations which were undertaken by the late Mr Lumsden, both of which are very distinct from one another, the one being an obligation *ad factum præstandum*, and the other to make a money payment of interest. The obligation *ad factum præstandum* is in these words, “to purchase and transfer, or procure to be transferred in the books of the Governor and Company of the Bank of England . . . the capital stock or sum of £5000 3 per cent Consolidated Bank Annuities, and that upon or within the day or time to be specified in the notice to be given to or left for me in manner after mentioned.” That is certainly not an obligation to pay money ; no doubt it is an obligation, the performance of which may involve an expenditure of money, but that does not make it the less an obligation *ad factum præstandum*. The debtor in such an obligation may not be able to fulfil it without a money payment, but what he has to do in discharging the obligation is to perform certain acts. He has in the present case to put the creditor in the obligation in possession as owner or transferee of certain stock. That may cost him more or less according to the price of the stock at the time, but the obligation upon him is to place the trustees in the position in which they were before the bonds and dispositions were granted, that is, to make them owners *qua* transferees of £5000 and £3500 three per cent Consolidated Annuities.

Another obligation which was laid upon him at the same time was to pay interest at the rate of three per cent upon these two sums. That is a money obligation of an ascertained amount, and accordingly the objection, that that obligation which it was sought to secure is too indefinite, falls to the ground.

The first obligation is to perform an act which can only be done in one way,

<sup>1</sup> Bell's Comms., i. (7th ed.) 730 ; Stein's Creditors v. Newnham, Everet, & Co., 1789, M. 1158, affd. H. of L. Feb. 25, 1791, 3 Pat. Appa. 345 ; Magistrates of Edinburgh v. Begg, Dec. 20, 1883, 11 R. 352 ; Tailors of Aberdeen v. Coutts, Dec. 20, 1834, 13 S. 226, H. of L. May 23, 1837, 2 S. & M'L's Appa. 609, and Aug. 3, 1840, 1 Robinson's Appa. 296 ; Tod v. Dunlop, Dec. 13, 1838, 1 D. 231 ; M'Donald & Lawson v. Place, Feb. 24, 1821, Hume's Decna. 544.

and the other is to pay a definite and stated sum of interest. I think the bonds are not subject to the objections which have been urged.

No. 1.

Oct. 16, 1888.  
Edmonstone  
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LORD MURE concurred.

LORD SHAND.—If it could have been successfully maintained that an obligation *ad factum præstandum* cannot be made a real burden, there would have been room for argument in support of the reclaiming note, but, as the Lord Ordinary says, there is no doubt that such an obligation can be constituted a real burden, and that proposition has not been disputed. An obligation by one person to make or to procure the transference of certain specified stock into the name of another is an obligation *ad factum præstandum*, and the circumstance that money (the amount of which may be more or less according to circumstances) may have to be paid or laid out in order to the performance of the obligation does not affect the character of the obligation or make it in any way indefinite.

But further, the undertaking to pay interest is practically an obligation to pay three per cent upon a certain sum; and there is nothing of an indefinite character in that. The argument appears to me to fail upon both points.

LORD ADAM concurred.

THE COURT adhered.

COWAN & DALMAHOY, W.S.—MACKENZIE & KERMAK, W.S.—Agents.

ANDREW HENDERSON, Pursuer (Reclaimer).—*Rhind*.

No. 2.

MRS I. M. BURD OR HENDERSON, Defender (Respondent).—*Salvesen*.

Oct. 17, 1888.  
Henderson v.  
Henderson.

*Process—Reclaiming Note—Expiry of reclaiming days in vacation—Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), sec. 20.*—The 20th section of the Personal Diligence Act, 1838, provides that a Lord Ordinary's judgment in a petition for recall of arrestments "shall be subject to the review of the Inner-House by a reclaiming note duly lodged within ten days from the date thereof."

In cases where the time for reclaiming expires on a day when the Clerk's office is not open, the provision of the statute is sufficiently complied with if the reclaiming note is lodged on the first day thereafter on which it is open.

A PETITION was presented by Mrs I. M. Burd or Henderson for recall of arrestments used by her husband Andrew Henderson on the dependence of an action of count, reckoning, and payment at his instance against her. 1ST DIVISION.  
Lord Lee.  
B.

On 18th July 1888 the Lord Ordinary (Lee) recalled the arrestments on consignment of £120.

Henderson reclaimed against that interlocutor, but the reclaiming note was not lodged till Tuesday, 31st July, instead of Saturday, 28th July, the last of the reclaiming days, in consequence of the Clerk's office being open only on Tuesday, Wednesday, and Thursday during vacation.

In the Single Bills, on 16th October following, the respondent objected to the competency of the reclaiming note on the ground that it had not been lodged within the ten days allowed for lodging a reclaiming note by the 20th section of the Personal Diligence Act, 1838.\*

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\* The Personal Diligence Act, 1838, sec. 20, provides that "it shall be competent to the Lord Ordinary in the Court of Session before whom any summons containing warrant of arrestment shall be enrolled as Judge therein, or before whom any action on the dependence whereof letters of arrestment have been

## No. 2.

Oct. 17, 1888.  
Henderson v.  
Henderson.

Argued for the respondent;—This was a ten days' interlocutor, and a reclaiming note fell to be lodged within ten days from the date of the interlocutor, whether the reclaiming days expired during session or in vacation. The case of *Lockhart*<sup>1</sup> was a direct authority, and the judgment in it had been approved in the subsequent case of *Joel*.<sup>2</sup> If the Clerk's office in the Register House was shut on the day on which the reclaiming days expired, the reclaiming note ought to have been taken to the Clerk's private residence.

Argued for the claimer;—According to the ordinary rule the reclaiming note would have been in time if lodged upon the first box-day. The Clerk's office where the reclaiming note fell to be lodged was not open on Saturday, 28th July—the tenth day after the date of the interlocutor—nor was it open till Tuesday the 31st, on which day it was lodged. That was sufficient.<sup>3</sup> The 94th section of the Court of Session Act, 1868, had a bearing on the case. It provided that if the interlocutor had been signed in vacation, it could have been reclaimed against upon the next box-day in vacation. It was only reasonable that the same rule should apply to interlocutors signed during session—where the reclaiming days did not expire till vacation. In any view, *Lockhart's* case was distinguishable from the present, because there the reclaiming note was not lodged till the box-day.

LORD PRESIDENT.—The interlocutor which is reclaimed against in this case was pronounced on 18th July last, and according to the provisions of the Personal Diligence Act the reclaiming note ought to have been lodged within ten days afterwards. These ten days expired on the 28th July, which was a Saturday, and the provision of the Act requiring the reclaiming note to be lodged within ten days from the date of the interlocutor reclaimed against appears to have been incapable of fulfilment, because the Clerk's office at which the reclaiming note falls to be lodged is not open on Saturdays, and there was no one to receive it. It seems to me that when a limited time is allowed by the Legislature for the exercise of a privilege of this kind, that must always be subject to the implied condition that it is possible to perform the act in question within the specified time. Here that was impossible. If we were to hold that in consequence of the impossibility of implementing the statutory obligation to lodge the reclaiming note within the specified period there was an obligation to lodge it within a shorter time, we should be construing the statute in a manner quite unprecedented. In this case it would limit the reclaiming days to eight instead of to ten, which are given by the statute. I therefore think that this objection must be repelled.

In repelling the objection I do not think we are doing anything to interfere with the judgment in the case of *Lockhart*, which has been cited. I should be

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executed has been or shall be enrolled as Judge therein, and to the Lord Ordinary on the Bills in time of vacation, on the application of the debtor or defender by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recall or to restrict such arrestment, on caution or without caution, . . . provided that his judgment shall be subject to the review of the Inner-House by a reclaiming note duly lodged within ten days from the date thereof."

<sup>1</sup> *Lockhart v. Cumming*, May 27, 1851, 13 D. 996, 23 Scot. Jur. 459.

<sup>2</sup> *Joel v. Gill*, Jan. 11, 1860, 22 D. 357, 32 Scot. Jur. 159.

<sup>3</sup> *Craig v. Jex Blake*, March 16, 1871, 9 Macph. 715, 43 Scot. Jur. 363; *Russell v. Russell*, Nov. 12, 1874, 2 R. 82.

sorry to do so, because that judgment is supported not only by the authority of the Judges who decided the point, but also by the authority of the Judges of the other Division who decided the subsequent case of *Joel v. Gill*, and who took occasion in doing so to draw a distinction between it and *Lockhart's* case, and stated that they left the judgment in *Lockhart's* case undisturbed.

No. 2.

Oct. 17, 1888.  
Henderson v.  
Henderson.

LORD MURE.—I have always understood that where a reclaiming note is appointed to be lodged within a specified time, and the day on which that time expires is one on which the offices are not open, the note will be in time if it is lodged, as was the case here, at the first possible opportunity after the expiry of the days within which it is provided that this shall be done. It seems to me, therefore, that there was here a sufficient compliance with the provisions of the statute. If we were to decide otherwise, we should be shortening the time permitted by the statute.

LORD SHAND.—I am of the same opinion.

LORD ADAM.—I concur.

THE objection was repelled, and the case was sent to the Summar Roll.

WILLIAM OFFICER, S.S.C.—D. HOWARD SMITH, Solicitor—Agents.

DAVID SCOTT COWANS AND OTHERS (Daniel Cowan's Trustees),—  
Pursuers and Real Raisers.

No. 3.

HENRY COWAN, Claimant (Reclaimer).—*Sir Charles Pearson.*

Oct. 17, 1888.  
Cowan's Trus-  
tees v. Cowan.

MES MARGARET COWAN OR HODGE AND OTHERS, Claimants (Respondents).—*Murray—Salvesen.*

*Process—Multiplepointing—Claimants benefiting by the litigation of one of their number—Expenses.*—In a multiplepointing where only one of several next of kin, who were all called and had the same interest in the fund *in medio*, put in a claim and succeeded in making it good against the heir-at-law, the others who appeared afterwards were ordained to pay their shares of the whole expenses incurred by him in the litigation, not excluding the expenses of a part of it in which he had been unsuccessful.

(VIDE *ante*, March 19, 1887, 14 R. 670.)

The trustees of the late Daniel Cowan brought a multiplepointing for the purpose of settling certain disputes which had arisen between the heir-at-law and the next of kin in regard to the succession to the trust-estate. The heir-at-law and the next of kin of whom there were four were called as defenders. Henry Cowan was the only one of the next of kin who lodged a claim at this stage, and the question whether the estate fell to be dealt with as heritable or moveable was subsequently litigated between James Cowan, the heir-at-law, and him, with the result that the claim for the former was repelled by the Lord Ordinary (Trayner) on 9th November 1886. The heir-at-law reclaimed, and on 19th March 1887 the First Division recalled the Lord Ordinary's interlocutor, and found, *inter alia*, "that the undisposed of residue falls to be divided between the competitors, the heir and executors of the testator," in certain proportions, and the reclamer was found entitled to expenses since the date of the Lord Ordinary's interlocutor, and it was remitted to the Lord Ordinary to proceed with the cause—(March 19, 1887, *ante*, vol. 14, 670.)

1st Division.  
Lord Trayner.  
B.

On 20th May following, the Lord Ordinary decerned against Henry Cowan for £42, 2s. 6d., the amount of expenses found due by him as taxed,

No. 3. reserving to him the right to recover from the other next of kin their proportion of that sum.

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A claim was thereafter lodged for Mrs Margaret Cowan or Hodge and the two other next of kin, who claimed each to be preferred to one-fourth of the moveable estate, and on 27th January 1888 the Lord Ordinary pronounced the following interlocutor:—"Ranks and prefers the claimant James Cowan to the sum of £45, 17s. 1d., with interest corresponding thereto since the date of consignment, being his share of the fund *in medio*, in terms of the interlocutor pronounced by the First Division on the 19th March 1887: Finds the claimant Henry Cowan entitled to payment out of the fund *in medio* of the sum of £46, 12s., being three-fourths of the expenses in which he was found liable by the interlocutor of 20th May 1887, and three-fourths of the estimated expense incurred by him under the reclaiming note, No. 15 of process: Further, ranks and prefers the claimants Henry Cowan, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans, each to the extent of one-fourth of the balance of the fund *in medio*."

Henry Cowan reclaimed, and argued;—The other next of kin, who were now to benefit by his having come forward and prevented the heir-at-law from carrying away the whole estate, must bear an equal share with him of the expenses of vindicating the fund.<sup>1</sup> That applied both to the Outer and to the Inner House expenses, although it was true that he had not succeeded in holding the Lord Ordinary's interlocutor in its entirety in the Inner-House. He was respondent there, and it could not be said that his contentions were of a reckless nature. The whole expenses ought to be deducted from the fund *in medio* before division, or three-fourths of them ought to be paid to Henry by the other next of kin.

The respondents, who were Mrs Margaret Cowan or Hodge and the other next of kin, argued;—The reason why they had held back at first was that they were on terms for an amicable settlement of the case, in which Henry Cowan had refused to join them. They could not in any case be called upon to contribute to the expenses of that part of the action in which Henry had been unsuccessful. None of the authorities went that length.

LORD PRESIDENT.—In this case the competition was between the heir and one of the four next of kin of the testator. The fund *in medio* consisted of heritage, but the Lord Ordinary, on 9th November 1886, found that the property forming the fund *in medio* was "to be regarded and dealt with as moveable succession." In a reclaiming note against that interlocutor we modified that judgment, and found that the heir was entitled to a certain portion of the fund *in medio*. The question between the heir and the executor having thus been determined, the three next of kin who had not appeared before put in a claim, in which they asked to be allowed to participate in the fund which had been recovered by the one executor, and the question is on what terms they ought to be permitted to participate in this fund.

The principle upon which questions of this kind fall to be decided is well settled. Those persons who are interested in an estate, but who do not come into Court, but leave the question to be fought out by one of their number who is more valiant than they, must, when they claim to participate in the fund

<sup>1</sup> Morgan v. Morris, March 11, 1856, 18 D. 797, 28 Scot. Jur. 346; Binnie's Trustees v. Henry's Trustees, July 3, 1883, 10 R. 1075; Jaffé v. Carruthers, March 3, 1860, 22 D. 936, 32 Scot. Jur. 395.

which has been recovered by these means, bear a share of the expenses which have been incurred by him in vindicating and getting possession of the fund. That is a very obvious principle of equity, and in ordinary cases I think the way in which it is to be applied can be easily determined. In the present case the Lord Ordinary has found that Henry Cowan, the successful litigant who has come forward and fought the case for the next of kin, is entitled to payment out of the fund *in medio* of "three-fourths of the expenses in which he was found liable by the interlocutor of 20th May 1887, and three-fourths of the estimated expense incurred by him under the reclaiming note." I do not think that that is consistent with the principle to which I have referred. In order to give effect to the principle, we must do one of two things. Either we must order that three-fourths of the expenses must be paid over into the pockets of the successful litigant, or the entire amount of the expenses must be deducted before division of the fund *in medio*. Either of these courses is consistent with the principle in question. But the course which has been followed by the Lord Ordinary is inconsistent with it, because he appoints only three-fourths of the expenses in which Henry Cowan was found liable to be deducted from the fund *in medio*. He does not allow the other one-fourth to be also deducted.

I do not think it matters in which of the two ways the correction is made. The only point which was raised as constituting a specialty was that in the reclaiming note which was presented against Lord Trayner's interlocutor of 9th November 1886 Henry Cowan was to a certain extent unsuccessful, and that a portion of the fund *in medio* which the Lord Ordinary had held fell to him was by our judgment given to the heir. It is therefore said that the expenses incurred by him in supporting the reclaiming note ought to be borne by himself. I am not prepared to assent to that proposition. I can conceive a case of nimious and oppressive litigation where the litigant could not expect to be reimbursed for the expense he had incurred. But this is not a case of that kind. The true view in estimating the share of the expenses to be borne by the three parties who have a similar interest with Henry Cowan in the result of the case but did not appear to support it is, that when they seek to share in the fruits of his success they are bound to bear a share of the expense of all the mishaps which were incidental to the litigation.

LORD MURE concurred.

LORD SHAND.—There is no doubt that if Henry Cowan had not appeared in the early stages of this case the whole fund *in medio* would have been swept away by the heir-at-law. The executors, who did not then come forward, are now taking the benefit of Henry Cowan's interference; and I am of opinion that whatever legitimate expenses were incurred by him in vindicating their and his own position must be paid equally by all of those who took benefit by what he did. I have reason to know that this was what was intended by the Lord Ordinary, although the form of his Lordship's interlocutor has not carried this out. What ought to have been done in order to produce this result was to have deducted from the fund *in medio* the whole of the expenses incurred in vindicating the fund.

The only specialty in the case is that alluded to by your Lordship. As Henry Cowan was not entirely successful in maintaining the Lord Ordinary's interlocutor when it came here upon a reclaiming note, that seems to shew that he was wrong in litigating as he did; and no doubt if his contention had been

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No. 3. recklessly improper or unreasonable, I think we should have held that he had no claim to be recouped. But that has not been made out, and I am therefore of opinion that those who benefited by the position which he took up must bear their share of the expenses which were incurred,—even although on certain incidental points he was not successful.

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LORD ADAM was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor reclaimed against, in so far as it deals with the fund *in medio* falling to the next of kin: Find that the whole expenses incurred by said reclamer in the competition with James Cowan, the heir-at-law, including expenses for which the said reclamer was found liable to said heir-at-law, fall to be paid to the reclamer out of the fund *in medio*: Find the reclamer entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against, and of consent rank and prefer the said Henry Cowan to the sum of £143 being his share of the fund *in medio*, and the amount of the expenses to which he has been found entitled under the first and second findings of this interlocutor, as the same have been adjusted by the counsel for the parties: Further of consent, rank, and prefer the claimants Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans each to the extent of one-third of the balance of the fund *in medio*," &c.

REID & GUILD, W.S.—J. SMITH CLARK, S.S.C.—Agents.

No. 4. HENRY TOD (Sutherland's Trustee), Pursuer (Appellant).—*C. J. Guthrie*  
—*MacWatt*.

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Sutherland's Trustee v. Miller's Trustee.

ALEXANDER GEDDES (Miller's Trustee), Defender (Respondent).—*Strachan*—*M'Lennan*.

*Lease—Tacit Relocation*.—An agricultural tenant whose lease was to expire at Whitsunday 1885 made a verbal arrangement with his landlord as to a new lease at a reduced rent. The landlord, on 1st December 1884, delivered to him an open letter to the factor stating the terms of the new lease, and desiring the factor to prepare a formal lease. Owing to delay on the part of the factor, and to the insolvency of the landlord, who was obliged to execute a trust-deed for behoof of creditors, the formal lease was never executed. The tenant remained in possession of the holding till 1887. In an action by the landlord's trustee for the rent under the old lease on the ground that it had been renewed by tacit relocation, *held* that the tenant's possession was to be referred not to tacit relocation, but to the new arrangement.

*Lease—Constitution—Rei interventus*.—*Question*, whether a tenant's abstaining from giving the statutory notice of his intention to terminate a lease in consequence of an informal agreement with his landlord for a new lease at a reduced rent could be held to be sufficient *rei interventus* to validate the agreement.

2D DIVISION.  
Sheriff of Caithness.  
I.

HENRY TOD, W.S., sole trustee under a trust for creditors granted in March 1885 by George Sutherland of Forse, Caithness-shire, raised an action in the Sheriff Court of Caithness in March 1887 against John Miller, farmer, for payment of £97, 13s. 11½d. as rents due at Candlemas 1886, Lammas 1886, and Candlemas 1887 for certain small farms on the estate of Forse, about £61 being the annual rent of the whole.

The defender had been in possession of the subjects in question prior to 1885 under different leases, which, with one exception, expired at

Whitsunday 1885. The pursuer averred that the defender had since Whitsunday 1885 remained tenant by tacit relocation, and was therefore liable for the rents sued for, being the same rents as under the expired leases.

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The defender admitted that he had remained tenant, but denied that he had done so by tacit relocation. He averred that he entered into a verbal arrangement with Mr Sutherland on 8th November 1884, whereby he was to obtain a new lease for fifteen years at the reduced rent for the subjects of £53, and that this agreement was confirmed and reduced to writing in a subsequent letter addressed by Mr Sutherland to his factor and delivered to the defender as a completed memorandum of lease to be presented to the factor in order that a formal stamped lease might be prepared. He further averred that the term of Whitsunday 1885 "was the termination of a two years' lease of the said subjects between the defender and Mr Sutherland, and accordingly it was necessary, under section 28 of the Agricultural Holdings (Scotland) Act, 1883, that the defender, in order to prevent tacit relocation, and to secure his right to remove, should have given notice of removal to Mr Sutherland at Martinmas 1884. In consequence, however, of said agreement for a lease, and on the faith thereof, the defender abstained from given notice of removal, passed from his right to remove, and entered into arrangements for continuing in possession. These facts were well known to Mr Sutherland, who entirely acquiesced therein. The new lease was thus legally binding *rei interventus*."

This defender referred these averments as to the constitution of the lease to the oath of Mr Sutherland.

Mr Sutherland deponed that on 8th November 1884 he and the defender came to a verbal agreement for a new lease for fifteen years from Whitsunday 1885, with certain breaks in the tenant's favour, and a fixed sum for meliorations, the rent to be £53. He further deponed that these conditions were reduced to writing in a letter of 1st December 1884 quoted below,\* which was addressed to his factor Mr John Nimmo, writer, Wick, but which was handed by the witness to the defender's wife, to be given to Mr Nimmo that he might prepare a stamped lease in accordance with it. He deponed that he read over the letter to the defender's wife before handing it to her, and then put it in an envelope unclosed and addressed to Mr Nimmo.

The Sheriff-substitute (Harper) found "that the verbal agreement for a new lease averred by the defender, and the reduction to writing of the terms thereof also averred by the defender, have been proved by Mr Sutherland's oath: Allows to the defender a proof of his averments of *rei interventus*."

\* "Dear Sir,—On the 8th of last month I arranged with John Miller, Boulglass, for a new lease to him from Whitsunday next of the farms and lots he now holds, at a yearly rent of fifty-three pounds (£53) and road-money. Duration of lease fifteen years, with breaks in his favour at the end of five and ten years. All improvements to be made solely at his own expenses, without any compensation to be paid therefor at the termination of the lease—wire fences excepted.

"As to the valuation he is now entitled to for the wood, flags, &c., on his houses, I have agreed that a sum of three hundred pounds (£300)—minus £2 per annum during the currency of the lease—is to be paid to him at his outgoing, in lieu of all expenses and other claims.

"A stamped lease to be entered into; also a stamped lease of fourteen years to be given to Widow Miller and the representatives of the late Benjamin Miller, Barogill, on the same conditions they now hold the farm."



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It was proved by the evidence of the defender that he had gone to Mr Sutherland on 8th November 1884 with the view of giving the notice of his intention to leave at Whitsunday 1885, which would be required under the Agricultural Holdings Act, 1883, sec. 28, but that in consequence of the arrangement as to a new lease at a reduced rent, which was afterwards specified in the letter of 1st December 1884, he did not give the notice, but continued in possession and laboured the farms. It appeared further from the evidence of Mr Sutherland's factor, Mr Nimmo, that he did not on receipt of the letter of 1st December 1884 prepare a formal lease, in consequence of his being much engaged with other matters, and that Mr Sutherland granted a trust for creditors on 24th February 1885, after which he (witness) gave up all thought of preparing the lease; further that having been instructed by the agent under the trust-deed not to grant new leases containing any change on the rental, he wrote to the defender, as follows, on 25th April 1885,—“ . . . With reference to Mr Sutherland's letter to me of 1st December last, I delayed preparing the leases in the knowledge that they would not be binding unless possession was had under them; and after the execution by him in February last of the trust-deed, I brought it under the notice of the agents under the trust-deed, who informed me they had written to Mr Sutherland that it would be better to make no changes upon the rental by granting new leases.—Yours truly, JOHN M. NIMMO.” This witness also deponed that on 4th April 1885 he had verbally informed the defender that a new lease would not be granted, but there was no other evidence of this statement, and the defender did not remember its having been made.

The defender became bankrupt during the action, and Alex. Geddes was appointed trustee on his sequestrated estates.

The Sheriff-substitute (Harper) assoilzied the defender.

The pursuer appealed, and argued ;—(1) It could not be held that the tenant held under a new arrangement, and it must follow that he held by tacit relocation. The letter of 1st of December 1884 did not constitute a lease. It was not even a promise to the defender to give him one, for it was a letter addressed not to him, but to the landlord's own agent. It was alleged that the new arrangement came into effect at Whitsunday 1885. But the letter of 25th April 1885 had already intimated to the defender that no new lease would be granted. It lay on the defender to establish that he was holding under a new lease, and he had failed to do so. (2) It was said that the new arrangement, even if not complete in itself, was validated *rei interventu*. But nothing the tenant was said to have done in consequence of the new bargain was unequivocally referable to it. It was only said that he had abstained from doing something. Mr Bell<sup>1</sup> was of opinion that in order to constitute *rei interventus* there must be “proceedings unequivocally referable” to the new bargain. The word “proceedings” implied something positive, something that the other party might check.

Argued for the defender ;—(1) Tacit relocation was excluded by the letter of 1st December 1884, and by all the facts of the case. The obligation as to the new lease did not require *rei interventus*. It was a unilateral obligation relative to the land, and delivered to the tenant that it might be acted upon by the landlord's servant. Such a unilateral obligation bound the granter,<sup>2</sup> and it was clear that the tenant acted on

<sup>1</sup> Bell's Princ., sec. 26.

<sup>2</sup> Ferguson v. Paterson, 1748, M. 8440; Muirhead v. Chalmers, 1759, M. 8444; Fulton v. Johnston, 1761, M. 8446.

it. It was thus quite sufficient to constitute a new bargain of lease.<sup>1</sup> The clause in the letter of 1st December 1884 bearing that a stamped lease was to be entered into was not suspensive of the transaction. It was an instruction to the writer's servant. (2) Where a landlord had so acted as to lead to the conclusion that the agreement for a new lease was complete, the tenant's mere continuation of possession, although without any further specific act constituted *rei interventus*.<sup>2</sup>

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LORD YOUNG.—The action is one for certain rents, and is laid upon the footing that the defender is tenant by tacit relocation, and has been so since Whitsunday 1885. If he has been, the rent sued for in the action is due. The first and only material issue, then, being whether the defender was tenant by tacit relocation, we find he says he was not, and in support of his denial he says that upon the eve of the expiry of the period when notice had to be given in order to terminate the then existing lease as at Whitsunday 1885, he resorted to the landlord, and that they arranged for a new lease, to come into effect at the termination of the old one. If that new lease was agreed upon that was an end to tacit relocation. Now, the alleged bargain for a new lease, to come into operation at the termination of the old one, is contained in the letter of 1st December 1884. That is a letter by the landlord to his agent expressing the fact of the new bargain and its terms, and desiring the agent to carry the bargain into formal execution. The landlord gave it to the tenant to give to the factor, communicating to the tenant its contents, and he then gave it to the factor. Thereupon, the tenant says, he abstained from giving the notice which he would otherwise have done, to terminate the old lease, and prevent tacit relocation. I think that is natural and probable in itself. Now, a letter so expressed by the landlord addressed to his agent, even though given to the tenant to carry, would not of itself constitute a lease for a period of years. More would be required. Whether the tenant's abstention from giving regular notice that he terminated the old lease and reliance on the new bargain would be sufficient *rei interventus*, I do not think we require to determine. The inclination of my opinion is that that circumstance would be sufficient to prevent the landlord from resiling from the bargain. The period elapsed in which the tenant would have looked for a new farm, and he may have allowed it to pass in reliance on the former agreement for a lease. But we need not, I say, decide that, for unless the contract as expressed in the letter to which I have referred was departed from, it remained and was in existence at the termination of the old lease in 1885. Now, the tenant remained in possession, and I think that his possession subsequent to Whitsunday 1885 must on principle (which has received effect in many cases) be attributed to the new bargain, and not to tacit relocation on the old lease. That is to my mind irresistible. The letter is inconsistent with the notion of tacit relocation. *Expressum facit cessare tacitum*. Tacit agreement to continue on the old relation is inconsistent with their having expressed the terms of the new one. Now, that reduces the question to this, Did the landlord validly withdraw from the agreement before the end of the old lease at Whitsunday 1885, so that the possession after that date is not to be attributed to the new bargain? It was argued that he did, and that that is shewn by the letter of his

<sup>1</sup> *Arbuthnot v. Campbell*, 1793, Hume's Decns. 785; *Murdoch v. Moir*, June 18, 1812, F. C.

<sup>2</sup> *Sutherland v. Hay*, Dec. 12, 1845, 8 D. 283, 18 Scot. Jur. 133; *Ballantine v. Stevenson*, July 15, 1881, 8 R. 959.

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agent, dated 25th April 1885. Now, I do not think that that letter expresses withdrawal. The strongest expression in it is,—“I delayed preparing the leases in the knowledge that they would not be binding unless possession was had under them.” That is not quite accurate, for he explains in his evidence more accurately that the delay was because he was too busy to prepare the leases, and it would be sufficient to prepare them before Whitsunday. Now, that was not an intimation that the new lease was not to be gone into. The letter proceeds to say that after Mr Sutherland had executed his trust-deed in February, “I brought it under the notice of the agents under the trust-deed, who informed me that they had written to Mr Sutherland that it would be better to make no changes upon the rental by granting new leases.” That is not a withdrawal. It is a statement of fact as to a letter to Mr Sutherland. It did not lead Mr Sutherland to do anything to shew that he had departed from the arrangement upon which to his knowledge the tenant was acting. There is no evidence at all that he took up the position, which, while the law might allow it, no one would be likely to take up, of resiling from a bargain, while good faith would hold him to it. If, then, Mr Sutherland did not withdraw from the arrangement, the possession, as the tenant says, is not under the old lease but under the new arrangement, and this action, which is founded on tacit relocation under the old lease cannot stand. I propose, therefore, to negative the foundation of the action—tacit relocation since Whitsunday 1885—and to dismiss the action, reserving to the parties their rights *inter se* as to rent, for some rent will be due, and as to meliorations.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think that the letter of 1st December 1884 taken by itself would not constitute a binding agreement of lease. It was not addressed to the tenant, the defender, but to the landlord's agent. More will be required to constitute a lease. But there is no question that such a document will be sufficient if *rei interventus* has followed on it. If the defender had entered into possession, or continued it after Whitsunday 1885, without anything further being said, I think there is no question that the agreement would have been constituted. But it is said that the landlord resiled either by verbal intimation on 4th April 1885 or by letter on 25th April 1885. To take the latter first. It is clear that in the letter there is no evidence of resiling. It does not express that. I cannot therefore look upon it as affecting the position of the defender. But the question remains, whether there was any other intimation that the landlord was to resile from the new bargain. It is said that that was sufficiently intimated by Mr Nimmo, the landlord's agent, in a conversation which took place on 4th April 1885. I think that the evidence on which that contention was founded is not sufficient evidence that the landlord resiled from the new bargain. It is not even said in the evidence that Mr Nimmo had authority from his employer to make such an intimation. I think it would be unjust to the defender to hold that the landlord ever resiled from the new arrangement.

I think, therefore, that the pursuer has not established that the defender has been possessing under tacit relocation.

LORD LEE.—I incline to go the length of holding, along with Lord Young, as I understand his Lordship's view, that it would have been too late for the landlord to resile in April 1885. It is said that the tenant's mere abstention

from giving a notice he might otherwise have given is insufficient. That may be, but I have difficulty in understanding a case of mere abstention. It cannot be taken by itself. By the necessity of the case there was more. The tenant not only gave no notice, but went on to possess, and after it became too late to give the notice he was possessing the farm in a position not so free as before. He did so under the belief, at least, that there was a new arrangement and not a tacit relocation of the old. If the landlord, on the other hand, could change his mind up to April 1885 the tenant might have had to go out in a few weeks without having made any other arrangement for himself.

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THIS interlocutor was pronounced:—"Find (1) that the defender possessed the lands and others libelled from Whitsunday 1883 till Whitsunday 1885, under a lease between him and George Sutherland of Forse, the proprietor of the subjects, and that the said lease terminated at Whitsunday 1885: (2) That he has since possessed the said subjects, not by tacit relocation under the said lease but under an arrangement entered into between him and Mr Sutherland, set forth in the letter of 1st December 1884, No. 14 of process, addressed by Mr Sutherland to his agent Mr Nimmo, and delivered by Mr Sutherland to the defender's wife on behalf of the defender: Therefore dismiss the action, reserving the pursuer's claims for rents, and the defender's claims for meliorations and all answers to said claims."

ALFRED SUTHERLAND, W.S.—THOMAS LIDDLE, S.S.C.—Agents.

ELIZABETH JAMIESON, Nominal Raiser (Appellant).—*Low—Kennedy.*

JAMES DALLAS, Real Raiser (Appellant).—*Low—Kennedy.*

ANN ROBERTSON, Defender (Respondent).—*Sym.*

WILLIAM DOUGLAS AND OTHERS, Defenders.

No. 5.

Oct. 23, 1888.  
Jamieson v.  
Robertson.

*Process—Multiplepinding—Competency.*—A creditor of a deceased person raised an action against his executor to constitute a claim against the estate which, if found due, would render the estate insolvent, and the executor defended the action. Thereupon another creditor, who maintained that the claim was excessive, raised a process of multiplepinding in name of the executor, calling all the other creditors of the deceased as defenders. It was stated at the bar that the multiplepinding was raised with the consent of the executor. The pursuer of the action of constitution objected to the multiplepinding as incompetent and unnecessary. Objection repelled.

ANN ROBERTSON, domestic servant, raised an action in the Sheriff Court at Stonehaven against Elizabeth Jamieson, executrix of the deceased Peter Duffus, crofter, Clashendrum, in whose service she had been, for payment of £104, 17s., of which £47, 10s. was for aliment of an illegitimate child of which he was the father, and the remainder for wages for several years. The executrix defended the action.

2D DIVISION.  
Sheriff of Kin-  
cardineshire.  
I.

James Dallas, another creditor of the deceased, thereafter raised an action of multiplepinding in name of the executrix, calling as defenders himself, Robertson, and all the other creditors on the estate. He stated that the free balance of the deceased's estate in the hands of the executrix was £93, 6s. 0½d.; that Robertson had raised the action for £104, 17s. against the executrix; and that defences had been lodged stating that the claim was overstated. He further stated,—“The real raiser and several other defenders have intimated that they will not agree to a division (of the estate) as they have well-founded objections to the claim of the said Ann Robertson.”

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Dallas pleaded;—(2) The pursuer, as holder of the fund *in medio*, being distressed by competing claims to the same, the estate ought to be distributed under the present action of multiplepinding, with costs to the real raiser. (3) The claim at the instance of the said Ann Robertson against the pursuer can be more satisfactorily determined under the present action, and the action at her instance should therefore be conjoined with the present proceedings.

Robertson denied that the action was necessary. She pleaded;—(1) There is no double distress, and the action ought therefore to be dismissed, with expenses. (2) The action of constitution by the defender having been first raised by her, and being the simpler and less complicated mode of action for dealing with her claim, the present action of multiplepinding was an unnecessary multiplication of actions, and ought to be dismissed, with expenses.

The Sheriff-substitute (Dove Wilson), on 5th August 1887, repelled the defences to competency, and found Robertson liable in expenses.

On appeal, the Sheriff (Guthrie Smith) pronounced this interlocutor:—“Sists the process until the issue of the relative action raised in the name of Ann Robertson.”

The action at the instance of Ann Robertson was thereafter proceeded with, and it resulted in her obtaining decree for a certain sum, with expenses.

Thereafter the Sheriff—a motion being made to recall the sist in the multiplepinding—recalled the sist and also the interlocutor of the Sheriff-substitute of 5th August 1887, dismissed the action, and found the real raiser liable in expenses. The pursuer and nominal raiser (the executrix) and the real raiser then appealed to the Court of Session.

Argued for them;—The multiplepinding was competent, because *ex facie* of the action there was an executry estate insufficient to meet the claims upon it, and requiring to be distributed among contending claimants. It was said that there was no double distress, and that while a trustee or executor might raise such an action for exoneration, this action was raised at the instance of Dallas and not of the executrix. But the answer was that the executrix approved of the action, and desired it to proceed. That was quite evident from the fact that she had become a party to the appeal. The action was thus in the same position as if the executrix had brought it herself, and there was no doubt that double distress was not required in order to justify an executor or trustee obtaining exoneration by means of a multiplepinding. The claim of Robertson was larger than the free residue of the estate—a fact which clearly justified the real raiser in bringing the action with consent of the executrix. The case of *Robb's Trustees v. Robb*<sup>1</sup> was distinguishable, because there the trustees who held the fund objected to the action being brought in their name.

Argued for Robertson;—There was here no double distress. The one question was, What was the amount of Robertson's claim? It needed no such process as the multiplepinding to determine that, for the question was actually being tried in the process raised by Robertson, when the real raiser thought fit to raise it again in this action. It was said by him that Robertson's claim was excessive, and that he had an interest to have it reduced. If so, he could have aided the executrix in her defence to

<sup>1</sup> *Robb's Trustees v. Robb*, July 3, 1880, 7 R. 1049; cf. *Crocket v. Panmure*, June 8, 1853, 15 D. 737, 25 Scot. Jur. 443; *Pollard v. Galloway*, Oct. 21, 1881, 9 R. 21.

that action, or, as she had no interest in it, she would doubtless have allowed him to carry it on in her name. But to raise a multiplepoinding about it was an abuse of process. Robertson, who was first in Court with her action, had a very strong interest to object to the competency of the multiplepoinding, for if it were competent the real raiser would be found entitled to the expenses of raising the process out of the fund *in medio*. The multiplepoinding was both inexpedient and incompetent, and the opinion of Lord Gifford in *Robb's* case applied. His Lordship there said (7 R. 1049),—"When a debt is legally due, and the only question is how much the creditor will take in lieu of his full claim, that is certainly not a ground for an action of multiplepoinding." It was attempted to get rid of the objection by saying that the executrix approved of the action, and she had for this purpose been induced to join in the appeal. That was her first appearance in the action except as nominal raiser. But that was to get over the fact that Dallas had raised the action by the contention that it might have been raised by another person, the executrix. Assuming that, it was surely a good answer that she had not done it.

No. 5.

Oct. 23, 1888.  
Jamieson v.  
Robertson.

LORD YOUNG.—The question in this case regards the competency of an action of multiplepoinding raised in name of the executrix-dative of the late Peter Duffus, a crofter in Kincardineshire. She is described as pursuer and nominal raiser—the real raiser being a creditor on the estate of the deceased of the name of Dallas. There are a number of persons called as defenders, who claim to be creditors on the estate, and one of them is Ann Robertson. The executrix, counsel for the real raiser informed us, assents to the action being raised in her name as pursuer and nominal raiser, and all the creditors assent, with the exception of Ann Robertson, who says that the action is incompetent. The nature of her claim has been explained to us. It is stated that she was in the service of the deceased Peter Duffus, and that her claim is for unpaid wages and for the aliment of a bastard child, of which the deceased was the father. It is stated, and apparently admitted, that while her claim is for £104, 17s., the whole amount of the estate in the hands of the executrix is £93, 6s. 0½d., and there are a number of other creditors. What objection is there to this action? I can conceive none. I must deal with it exactly as if it had been brought by the executrix herself. Mr Sym admitted that he could not dispute that an executor against whom claims are made which are greater than the estate in his hand may raise an action of multiplepoinding to obtain exoneration. What difference does it make that with her assent it is brought at the instance of other creditors? I see no reason to doubt its competency. It appears that Ann Robertson had before the multiplepoinding raised a summons to establish her claim by an action of constitution. I think the proper answer of the executrix was to bring the multiplepoinding. When it was brought at the instance of the other creditors I think the proper course would have been to bring the action of constitution before the attention of the Court, and to desire the Sheriff to treat the action of constitution raised by Ann Robertson as a claim in the action of multiplepoinding. Instead of that being done the Sheriff sisted the action of multiplepoinding until the other action had been disposed of. I cannot comprehend the wisdom of this course. It was the reverse of the right one, which was, as I have stated, to bring Ann Robertson's action into the multiplepoinding, and to hold the summons in the action as a claim in the multiplepoinding. The Sheriff thereafter dismissed the multiplepoinding as incompetent. Now, I am

No. 5. of opinion that it was perfectly competent, and I propose that we sustain the appeal, recall the judgments of the Sheriff appealed against, and find the appellant entitled to expenses, and remit the multiplepoinding back to the Sheriff.

Oct. 23, 1888.  
Jamieson v. Robertson.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—I concur. I do not think this was a case of a creditor attempting to take the management of the executry out of the hands of the executrix by a multiplepoinding raised against her will.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff sisting process in the multiplepoinding and the subsequent interlocutors recalling the sist and dismissing the action, and remitted the cause to the Sheriff.

D. LISTER SHAND, W.S.—W. B. RAINNIE, S.S.C.—Agents.

No. 6. GEORGE GREIG (Inspector of Poor of City Parish, Edinburgh), Pursuer (Respondent).—*Balfour—J. A. Reid.*

Oct. 25, 1888.  
Greig v. Simpson. ANDREW CRAIG SIMPSON (Inspector of Poor of South Leith Parish), Defender (Appellant).—*J. G. Smith—Salvesen.*

*Poor—Settlement—Poor-Law Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 76—Continuity of residence.*—A tailor, who lived with his wife and family in a house which he rented in the parish of South Leith, accepted a situation in Cupar-Fife, when there were still six weeks to run of the five years necessary to give him a residential settlement in South Leith. At first he took lodgings in Cupar, generally returning to visit his wife in Leith from Saturday to Monday. At the end of the six weeks, 26th May 1884, he removed his wife and family to Cupar to a house he had taken for them there immediately after he went to reside at Cupar, but of which he could not get possession till the May term. Held that he had not acquired a residential settlement in South Leith.

1st DIVISION.  
Sheriff of the  
Lothians.  
M.

THE inspector of poor of the City Parish, Edinburgh, raised an action against the inspector of poor of South Leith Parish in the Sheriff Court of the Lothians at Edinburgh, for repayment of advances made by him to Mrs Abigail Simpson or Morham and her children, alleging that the pauper's husband had at his death an industrial residential settlement in the latter parish by residence within that parish for five years prior to 26th May 1884, and that that settlement had been transmitted to his widow and family at his death.

The defender denied that Morham had resided in South Leith Parish for the five years necessary to acquire a settlement, as he had removed to and taken up his residence at Cupar, where he had obtained a new situation, on 9th April 1884.

The decision of the case came to depend entirely upon the question whether the acquisition by Morham of a residential settlement in South Leith had been interrupted by his removal to Cupar, it being proved that he had resided in South Leith continuously from 26th May 1879 till April 1884. The nature of the evidence appears from the extracts which are given below.\*

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\* Mrs Morham, who had been married to Morham in 1875, deponed, *inter alia*, as follows:—"My husband went to Cupar and got employment there from a Mr Miles. He went there on 9th April 1884. . . . He did not take the family and me over to Fife at that time; we did not leave till the term. My husband took lodgings with a Mrs Stark, at 16 Crossgate, Cupar.

On 4th February 1888 the Sheriff-substitute (Rutherford) pronounced this interlocutor:—"Finds as matter of fact (1) that John Wilson Morham, a tailor's cutter, died on the 29th of June 1886, survived by his wife, Mrs Abigail Simpson or Morham, and several young children; (2) that on the 10th of September 1886 the said Mrs Abigail Simpson or Morham became chargeable to the City Parish of Edinburgh, in which she was then residing with her children, and that she was at that time, and has ever since continued to be, a proper object of parochial relief; (3) that between the 10th of September 1886 and the 1st of October 1887 the pursuer, as inspector of poor of the said City Parish, advanced to Mrs Morham, for behoof of herself and her children, sums amounting in all to £20, 11s. 4d., conform to account No. 4 of process: Finds in fact and in law that the said John Wilson Morham had continuously resided in the parish of South Leith for the period of five years immediately preceding the 26th of May 1884, and thereby acquired for himself and for his said wife and children a residential settlement in that parish, which they retained at his death, on the 29th of June 1886: Finds further in point of law that

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son.

The family and I remained in the house in North Elliot Street till the 26th of May 1884. I remember that day distinctly from some letters that I have in my possession written by my husband. In a letter to me, dated 13th May 1884, he says,—'I am sure you wish that it (the removal) was all over, as well as I do. I think I will get away from the Saturday to the Tuesday—that is Saturday week.' The Saturday week which is there mentioned was the 24th of May. I received a letter from my husband, dated 18th May 1884, in which he says,—'I am glad to think that I will be home beside you next Sunday, and then the Sunday after that I will have you all over here and settled.' . . . . . When we went over to Cupar we stayed in my husband's lodgings for two days. Then we went to a house which he had taken for us at 44 Bonnygate, Cupar. The family and I settled down in that house with him. During the interval between the 10th of April and the 24th of May 1884, when he came across to remove the family and me, he generally visited me on the Saturdays, staying from the Saturday till the Monday. I only remember one week in which he did not come, but there may have been more. He was in the habit of staying till the Monday morning, and then going back to his work. During all that time the family and I had no other dwelling-house than the one in North Elliot Street. My husband sent me money to keep the house at that time. I had no other source of income. . . . Cross.—The house in Bonnygate was taken at Whitsunday for a year. I had taken the house in North Elliot Street for another year before that, but it was given up; the landlord took it off our hands. The house in Cupar was not ready for us when we went over there, and we stayed in Mrs Stark's for two days. We all stayed in Cupar for six months, and then we went to live in Portobello. My husband had got a situation with Mr Wallace in High Street, Edinburgh. That was a better situation than the one he had in Cupar."

Robert Miles deponed,—“I was a draper in Cupar for some years. I was engaged in business there in 1884. I required a cutter in the spring of that year. . . . I came across and saw Mr Morham, and engaged him. The terms of his engagement were £2, 2s. 6d. a-week, and a month's warning on either side. He came over to Cupar about the middle of March, but I could not give the exact date. I arranged lodgings for him with Mrs Stark, 16 Crossgate. He was with me for seven months. He left in the month of October, having got another situation in Edinburgh.”

Jessie Mason, Cupar, deponed,—“I reside with my grandmother, Mrs Stark. We keep lodgers. . . . Mr Morham engaged a room. I think it was in the end of March or beginning of April 1884 that he came. He then said that he intended to bring over his wife and children, but he did not say when. Sometime after he came he told us he had taken a house in Bonnygate.”



No. 6. the said parish of South Leith is bound to relieve the City Parish of Edinburgh, . . . of the sums disbursed by the pursuer for behoof of the widow and children of the said John Wilson Morham," &c.\*  
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The defender appealed to the Court of Session.

Argued for him;—The fact that Morham had removed to Cupar in April on a permanent engagement there prevented the acquisition of a constructive residential settlement in the parish of South Leith. *Hodgert's* case<sup>1</sup> decided that where the father of a family removed from a parish and went to a new employment in another parish, although the family remained behind and only joined him afterwards, the severance for poor-law purposes dated from the time when the head of the house left. Morham left for Cupar in April 1884, and took a residence there with the intention of bringing his wife and family to it as soon as possible. He thereby commenced an industrial settlement there, and the continuity of the settlement in South Leith was interrupted.<sup>2</sup> It was different where a man left in search of work and failed to find it; in that case the continuity was not interrupted. It was of importance to note that the words of the 76th section were "unless such person shall have resided in such parish," and there was no mention of the word "home."

Argued for the respondent;—It was clear upon the authorities that if the six weeks of absence in Cupar had been not at the end of a period of residence but in the middle, then they would not have interrupted the continuity of the settlement in South Leith. Personal presence was not required for the acquisition of a constructive residential settlement. What would suffice to keep up the relation, where there was personal absence, was well illustrated by the case of *Hodgert*.<sup>3</sup> It was very different from the present case. There the wife and family, although they remained behind when the husband went to work elsewhere, did so, not on the footing of proper tenants paying rent, but rather by favour and tolerance. Besides that case was decided before the doctrine of constructive

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\* "NOTE.—The Sheriff-substitute had the benefit of an ingenious argument on the part of the defender in this case, but he does not think it necessary to enter into a discussion of all the authorities that were cited. The doctrine of constructive residence in the acquisition of a settlement is now settled by a series of decisions, and as Lord Shand observed in the case of *Wallace v. Beattie*, 1881, 8 R. 345, 'The real test in questions of this kind is, where is the person's home?' In the present instance the Sheriff-substitute thinks that it is not doubtful that the home of the pauper's husband, for the period of five years from the 26th of May 1879 to the 26th of May 1884, was in the parish of South Leith. It is true that, for about six weeks prior to the term of Whitsunday 1884, he himself was absent in Cupar, where he had got work. But his home still continued to be in South Leith, where his wife and family still resided in the house which he had taken up to the Whitsunday term, and he joined them there as often as he could from a Saturday to a Monday. That he considered his home to be in South Leith is evident from his letter to his wife, dated Sunday 18th May (No. 22 of process), in which he says,—'I am glad to think that I will be home beside you next Sunday, and then the Sunday after that I will have you all over here and settled.'"

<sup>1</sup> *Hodgert v. Petrie and Mason*, June 13, 1851, 1 Poor-Law Magazine, 350.

<sup>2</sup> *Hastings v. Hughan and Semple*, Jan. 27, 1866, 8 Poor-Law Magazine, 331 (Lord President Colonsay, p. 336); *Allan v. Shaw and King*, Feb. 24, 1875, 2 R. 463; *Hamilton v. Kirkwood and Smith*, Nov. 13, 1863, 2 Macph. 107, 36 Scot. Jur. 49; *Wallace v. Beattie and Highet*, Jan. 6, 1881, 8 R. 345; *Deas v. Nixon*, June 17, 1884, 11 R. 945; *Hewat v. Hunter*, July 6, 1866, 4 Macph. 1033.

<sup>3</sup> 1 Poor-Law Magazine, 350.

residence was developed.<sup>1</sup> If the test was "the home" as had been laid down by several Judges, then the home was in South Leith. Morham's family, furniture, &c., were all there. He was only a lodger in Cupar.

No. 6.

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**LORD MURE.**—In this case the Sheriff-substitute has proceeded upon the view that the deceased John Wilson Morham looked upon his home as being in South Leith Parish, after he went to reside in Cupar, and has therefore held that he did not lose the settlement which he was then in the course of acquiring in South Leith Parish, the five years necessary to acquire that settlement having been completed shortly after he went to Cupar. In support of this view the Sheriff-substitute refers to the fact that in a letter written by the deceased to his wife in May 1884, he speaks of Edinburgh as his "home." But I do not think it would be safe to hold this isolated expression as conclusive of the present question, which depends upon the main leading facts of the case.

Now these facts are very clearly explained by the witness Miles, a draper in Cupar, whose cutter Morham was. He depones,—“I was a draper in Cupar for some years. I was engaged in business there in 1884. I required a cutter in the spring of that year. I was a draper, but I also carried on a tailoring business. It was in the month of March that I required a cutter. I advertised in the *Scotman*, and had several applications in writing, including one from John Wilson Morham, North Elliot Street, Edinburgh. I came across and saw Mr Morham, and engaged him. The terms of his engagement were £2, 2s. 6d. a week, and a month's warning on either side. He came over to Cupar about the middle of March, but I could not give the exact date. I arranged lodgings for him with Mrs Stark, 16 Crossgate. He was with me for seven months. He left in the month of October, having got another situation in Edinburgh. He told me about it, and I allowed him to go on a week's warning. He gave me to understand that he was to have a partnership or a commission with the party he was going to.”

The result of this evidence appears to me to make it clear that Morham entered into a permanent engagement with Miles, and made up his mind to take up his residence in Cupar as soon as that engagement was made. That that was his position is confirmed by the evidence of his widow, who is examined at considerable length, and states that immediately after her husband entered into the employment of Mr Miles he took a house in Cupar, and resolved to bring over his wife and family to reside with him there. This he accordingly did at the May term, as he could not till then secure a house for his family; but he continued to reside in Cupar himself from the time he entered upon his employment there, and never again took up his residence in South Leith.

In these circumstances, the question we have to decide arises upon the 76th section of the Poor-Law Act (8 and 9 Vict. cap. 83), which it is of importance to observe speaks not of the pauper's "home" but of his "residence," and what we have to consider is whether Morham ever resided for five years continuously in South Leith in the sense of the 76th section of the statute. I am of opinion that he never did. To complete that period he would have required to reside in South Leith till Whitsunday 1884. But he left South Leith, and took up

<sup>1</sup> Cf. *Greig v. Miles and Simpson*, July 19, 1867, 5 Macph. 1132, 39 Scot. Jur. 617; *Harvey v. Roger and Morison*, Dec. 21, 1878, 6 R. 446; *Moncreiff v. Ross*, Jan. 5, 1869, 7 Macph. 331.

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his residence in Cupar upon the 9th of April 1884, living in lodgings there until his family came over and joined him in the end of May, from which time he had secured a house; and I think it is pretty clear upon the evidence, that if he had been able to get a house sooner he would have taken it, and brought his family over at the first. If he had been able to do that, there would not, as I conceive, have been any difficulty or even doubt about the case. His connection, and that of his family, with South Leith would then have been entirely broken. But even as matters stand, and having regard to the fact that he took up his own permanent residence at Cupar in April, I cannot look upon the circumstance that he had to leave his family in South Leith as a matter of convenience, and occasionally visited them there, as making South Leith his own residence in the sense of the 76th section of the statute. This would, I think, be carrying the doctrine of constructive residence a good deal farther than it has ever before been carried, and to an extent not warranted by the decisions in any of the leading cases on the subject. For I cannot see how Morham, after fixing his own residence at Cupar, and settling himself there, could at the same time be held to be acquiring a constructive residence in South Leith Parish through his wife and family residing there till the house he had taken for them at Cupar was ready for their use.

I am therefore of opinion that we must sustain this appeal, and hold that the parish of South Leith is not liable to support the pauper and her family.

LORD ADAM.—This is an action brought by the Parochial Board of the City Parish of Edinburgh to have it found that Abigail Simpson Morham, at the date of her application for relief from that parish, had, in respect of the residence of her deceased husband in the parish of South Leith from 25th May 1879 to 26th May 1884 a subsisting parochial settlement in the latter parish, and for decree for payment of certain advances made to her by the pursuer. If the pursuer is able to establish the residence of the deceased John Wilson Morham in the parish of South Leith for the period in question, he must necessarily succeed in his action. The answer which is made is that it is not true that Morham resided in South Leith Parish for the whole five years.

The question turns upon the nature and effect of Morham's residence in Cupar from 9th April till 26th May 1884. If we are to put upon that residence the construction contended for by the appellant, then the continuity required to establish a settlement in South Leith Parish is broken—if we are to adopt the respondent's argument, it is not broken.

Morham was a tailor's cutter, and obtained a situation as such in Cupar, where he remained for seven months from 9th April 1884. That was a permanent engagement at the time it was made, and it was so intended. When he accepted it, he formed the intention of going to reside in Cupar in the immediate future and carrying on his occupation there. He took lodgings there at first, but he set about at once to find a house to which he might bring his wife and children at the ensuing term, and to which they then removed. He continued from the 9th April to reside continuously in Cupar, except that occasionally upon a Saturday he returned for the Sunday to Edinburgh to pay his wife and children a visit. Otherwise his residence in Cupar was continuous until October when he removed elsewhere in consequence of getting a better situation.

What then in law is the effect of that residence in Cupar, and are we to hold that from 9th April to 26th May Morham was constructively residing in the

parish of South Leith? The cases of constructive residence which have been cited deal with circumstances where there have been casual and temporary absences incidental to employment undertaken elsewhere than in the parish; where also there has been an intention to return when the temporary employment was over. Here there is an element which distinguishes this case from these previous ones. Morham's residence in Cupar was permanent. So little did he intend to return to South Leith that he arranged at once after going to Cupar to send for his wife and children. No doubt he came over occasionally for Sunday to Edinburgh, but Cupar was the permanent residence to which he returned upon the Mondays. Accordingly the continuity required to establish a settlement in the parish of South Leith was broken when he went to reside in Cupar.

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In so deciding I do not think we are going counter to the cases of *Miles* and others which established the doctrine of constructive residence, and we are deciding in conformity with the earlier cases of *Hodgert* and *Hastings* cited to us. These cases would have been directly applicable if the question had been whether or not Morham had acquired a settlement in Cupar, and from what period did it run. A permanent residence having been begun in Cupar, it was, in my opinion, impossible that a residential settlement could at the same time be in course of being acquired in another parish by holding that Morham was nevertheless constructively resident there.

LORD KINNEAR.—I am of the same opinion. The only question appears to me to be whether Morham's residence in Cupar was merely casual or occasional so as not to interrupt the continuity of his residence in the parish of South Leith. The evidence leaves no doubt in my mind that the residence in Cupar was due to a fixed intention to leave South Leith, and live permanently in Cupar, using the word "permanently" in the sense which Lord Adam has explained. The 9th April 1884, when Morham went to Cupar, appears to me to have been the beginning of a period of industrial residence, which would have given him a settlement there if it had lasted for the statutory period; and from that time his connection with South Leith came to an end.

As to the decisions which have been cited, the only cases which seem to have a material bearing are those in which the effect of temporary or occasional absences from a permanent place of residence has been considered. In these cases, as the Lord President points out in *Beattie v. Stark*, the judgment proceeded on a construction of the word "continuously," which the Court held must be read reasonably, and in accordance with the habits of mankind. I agree with your Lordships that in such cases as these the material question is whether the circumstances attending the occasional absence are such as to indicate an intention to return to the permanent residence.

The other class of decisions, by which it has been held, upon a construction of the word "residence," that a man may acquire a settlement by what is called constructive residence in a parish in which he has never actually resided, appear to me to have no bearing upon the present case. There is no question of constructive residence. The man's actual residence was in South Leith until April 1884, and when he left South Leith he established his actual residence in Cupar. I am satisfied upon the evidence that when he went to Cupar he had no intention of returning to South Leith, and I think that consideration conclusive of the whole question.

No. 6. The LORD PRESIDENT and LORD SHAND were absent.

Oct. 25, 1888.  
Greig v. Simpson.

THE COURT pronounced this interlocutor:—"Find, as matter of fact [after repeating the three first findings of the Sheriff-substitute's interlocutor]—(4) That the said John Wilson Morham had not continuously resided in the parish of South Leith for the period of five years immediately preceding the 26th of May 1884: Find in these circumstances, in point of law, that the said John Wilson Morham had not acquired for himself and for his wife and children a residential settlement in that parish which they retained at his death, and that the appellant, the inspector of the parish of South Leith, is not liable for the sum sued for," &c.

CURROB, COWPER, & CURROB, W.S.—SNODY & ASHER, S.S.C.—Agents.

No. 7. WILLIAM FORD & SONS, Pursuers (Reclaimers).—*Sol.-Gen. Robertson—G. W. Burnet—Salvesen.*

Oct. 25, 1888.  
Ford & Sons v. Stephenson.

RICHARD STEPHENSON, Defender (Respondent).—*J. C. Thomson—Mac Watt.*

*Trust—Trust for creditors—Principal and Agent—Responsibility of trustee who carries on business.*—A trader in embarrassed circumstances conveyed to one of his creditors his whole estates and business in trust for behoof of the grantor and his creditors, the trustee to have the management of the business, and the truster to act as his submanager, and to receive such weekly allowance as the trustee should think proper, the business to be carried on by the trustee till he should think it expedient to restore it to the truster or to sell it.

The business was carried on for twenty years by the truster under supervision of the trustee, the supplies being ordered by the truster and paid for by cheques drawn by the trustee upon a bank account in his name into which the drawings were paid. The trustee gave the truster a cheque for £6 monthly for his support.

*Held (rev. judgment of Lord Trayner)* that the trustee was personally liable for goods supplied to the business, on the ground that it was carried on by him under the trust-deed, and that the truster had acted as his manager.

2D DIVISION.  
Lord Trayner.  
I.

WILLIAM FORD & SONS, merchants, Leith, raised an action against Richard Stephenson, designed as "ironmonger and grocer, Duns," for payment of £175, 7s. 7d. as the amount of an account for goods delivered by the pursuers to the business of Matthew Wilson, grocer, Duns, between 6th July 1887 and 19th September 1887, when Wilson died, for which the defender was alleged to be liable.

The pursuers averred that on 26th June 1866 Wilson had granted a trust-deed conveying his whole estate to the defender for the purpose of carrying on the business,\* and that thereafter Wilson was truly in the em-

\* The trust-deed, which was prepared by a Mr Hunter, writer in Duns, and agent for the Royal Bank there, with which bank Wilson had previously been endeavouring to arrange a cash-credit, proceeded upon the narrative that Wilson's affairs had become embarrassed, and that without both pecuniary assistance and advice he found himself unable to carry on his business, and that he had exhibited to the defender a statement of his debts, accounts due to him, and a valuation of his means and estate (exclusive of certain policies of assurance), "and seeing that it is for the advantage of my creditors, as well as of myself, that my business should for a time be carried on under proper management, and the said Richard Stephenson being of opinion that by a prudent administration and management of my affairs under his control and supervision

ployment of Stephenson as manager. (Cond. 4) "The whole of the said account was incurred with the knowledge and approval of the defender, and on his behalf, in his conduct of the said business as trustee for Mr Wilson, and on the order of himself or persons authorised by him."

No. 7.  
Oct. 25, 1888.  
Ford & Sons v.  
Stephenson.

The pursuers pleaded that the goods having been ordered and supplied for behoof of the defender, as trustee for Wilson, or as an individual, he was liable to them in payment of the price.

The defender stated that Wilson, when his affairs became embarrassed in 1866, had applied to him for assistance and advice, and that he had agreed to make him certain advances to enable him to extricate himself and continue his business. "The defender was advised to procure the said deed (i.e. the trust-deed quoted below) as a security, if possible, for his advances, and in order that he might secure and enforce some supervision over Mr Wilson's business. The said trust-deed was not acted on to the effect of superseding Wilson in the conduct of his business, nor was that intended. No change took place in the conduct of said business, except as after men-

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they may be extricated from their present embarrassment, and he, with that view, being willing to make an advance on my behalf to the amount of £150 for the purpose of meeting with the present demands upon me, and with the view ultimately of paying all my debts and restoring my business to a healthy condition, it being hereby expressly provided, stipulated, and declared, that in security of the sum so to be advanced, or any further sum which may be advanced by the said Richard Stephenson, I shall assign to him the foresaid policies of life assurance" for £500 "in absolute security to him, his heirs, executors, and successors, by a separate deed of assignation, and the said Richard Stephenson being further willing to undertake the management of my affairs in trust for behoof of me and all my creditors, and for the purpose of enabling and empowering him so to do, I have resolved to grant these presents in manner underwritten: Therefore I do hereby dispoise, assign, and convey to and in favour of the said Richard Stephenson, as trustee, for behoof of me and all my just and lawful creditors, my whole estate and effects, heritable and moveable, real and personal, presently belonging and owing to me, and which may belong and be owing to me, or to which I may acquire right during the subsistence of this trust . . . excepting always from this trust the foresaid policies of life assurance; in trust for the uses, ends, and purposes, with the powers, and under the conditions, provisions, and declarations underwritten, namely:—Primo, That the said Richard Stephenson shall take the full management and control of my whole means and estate, and that I shall act as his sub-manager, and that the business of a grocer shall be carried on by the purchase and sale of spirits, porters, ales, groceries, and other such goods, and that for such time as shall seem expedient to the said Richard Stephenson, that is, until it shall seem to him that the business is in so healthy a condition as that he may restore the possession and management to me, and that he may with advantage to me and my creditors resign and upgive the present trust; it being hereby provided that I shall have the occupancy of the dwelling-house, and the use of the household furniture; and prices and proceeds of sales, and all purchases of goods to supplement the stock shall be under the control and management of the said Richard Stephenson, he being bound to make such weekly allowance for my services as shall seem to him necessary and proper for the maintenance of my family." The second purpose of the trust was for payment of the expenses thereof, with suitable remuneration to the trustee. The third purpose was,—“If it shall at any time appear to the said Richard Stephenson, as trustee foresaid, it is not for the advantage of me and my creditors to carry on the said business, then he is hereby empowered, without any further advice or consent of me, and at such time and in such manner as he may think expedient, to sell and dispose of the whole estate and effects hereby disposed, and such other goods or effects as may be bought in under his management.”

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tioned, in regard to cash transactions, and it was carried on as before by Mr Wilson for his own behoof. The said trust-deed was not intimated to creditors or published in any way. Of even date therewith Mr Wilson granted to the defender, in further security of said advances and interest, an assignation in security of two policies of insurance on his life with the Life Association of Scotland for £200 and £300, a copy whereof is herewith produced. In pursuance of the arrangement, and for the purposes of the business, an account was opened with the Royal Bank of Scotland at Duns, which was operated upon by cheques signed by the defender, and into which all money derived from the business was paid by Mr Wilson. The defender's position was that of a secured creditor with some charge of the cash and banking transactions. The existence and nature of the said deed and the defender's position under it have since the date of said deed, or at least since the year 1871, been well known to the pursuers, who were creditors at said date."

The defender pleaded;—(3) The said goods not having been ordered by, supplied to, or used for behoof of the defender, as trustee or as an individual, he ought to be assoilzied, with expenses. (4) The pursuers having since the date of the deed condescended on, or shortly thereafter, been fully aware of the defender's position thereunder, are not entitled to decree as concluded for.

A proof was led, from which the following facts appeared:—

Wilson began to deal with the pursuers in 1863. In 1866 he had become somewhat in arrear in his payments to them, and his business had got into a condition of embarrassment. On 19th June 1866 he informed the pursuers that he was arranging a cash-credit with the Royal Bank, Duns, and referred them to Mr Hunter, writer there, agent for that bank. In answer to their inquiries Mr Hunter wrote to them, on 26th June 1866, that Wilson, "finding it impossible to carry on his business from his own resources, has made an arrangement with Mr Richard Stephenson, ironmonger here, to aid him with money and advice. A trust-deed is to be executed in Mr Stephenson's favour giving him the full management of the business, so that any orders you receive will be through Mr Stephenson. Mr S. feels assured he will be able to restore matters to a healthy condition very shortly."

On 27th June 1866 the pursuers wrote to Wilson asking the nature of the arrangement which Mr Hunter's letter to them had indicated, and their letter was answered by Hunter on 28th June,—“Mr Wilson has now executed the trust-deed in favour of Mr Stephenson to which I alluded. The purpose of this trust is to carry on the business under Mr Stephenson's supervision, so that while the trust exists Mr Stephenson is the responsible party. He has opened an account here, into which, I understand, all monies drawn are to be paid, and from which all accounts are to be paid. If, therefore, you have the sanction of Mr Stephenson for any orders you may execute, Mr Stephenson will take care that you are paid. In short, Mr Stephenson has taken the management, and is to carry on the business for behoof of Mr Wilson.”

Hunter was not the private agent of the defender.

The pursuers from and after the date of Mr Hunter's letter to them continued to supply goods to the business. The orders were given by Wilson, who carried on the business ostensibly as before, receiving a monthly allowance from the defender. They were paid for by cheques drawn by the defender on an account opened by him in his own name in the Royal Bank, and titled Stephenson's "No. 2 account." This account he used for the purposes of the payments required for the business, and Wilson's duty was to pay into it the money received in the course of

business. The defender did not charge or receive any sum as remuneration for his services.

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On 24th May 1870 the defender wrote to the pursuers,—“ I would like very much to see you here with Wilson. As you are aware, I have been carrying on his business under trust for the last four years ; but as I have entered on a lease of the farm of Chapel, and now reside there, I am not able to devote any of my time to his business, and I am anxious to bring the trust to a close, and I would be glad to consult with you as to the best mode of procedure, so as no interest should suffer by my withdrawal.” On 3d June following he wrote saying that Wilson was probably about to obtain a certain loan, “ and should he be successful, I hope it will place Wilson in a position to dispense with my services and the trust-deed.” Pending this contemplated arrangement, Wilson desired certain additional credit from the pursuers, which they were unwilling to give, but which the defender was anxious that they should give. In the course of the correspondence he wrote to them that Wilson’s estate owed him upwards of £400, and that he was not in a position to allow that amount to be increased, and that if they could not accommodate Wilson as he desired, “ the only thing that I can see for it is to bring his affairs to a standstill and advertise the business.” The pursuers maintained the position they had taken up of declining to give Wilson the terms as to credit which he desired, unless some satisfactory security was given them.

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In the course of the correspondence passing at that period the letters quoted below were written by the pursuers to the defender.\*

On 25th August 1870, while the proposed new arrangement between

\* 23d July 1870.—“ We are in receipt of yours of yesterday. It is very inconvenient for any of us to go to Duns on an early day, and we feel we cannot allow Wilson’s debt to remain any longer in its present state. It is evident that, whatever the cause, his funds have not of late been employed in the payment of his business debts, if we may judge from the state of our long overdue account, as described to you in ours of the 21st. We would like to be informed as to the amount of cash he has received for the last five months, and what has been done with it ; and as it is now some years since your arrangement with him was entered into, we will feel obliged by your sending us a copy or the original, which we shall return in course. If we do not receive a payment to account in course, or are not assured by you that we may count upon one within three or four days, we feel there will be nothing for it but the necessary steps under such circumstances. Having come to this decision, we hope to hear in reply what course you mean to adopt.”

26th July 1870.—“ . . . If you wish, as we understand, to withdraw from your present connection with him, and if he has no other security to offer us, then it can only remain to decide what steps should be adopted under the circumstances, and to enable us to judge of that we would like to know the precise nature of the deed under which you are connected with him.”

1st August 1870.—“ . . . If we get sufficient security we would continue to supply Mr Wilson on our very best terms with goods to the amount of £400 or £500 as now ; but if, say by Thursday, you find it is not likely to be provided, we trust that you will take immediate action to realise and pay our claim, and render unnecessary any steps we might think otherwise incumbent on us.”

On 17th August 1870 the pursuers wrote to the defender offering to let their claim lie over on condition of satisfactory security being found, and, further, to give, on that condition, certain terms of credit. In this letter they wrote,—“ We would also suggest that in order further to induce his friends to befriend him, you should agree to continue the trust-deed, which would enable his securities through you to put a stopper at once on Wilson should he be found failing in any respect to implement his engagement, and enable you at any time to look into his affairs.”



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the pursuers and Wilson was under discussion, the defender gave the pursuers a special guarantee of payment of certain goods which Wilson required. In the letter undertaking this obligation he wrote referring to the proposed arrangement, and stating that it was likely to be carried through in a few days, and concluded his letter thus:—"In the meantime send him what goods he may order, and I will see you paid until the arrangement is carried through." Eventually the pursuers received bills to the amount of £350 signed by Wilson and guaranteed by two persons named Kellie and Hannan, and a cheque of £28 from the defender, which wiped out the debt then existing.

Thereafter matters went on as they had done prior to 1870, goods being ordered from the pursuers by Wilson, and paid for by the defender's cheque.

In 1874 the defender purchased the premises in which Wilson's business was carried on, and of which Wilson was the tenant. Thereafter the defender in keeping the trust account credited himself with the rent.

In April 1882 the defender again became desirous of being free from the trust-deed, and the letters on that subject quoted below passed between him and the pursuers.\* In consequence of the proposal to dispose

\* Defender to pursuers, 14th April 1882.—"Dear Sirs,—I think it right that you should know from me the present state of Mr M. Wilson's affairs, especially as he intends seeing you to-morrow on the subject. You are aware that several years ago he was seriously embarrassed; at that time he executed a trust-deed in my favour, under which the business has been carried on, and I am glad to say that now he is perfectly solvent. The carrying on of the trust has involved me in raising, for the purpose of carrying on the business efficiently, a considerable sum of money, and I am anxious now to be relieved from this, as well as the responsibility of the trust, but Wilson's difficulty seems to be in raising a sufficient capital to allow me to resign, and if this cannot be done, the only other alternative seems to me to dispose of the business. This on Wilson's account would be a serious matter, as the business is a good one, easily managed, and on the whole profitable; besides, the premises have now been bought and improved to suit the requirements of his trade. If you can suggest any way out of the difficulty, perhaps you will communicate it to Wilson, who will call on you sometime to-morrow."

Defender to pursuers, 19th April 1882.—"Dear Sirs,—I have been seriously considering the matter as to which Mr Wilson called on you on Saturday. It appears to me the only way practicable under the circumstances is to try and get someone who wishes to extend their business to take this one and retain Wilson as their manager, and give him either a share of the profits or a salary for his services. It's a nice tidy business, easily managed, with a most select connection, turning over about £4000 per annum, with good profits, and capable of great extension. He has a large and a growing trade of sending whisky to London and the south of England. It would take about £1000 to take the business in its present state, paying for stock and debts, and I must either arrange to let the premises on a long lease, or sell them, as it may be wished. If you know of anything likely to suit kindly let me know, as well as your opinion as to this proposal."

Pursuers to defender, 20th April 1882.—"Dear Sir,—We are favoured with yours of yesterday. We would be very sorry if Mr Wilson has to give up his business, but we cannot be surprised that you should wish to be free of your present responsibility. No one occurs to us in the meantime whom it might suit to take over the business under the management of Wilson, but we shall keep the matter before us, and communicate with you should we find any likely person to entertain it."

Defender to pursuers, 21st April 1882.—"Dear Sirs,—I am duly in receipt of yours. Perhaps the best way will be to advertise the business, and see what

of the business referred to in these letters an advertisement offering such a business for sale was inserted in the newspapers, reference being made in it to the pursuers, who directed the persons who made inquiries regarding it to communicate with the defender. No sale, however, took place.

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In December 1882, some orders by Wilson being then unpaid, he ordered a supply of goods. The pursuers were unwilling to furnish them, considering the state of his accounts, and wrote to him the letters as to the conditions on which they would do so which are quoted below.\* The dealings of parties, however, notwithstanding these letters, continued as they had done throughout the course of the trust, orders being given by Wilson and executed by the pursuers without the defender's indorsation.

On Wilson's death, as above stated, in September 1887 he left a settlement, under which the defender and Wilson's daughters were trustees and executors.†

In his evidence the defender deponed,—“I never took possession of the business. It was carried on precisely the same as before. I am not aware that the trust-deed was intimated to anyone in 1866. It was not intimated to creditors that they might accede to my being trustee. I looked into Mr Wilson's shop almost every day to supervise the business. I cannot say that I examined all the books, but I looked at the bank-book and cash-book. I made an examination at the balancing time. I did not take anything to do with the orders. . . . Cross for pursuers. —(Q.) In the matter of the arrangement under which you acted, did Mr Hunter, a lawyer in Duns, act for you? (A.) I don't think I had anyone acting for me; I think I acted for myself. . . . I certainly never authorised Mr Hunter to say that I was responsible.” He explained that Wilson's allowance from the trust was £6 monthly, payable by defender's cheque, but that he often took more. “I objected to his taking more, but I could not help his doing so. . . . (Q.) According to the arrangement,

comes of it. Would you have any objection to allow the reference to be to yourselves in the first instance.”

\* 28th Dec. 1882.—“We have your telegram, and have forwarded, not without some hesitation, the hhd. whisky. When executing your last order, we pointed out that the October goods were not yet paid, and you replied on 18th inst. that a cheque would be sent shortly. Instead of sending a cheque you now order this whisky, and do not say a word in explanation. We trust to have a cheque from you to-morrow, and in future we would like your orders for goods countersigned by Mr Stephenson.”

5th Jan. 1883.—“We have your order for sugar, which has been forwarded; but we must remind you of the request we made in our last that your orders in future should be countersigned by Mr Stephenson. Looking at late delays in payment, we think this arrangement is proper and necessary in the interest of Mr Stephenson, as well as in yours and our own. Don't forget this in sending future orders.”

† On 5th October 1887 the pursuers wrote to Miss Wilson, who was then managing the business, with an invoice of goods sent,—“Before sending more goods we would like to know who is to be responsible for payment. Hitherto we have had Mr Stephenson's guarantee, which we hope he will be pleased to continue.” The defender replied, on 6th October 1887,—“Miss Wilson has shewn me your letter to her of 5th. You are aware Mr Wilson granted a trust-deed in my favour several years ago, and the business has been carried on under the powers granted to me by the same up to his death, when the deed lapsed. . . . The trustees under the settlement will be responsible to you for any goods supplied to them after Mr Wilson's death. With reference to what you say as to my personal guarantee for any goods supplied to Mr Wilson, I can only admit this in so far as the trust-funds will enable me to pay the same, and I am hopeful the estate may admit of everyone being paid in full.”

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he got nothing from the business except what he got by your cheque? (A.) The arrangement is embodied in the trust-deed. (Q.) Is not that the case? (A.) He was not to take any money except what he got through my cheque. (Q.) In point of fact, the position which he held was that of submanager? (A.) Certainly not; you did not know him! It was impossible to have carried on that business with an *imperium in imperio*; the nature of the business was such that it was impossible for any man to have acted as manager. (Q.) I understand you to say that the management of the business was not according to the trust-deed? (A.) The management of the business was continued the same as it had been before the trust-deed was granted. (Q.) Having been referred to that passage in the trust-deed, was the arrangement or was it not in accordance with the trust-deed? (A.) If I was to be manager, it certainly was not in accordance with the trust-deed. By the Court.—(Q.) You were not manager? (A.) I was not manager, neither was Wilson submanager. I was his trustee, exercising supervision over him.”

The Lord Ordinary (Trayner) assoilzied the defender.\*

The pursuers reclaimed, and argued ;—The correspondence shewed that the defender was the person whom the law must hold responsible for their accounts. By the trust-deed he was invested in Wilson's business and estate, and Wilson was merely his servant. The defender was in absolute control of the business, with a power of sale, and occupied his position without any limit of time. The case was thus distinguishable from those quoted by the Lord Ordinary, where the person sought to be made liable was a creditor put for a limited time into a position to work out a security. The simple ground on which the defender was liable was that he carried on the business; he was therefore, like any trustee who carried on a business, liable for the orders given by himself or by the person who, with his authority, gave them. It could not be maintained that the pursuers did not rely upon the defender's paying the account sued for when they had for many years been paid by him for every other order given in the course of the business. They had been told by Hunter at the time the trust-deed was executed what was intended to be its effect. They had, after a time,

\* “OPINION.—I think it quite clear that the defender and the late Matthew Wilson never stood towards each other in the relation of principal and agent, or master and servant, in connection with Wilson's business, and that, therefore, the decision in *Macphail's* case (15 R. 47) has no application to the present. On the other hand, I am unable to distinguish this case in principle from the cases of *Eaglesham* (2 R. 960), *Miller* (3 R. 548), *Stott* (5 R. 1104), and *Newcastle Chemical Company* (9 R. 110).

“The trust-deed granted in favour of the defender was intended as a security to him for advances made; and although it authorises the defender to take the management of Mr Wilson's business, and to place Mr Wilson in the position of a submanager, the relations between the defender and Mr Wilson never took that shape. Wilson continued in the management of his business, as the pursuers knew. They corresponded with him on that footing. Even if the defender had assumed the position of manager of Wilson's business, that would not have inferred liability for Wilson's debts.

“The pursuers say that in sending the goods to Wilson the price of which is now sued for they relied on the defender being liable therefor. They had no good ground for so relying on the defender. They knew the terms of the trust-deed, and should have known that the trustee under such a deed was not personally liable for the debts of the truster. It is not pretended that the defender ever gave the pursuers any reason to suppose that he would be liable for Wilson's debts. On the contrary, the correspondence in process appears to me to establish that, while the pursuers relied on the defender taking a supervision of Wilson's business, they looked to Wilson alone as their debtor.”

asked to see it, and the defender had shewn it them without suggesting that it was not really the charter of the dealings between them. The defender, as well as they, had again and again referred in the correspondence to his responsibility in carrying on the business as trustee. It was said that the pursuers did not rely on the defender, because they had asked and got special guarantees more than once. But the explanation was that the special guarantees were given at two periods, 1870 and 1882, when the trust was for a time in abeyance, and a new arrangement was contemplated, which made it desirable to have a special temporary guarantee.

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Argued for the defender;—The defender's position was that of a creditor supervising a business, and advising the trader in money matters. It was not that of a trustee in possession of a business, and carrying it on with the cedent as manager. The pursuers must have known that the deed was not acted on to the effect of divesting Wilson and investing the defender with the full control of the business. The correspondence shewed that they looked upon the defender as Wilson's adviser and his substitute, to whom they trusted. They looked upon him as a sort of interdictor of Wilson. The Lord Ordinary was right in distinguishing the recent case of *Macphail & Son v. Maclean's Trustee*<sup>1</sup> from the present, because the defender in that case was placed by the lease and by delivery in full possession of the cedent's estate, and the cedent thereafter held the estate merely as agent for him. Besides, in that case the defender was made responsible to the extent of the trust-estate only, and the defender was quite willing to make a concession to that extent here. Again, the case of *Eaglesham*<sup>2</sup> was different on another ground. There the person sought to be made liable was in receipt of payment by way of commission for his services to the trader. Yet there the judgment was for the defender, because, as here, his true position was held to be that of a creditor having supervision of the trader's business, but not substituted for him in it. As the Lord Ordinary pointed out, the principle which applied to the present case was the same as received effect in the other cases cited by the Lord Ordinary.<sup>3</sup> The pursuers desired the Court to look to the form of the deed under which the defender was made trustee. But the substance of the transaction was the thing to be regarded, and it was clear that the pursuers regarded the trust as a check upon Wilson to be made effectual by the business abilities and good offices of the defender, and such it really was.

At advising,—

LORD YOUNG.—This is an action at the instance of a firm of merchants for payment of an account for supplies which were made to a grocery business in Duns which was at one time carried on by a Mr Wilson, who died in September 1887. The period of currency of the account sued for as it now stands is from July 1887 to the date of Wilson's death in September 1887. The amount as ascertained in the minute of restriction is £175, 17s. 7d. The action is not against Wilson's representatives as such, but against Stephenson, an ironmonger in Duns, in whose favour Wilson executed a trust-deed about twenty years ago. We have the trust-deed. I do not detain your Lordships by quoting it at length, but shall state what appears to me its import and effect. Wilson was in labouring

<sup>1</sup> Nov. 16, 1887, 15 R. 47.

<sup>2</sup> *Eaglesham v. Grant*, July 15, 1875, 2 R. 960.

<sup>3</sup> *Miller v. Downie*, March 4, 1876, 3 R. 548; *Stott v. Fender & Crombie*, July 20, 1878, 5 R. 1104; *Newcastle Chemical Co. v. Oliphant & Jamieson*, Nov. 15, 1881, 9 R. 110.

**No. 7.** circumstances at the time of its date, 26th June 1866. His business had not been going on satisfactorily. Stephenson acted the friendly part of undertaking to carry it on, and put it on a more satisfactory footing. In order to carry it on he had to make some advances. On the other hand, Wilson by the trust-deed divested himself of the business and of everything else of which he could divest himself in favour of Stephenson, as trustee, in order that he might carry on the business and endeavour by his exertions and by his sensible management to put it on a better footing. By the trust-deed Wilson was completely divested and Stephenson invested subject to the trust. He appointed Wilson himself to carry on the business, as manager and under his supervision, accounting to him by paying over to him all the receipts, that is, the income from the business, while he Stephenson, paid for the supplies made to the business.

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Now, I cannot take the trust-deed as what it was represented to be—that is, a mere sham. I think it was a reality, and that we have not to consider the case of a trust-deed not acted upon, for the trust-deed was acted on. It was acted upon for twenty years. During that period the trustee received the receipts of the business, and paid for the supplies. His purpose was so to carry it on that the receipts should exceed the outgoings, for otherwise it would have been according to his trust and duty to bring the business to an end by selling it, if possible, or at all events to terminate it in some way so as to avoid loss. That during those twenty years, Stephenson knew the exact state of matters from day to day is certain, for one of the admitted facts of the case is that the drawings were paid to him, and that the supplies were paid for by him. There was no other source of payment, for Wilson had nothing. He was the manager and had an allowance, but Stephenson had the funds with which the payments were to be made. It is for that reason I say that Stephenson knew the condition of the business for twenty years. The trust indeed subsists still. The business, if worth anything at all, will be sold by the trustee, and in the course of the execution of the trust, for the trust includes all that Wilson possessed.

Now, the pursuers were acquainted with the fact of the trust-deed being granted from the first. In 1866 they, who were the chief merchants who made the supplies, received in reply to their inquiries letters from Hunter, the man of business who prepared the trust-deed, and who must have known what was intended by the parties. He said in one of these, that dated 26th June 1866, —“A trust-deed is to be executed in Mr Stephenson's favour giving him the full management of the business, so that any orders you receive will be through Mr Stephenson”; and again on 28th June 1886, “Mr Wilson has now executed the trust-deed in favour of Mr Stephenson to which I alluded. The purpose of the trust is to carry on the business under Mr Stephenson's supervision, so that while the trust exists Mr Stephenson is the responsible party.” Now, what Mr Hunter there states would be the legal result of the trust is not in my opinion doubtful in point of law. If a trustee carries on a business directly or through the medium of a manager, he is responsible for the debts undertaken in so carrying it on, whether they are undertaken by himself or by the manager acting within the scope of his authority. That is a familiar thing in the case of a trustee in bankruptcy. He may go on with a contract or (to take a familiar instance) continue to manage, with the landlord's consent, the farm of a bankrupt farmer. Or he may appoint the bankrupt as his manager, and continue to

manage the farm through him. He is responsible in such a case for the debts incurred by himself or by the manager. Now, the question here is whether the account sued for is for debts incurred by Stephenson, the trustee, it being immaterial whether they were incurred by himself or by his manager Wilson with his authority. I do not doubt that they are debts of the trust. Stephenson was not carrying on the business for himself. I observe some confusion on this matter in the examination of the witnesses, and the same was observable at the debate. It seems to have been supposed that the allegation was that Stephenson was carrying on the business for his own profit—a thing never suggested at all. It would have been a breach of trust if he had carried it on for his own profit. The legal responsibility was upon him because the contract was his contract. It is said that Stephenson is not liable for Wilson's debts. He is not. But he is liable for a debt incurred by himself in carrying on the trust to the party with whom he dealt. We know from the trust-deed what Wilson's authority to order the goods was. Wilson was manager, and the orders he gave were from 1866 to 1887 given with Stephenson's sanction, which was shewn by his paying the accounts so incurred. It is not suggested that the orders were in excess of his authority with regard to the account in question. Stephenson had a duty to see that the debts incurred in consequence of the orders given did not exceed the drawings of the business. He was successful in that to a considerable extent. I observe that in one or two of his letters he alludes to that. He says (on 14th April 1882 in a letter to the pursuers) that "the business is a good one, easily managed, and on the whole profitable," and in a letter of 19th April 1882 he calls it "a nice tidy business, easily managed . . . and capable of great extension." That shews that he had performed his duty by seeing that the debts were not getting beyond the drawings, which were his means of meeting them.

Now, two incidents in the conduct of the trust were referred to at the debate. One of them occurred in 1870. It appears that then Stephenson had taken a farm and did not expect to be able to give to the business the same amount of attention as before. He told the pursuers of this fact, saying that he wished to bring his actings as trustee to an end, and be free from the position he occupied. The import of the answer to this letter is that the pursuers appreciated his desire, but they pointed out that it would be fair to them that some arrangement should be made as to what was due to them, and that some provision should be made for the future. Nothing came of it at that time, and matters went on as before, Wilson, I mean, being manager and accounting to Stephenson. In 1882 there was another manifestation of desire to be free from the trust on the part of Stephenson. He wrote to the pursuers—"I think it right that you should know from me the present state of Mr M. Wilson's affairs, especially as he intends seeing you to-morrow on the subject. You are aware that several years ago he was seriously embarrassed; at that time he executed a trust-deed in my favour under which the business has been carried on"—(that is the business which it has been argued to us was not carried on under the trust at all). "I am glad to say that now he is perfectly solvent. The carrying on of the trust has involved me in raising for the purpose of carrying on the business efficiently a considerable sum of money, and I am now anxious to be relieved from this as well as the responsibility of the trust" (what responsibility, if his present argument is right?) "but Wilson's difficulty seems to be in raising a sufficient capital to allow me to resign, and if this cannot be done, the only other alternative seems to me to dispose of the

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**No. 7.** business. This on Wilson's account would be a serious matter, as the business is a good one, easily managed, and on the whole profitable; besides, the premises have now been bought and improved to suit the requirements of his trade." I may here notice that we were told in answer to our question that in 1874—thirteen years before the account sued for—the defender purchased the premises, so that the trust business was thenceforth conducted in premises belonging to him, he charging the trust a rent for them, and taking credit for it out of the trust funds. That puts out of this case any question of need of delivery in order to operate a legal transfer to him of anything belonging to Wilson or brought into the premises when purchased for the business. The title being with him, and the business being his in trust, he asked the pursuers to assist him in disposing of the business, and on 20th April 1882 they write to him—"We would be very sorry if Mr Wilson has to give up his business, but we cannot be surprised that you should wish to be free of your present responsibility," and go on to say that though no one occurs to them at the time as a purchaser of the business, they will communicate with him (the defender) if they hear of anyone who would be a likely person to take it over. It is thus again pointed out to the defender that the pursuers are quite willing that he should be freed from his position on reasonable terms for themselves. If they continued their supplies, they wished him to continue responsible for them until the new arrangement should take place. Then come two letters, one in December 1882 and the other in January 1883. The former is as follows—"We have your telegram, and have forwarded, not without some hesitation, the hogshead whisky. When executing your last order, we pointed out that the October goods were not yet paid, and you replied on 18th inst. that a cheque would be sent shortly. Instead of sending a cheque you now order this whisky, and do not say a word in explanation. We trust to have a cheque from you to-morrow, and in future we would like your orders for goods countersigned by Mr Stephenson." The other letter is as follows,—“We have your order for sugar, which has been forwarded, but we must remind you of the request we made in our last, that your orders in future should be countersigned by Mr Stephenson. Looking at late delays in payment, we think this arrangement is proper and necessary in the interest of Mr Stephenson, as well as in yours and our own. Don't forget this in sending future orders.”

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Now the meaning which these letters convey to my mind is this. The pursuers were, though business men, and properly alive to their own interests as such, evidently friendly to Wilson and to the defender, whose interference in Wilson's affairs, thereby involving himself in responsibility, they appreciated. They wished that no orders, and especially no large orders, should be executed without Stephenson's knowledge. He was kept aware of his responsibility for his manager's orders. They say in the letter "in the interest of Mr Stephenson as well as yours and our own," meaning that the business will thrive according as the defender's judgment is followed, and that the defender has an interest because he has a responsibility to them. But I cannot read these letters as meaning that between the defender and the pursuers goods would henceforth only be supplied when the defender signed the order. The ordinary law as to a trustee's order by himself or his manager, as I have already explained it, was applicable. It might have been superseded by a special contract that no order was to be good unless the defender signed it, but I do not think that that agreement was made. No distinction was made between the future and the

past, and it is not said that orders were paid for which had Stephenson's signature and that payment of others was refused because they were not signed. On the contrary, the defender paid for them all. Nor yet is it suggested that any of Wilson's orders were in excess of his authority as manager.

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On the whole, therefore, I am unable to reach the conclusion that the defender is not responsible. Nor do I think that in this or in any case it makes any difference to the liability of the trustee that the beneficiary may be liable also. Wilson was no doubt a beneficiary in this trust. Profit made after payment of the debts and restoration of the business to a healthy condition would have gone to him. In the same sense a bankrupt is a beneficiary in the trust held by a trustee in bankruptcy, and rare cases have occurred in which a surplus has existed in a bankruptcy and the bankrupt has received it. But the interest of Wilson in this trust makes no difference to the liability of the trustee, who carried on the business for twenty years.

I am unable, on the grounds I have now stated, to concur with the judgment of the Lord Ordinary, and I have reached my conclusion with regret, for I should be sorry if the defender's kindness in acting as he did should cause him serious loss. I hope it may not do so. We were told during the debate that the estate of Wilson will pay at least 10s. per £1. That makes the case not very important in point of money. But I am of opinion that the pursuers must have decrea

**LORD RUTHERFURD CLARK.**—I am of the same opinion. I think the business was carried on by the defender. He says so in various letters, and his statement is in my judgment in accordance with the fact. He was carrying on the business at the time when the goods were ordered of which the price is here sued for. In these circumstances, I hold that the true legal view is that the defender was the purchaser of the goods, and is therefore liable for the price. I therefore agree that the interlocutor ought to be altered.

**LORD LEE.**—I have no difficulty in assenting to the doctrine that a trustee who, in carrying on a business under such a trust as that now before us, orders goods for the purposes of the business, either personally or by another deriving authority from him, must be liable in payment of the price. Nor have I any difficulty in holding with your Lordships that this trust was acted on for some time by the parties. But I have difficulty on the question whether the account sued for was incurred during a time when the trust-deed really represented the relation in which the defender stood to the pursuers.

The question is, whether the goods charged for in this account were supplied to the defender's order or to the order of anyone authorised by him? The allegation in condescendence 4 is,—“The whole of the said account was incurred with the knowledge and approval of the defender and on his behalf, in his conduct of the said business as trustee for Mr Wilson, and on the order of himself or persons authorised by him.” If that is true, then the defender is liable without doubt. The view of the Lord Ordinary is,—“I think it quite clear that the defender and the late Matthew Wilson never stood towards each other in the relation of principal and agent or master and servant in connection with Wilson's business.” I cannot say that their relations never took that shape, but my difficulty is that there were two periods at which the relation constituted by the trust appears to have been superseeded. The first was in 1870, the second in 1882. I think that the correspon-



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dence of 1870 shews that the pursuers accepted the defender's intimation as sufficient notice that the trust was then suspended, and that it was not until the defender agreed to continue the trust that the former relation was resumed. I refer particularly to the letters between 25th August and 13th September 1870, as proving that the trust was suspended at that time. But the question is, whether there was not another suspension of the trust in 1882. A letter from the defender to the pursuers intimating his unwillingness to continue in the trust has been read. This was followed by two letters, dated 28th December 1882 and 5th January 1883, which your Lordship has noticed. In the letter of 5th January the pursuers intimated to Mr Wilson their wish that "your orders in future should be countersigned by Mr Stephenson," and they added, "we think this arrangement is proper and necessary in the interests of Mr Stephenson as well as in yours and our own." What is the meaning of these letters? I think it can only be that any orders not so countersigned by the defender would not be regarded by the pursuers as given with his authority, and I should have thought it incumbent on the pursuers to shew that the orders, the payment of which is sued for in this account, were so countersigned by the defender. But no argument was addressed to us on this point. It was not contended that there was any change in the relations between the pursuers and the defender at this time in point of fact. I therefore cannot dissent from your Lordship's judgment, but I wish to say, that if it had been shewn that these letters were acted upon after January 1883 I might have come to a different conclusion.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the defences, and gave decree for the sum £175, 7s. 7d., with expenses.

BOYD, JAMESON, & KELLY, W.S.—MACK & GRANT, S.S.C.—Agents.

**No. 8.** **Oct. 27, 1888.**  
**Smith v.**  
**M'Bride &**  
**Smith.**

**JAMES SMITH, Pursuer (Respondent).—Shaw—J. G. Stewart.**  
**JOSEPH M'BRIDE AND WILLIAM SMITH, Defenders (Appellants).—**  
**M'Lennan.**

*Partnership—Goodwill of business—Right of partner who has purchased goodwill to exclusive use of firm name.*—Smith, one of the partners of Smith & M'Bride, bought the business and goodwill, and carried the business on for three years in his own name. At the end of that time his former partner M'Bride and a person also named Smith, who had entered into partnership with him, began to trade in the same business in the same town, under the name Smith & M'Bride. Held that Smith was entitled to interdict against their trading under that name.

**2D DIVISION.** **James Smith and Joseph M'Bride** carried on business in partnership as aerated water manufacturers at Waverley Lane and Sugarhouse Lane, Greenock, and also at Largs, prior to August 1884, under the name of Smith & M'Bride. In that month, their agreement of copartnery having terminated, they advertised for sale "the business of aerated water manufacturing carried on for many years extensively and successfully . . . by Smith & M'Bride . . . together with goodwill, stock in trade, machinery, horses, harness, vans, bottles, bottle-racks, boxes, and whole utensils and outstanding debts."

Thereafter they entered into a minute of agreement, by which it was arranged that the advertisement should be withdrawn, and that Smith should pay and M'Bride accept £300 for the latter's "share and interest in the business." The fourth article of the agreement was,—“Mr Smith gets all that is offered for sale in the advertisement; takes and pays all liabilities of the firm, and gets right to collect all debts due to the

firm, and to the goodwill of the business." Thereafter a notice of dissolution signed by both parties was advertised. It stated, *inter alia*, that Smith had "acquired the said business, with goodwill, machinery, and stock in trade. He will continue to carry on said business in his own name."

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James Smith thereafter continued the business in the premises formerly occupied by the firm.

About a month after the dissolution M'Bride began business as an aerated water manufacturer in Nicolson Street, Greenock.

On 24th December 1885 M'Bride, David M'Kelvie, and William Smith (a brother of James) entered into partnership as aerated water manufacturers, under the firm "M'Bride, Smith, & M'Kelvie."

On 27th August 1887 M'Kelvie retired from the firm, and M'Bride & Smith entered into an agreement to carry on the business under the same conditions as those contained in their contract with M'Kelvie, but under the firm "Smith & M'Bride." A notice of M'Kelvie's retirement was advertised in the *Gazette*. It stated that the "business continues to be carried on by the subscribers, Joseph M'Bride and William Smith, on their own account, under the firm of Smith & M'Bride." M'Bride and William Smith subsequently traded as Smith & M'Bride.

James Smith raised an action in the Sheriff Court at Greenock against Joseph M'Bride and William Smith, "who carry on business as aerated water manufacturers under the style or firm of Smith & M'Bride, aerated water manufacturers, at No. 61 Nicolson Street, Greenock," craving interdict against the defenders as a company or as partners thereof, or as individuals, "trading under the firm name or style of Smith & M'Bride."

The pursuer averred that he continued to carry on the business of his former firm of Smith & M'Bride, "under the style or firm of Smith & M'Bride, and his own name," that his business was still known as that of "Smith & M'Bride," "and that the assumption and use of that style or firm by the defenders will injure him in his business, mislead the public, and cause confusion between the pursuer's and the defenders' businesses. This has already happened."

The defenders denied these averments, and averred that the pursuer carried on business under his own name and in no other, and that he had renounced any right he might have to the exclusive use of the name Smith & M'Bride. With regard to the change in the name of their firm, they stated,—"In consequence of said retirement of Mr M'Kelvie, and of there being no person of the name of M'Kelvie left in the firm, and because of certain re-arrangement of their business and otherwise, the defenders resolved thereafter to change their firm's name into that of Smith & M'Bride. Said firm had no connection whatever with the old and long previously dissolved and defunct firm of Smith & M'Bride, nor was it a continuation in any sense, or a succession in any way, of said old firm, but it was simply adopted because of the individual partners composing said firm having said names."

The pursuer pleaded;—(3) The defender M'Bride, having sold to the pursuer all his right, title, and interest in the stock, plant, and goodwill of said firm of "Smith & M'Bride," is not entitled, either by himself or in conjunction with any other person or persons, to carry on the business or trade of an aerated water manufacturer or aerated water manufacturers, in the locality of Greenock, under the style or firm of "Smith & M'Bride," and interdict should be granted as prayed for.

The defenders pleaded;—(3) The pursuer having no right or title to the use or continuation or adoption of the firm of Smith & M'Bride, the prayer of the petition should be refused, with costs. (5) The defenders

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being at liberty or in right to assume the name of said firm, or to carry on business under said firm, should be assailable, with costs.

The facts above narrated were admitted, and further probation was renounced.

The Sheriff-substitute (Nicolson), after findings in fact to the effect already stated, found in law "that the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride," and granted interdict in terms of the prayer of the petition.\*

On appeal the Sheriff (Moncreiff) affirmed the Sheriff-substitute's interlocutor.†

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\* "NOTE.— . . . When the defenders parted with M'Kelvie, the name of the firm had to be changed, and the omission of M'Kelvie was all that was necessary. Instead of 'M'Bride, Smith, & M'Kelvie' it should thenceforth have been 'M'Bride & Smith.' But instead of that the name of the junior partner has been put first and that of the senior second. Why so? 'Because of certain re-arrangement of their business and otherwise,' say the defenders (art. 4). 'Otherwise' is a very vague and comprehensive word, and if here I take it to mean 'because the name of Smith & M'Bride was already well known in the trade, while that of M'Bride & Smith was new,' I believe I rightly interpret the words and the conduct of the defenders. Their further explanation that the new name 'was simply adopted because of the individual partners composing said firm having said names,' I must regard as scarcely tolerable, if not simply incredible.

"That the assumption of this name by the defenders, and the consequent confusion of a new firm with an older firm represented by the pursuer, is injurious to him, and that he is entitled to be protected from such injury, I cannot doubt."

† "NOTE.—The Sheriff-substitute's judgment is clearly right. Whatever may be the defenders' legal rights, there can be little doubt as to their *animus* or intention in adopting the firm of 'Smith & M'Bride,' viz., to obtain any benefit that was to be derived from the name of the old firm. The Sheriff-substitute has explained this so fully that I need add nothing. As to the law of the case, I think that in a question with a partner who has sold his interest in the 'goodwill' of a business it must be held that he loses the right to use the old firm. This is correctly laid down by Lindley on Partnership (4th edition), p. 861,— 'The purchaser of a goodwill of a business acquires the right not only to represent himself as the successor of those who formerly carried it on, but also to prevent other persons from doing the like.' In the case to which he refers (which closely resembles the present), viz., *Churton v. Douglas*, 1859, Johnson's Chan. Reps., p. 174, there will be found a valuable exposition of the law by Vice-Chancellor Page Wood, which fully supports the statement in the text.

"It is said that the pursuer bound himself not to assume the name of the old firm. I do not so read the notice in the *Gazette*. That notice means no more than this, that it was the intention of the pursuer to carry on the business in his own name; and I think it is clear that he would have been at least entitled to have added 'Successor of Smith & M'Bride,' if he had thought fit. Even if the pursuer were not entitled to use the old name of 'Smith & M'Bride' (which I do not affirm), it by no means would follow that M'Bride, who was bought out, and had assigned his whole interest in the concern to Smith, was entitled to do so, and represent himself as carrying on the business of the old firm. As to the time which had elapsed without the pursuer using the old firm's name (if this is the case), I think a sufficient explanation is, that until the assumption of the name by the defenders it was quite understood by the public that the pursuer was carrying on the business of the old firm. I therefore think that he is entitled to the protection sought, and that interdict has been rightly granted."

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The defenders appealed, and argued;—No one could be interdicted from carrying on business in his own name, or by means of a collocation of his own name with that of a partner. The only exception to this was the case of one fraudulently selling an article which another had long been selling, and taking an unfair advantage of the similarity of name.<sup>1</sup> The defenders were not committing any fraud on the pursuer, who had renounced the opportunity of proving any by renouncing probation. It was clear that the pursuer had never intended to use the name "Smith & M'Bride," though he might have used it when he bought the goodwill of the old firm, for he advertised that he intended to trade under his own name, and had done so from 1884 till he raised the action. He had thus renounced the use of the name, or at least barred himself from objecting to its use by the defenders. His contention must be that because he had once been a partner of a firm, and had bought its goodwill, another firm bearing the same name could never exist. The case of *Churton*<sup>2</sup> relied on by the pursuer was very different, for there the old firm had gone on with the old business, and Douglas, the defender, had set up a new business, adopting the name of the old firm, and had solicited business from the customers of the old firm.

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In answer to the Court defenders' counsel stated that he had no further explanation to give of the change in the order in which the names of the partners appeared in their new firm than that set out on record.

Argued for the pursuer;—The pursuer having purchased the goodwill of Smith & M'Bride was entitled to the use of the name, and to restrain others from using it.<sup>3</sup> He did not admit that he had abandoned the use of that firm name, and he still conducted his business in the premises with which it was associated. In any view the term of four years during which he had carried on business in his own name was not so long as to shew an intention to abandon the right he had purchased to the use of the name Smith & M'Bride.

**LORD YOUNG.**—This is an application by a person who purchased a going business as an aerated water manufacturer, with its stock and goodwill, in August 1884, to have the person from whom he purchased it, and the firm which that person has now formed, interdicted from trading under the firm's name, the right to which he purchased along with the goodwill. The Sheriff-substitute in his interlocutor of 14th February 1888, after stating the facts that the business was purchased, and that the defenders had assumed the name and were using it in carrying on their business, found in law "that the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride," and he therefore granted interdict. I think that judgment was altogether right in fact and in law. It takes a strong case of right in another and consequent danger of injury to him to justify a Court in restraining any man from conducting his business in his own name. But I think this case is of such a character. Smith & M'Bride is the firm name under which the business was formerly conducted, and, as the advertisement issued when the business was sold bears, "extensively and successfully" conducted. The pursuer Smith, one of the partners, purchased it with

<sup>1</sup> *Burgess v. Burgess*, March 17, 1853, 3 De Jex, M'Naughton, & Gordon, 896.

<sup>2</sup> *Churton v. Douglas*, 1859, Johnston's Ch. Rep. 174.

<sup>3</sup> *Levy v. Walker*, Feb. 5, 1879, 10 Ch. Div. 463 (Lord Justice James), and *Churton v. Douglas*, *supra*.

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the right to use the firm name. M'Bride, the other partner, assumed two partners, another Smith and a man named M'Kelvie. They set up a similar business in other premises in the same neighbourhood, and though M'Bride had been a partner of Smith & M'Bride, it was within his legal right to do so. The name of the new firm was M'Bride, Smith, & M'Kelvie. That did not answer—M'Kelvie retired and M'Bride & Smith were left. They in August 1887, three years after the sale of the business of Smith & M'Bride to the pursuer inverted the order in which their names had previously appeared, and brought their firm name exactly to that of the original firm. It has appeared to both the Sheriffs that the object of this was to obtain the benefit to be derived from the name of the old firm in the conduct of a business the same as that of the old firm. Now, no answer has been made to that suggestion, no other view of it has been given to us. The obvious reason of the change, in the absence of explanation, is that which the Sheriffs thus brought prominently before the notice of the parties some months ago, and no other explanation is furnished to us. In these circumstances, I think the judgments of the Sheriffs ought to be affirmed.

LORD RUTHERFURD CLARK.—I agree.

LORD LEE.—I also concur. I think that a man who sells his business with its goodwill cannot derogate from his own grant. It was said for the defenders that the pursuer had abandoned the right he originally had to use the name, and to object to the use of it by anyone else. But I think that the circumstances afford no ground for that contention.

THIS interlocutor was pronounced:—"The Lords having heard counsel for the parties on the appeal dismiss the same, affirm the judgments of the Sheriff-substitute and of the Sheriff appealed against: Find the pursuer entitled to expenses, and remit," &c.

EMSLIE & GUTHRIE, S.S.C.—MILLAR & MURRAY, S.S.C.—Agents.

No. 9.  
Oct. 30, 1888.  
Marshall v.  
King.

MRS CATHERINE MELVILLE SIMPSON OR MARSHALL AND OTHERS,  
First Party.—*C. J. Guthrie.*

JOHN KING AND ANOTHER, Second Parties.—*C. S. Dickson.*

JOHN KING AND OTHERS (Melville's Trustees), Third Parties.—  
*C. J. Guthrie.*

*Succession—Vesting—Payment postponed till death of liferenters—Clause of survivorship.*—A trustor by his trust-settlement, *inter alia*, directed his trustees, so soon as they should see fit, to convey certain heritable property to two daughters—his only children—in liferent respectively, and to two grandchildren *nominatim* and other grandchildren *nascituri*, equally among them, share and share alike, "any of whom failing, the share or shares of the decessor or decessors to the survivors, equally among them, share and share alike, in fee."

*Held* that the fee did not vest in the testator's grandchildren or their issue at the testator's death, but that on the death of each daughter the half liferented by her fell to be divided among the testator's grandchildren or their issue then in existence, exclusively.

1ST DIVISION.  
B.

By trust-disposition and settlement David Melville, a merchant in Greenock, who died on 30th November 1845, conveyed to John King and others, as trustees, *inter alia*, heritable estate in Greenock. The seventh purpose of the deed was in these terms:—"In the seventh place, that my

said trustees, acceptors or acceptor, survivors or survivor of them, the major number accepting and surviving being a quorum, shall, so soon as they see fit, give, grant, and dispose to and in favour of the said Mrs Martha Melville Simpson and Mrs Catherine Melville or King" (who were his only children), "equally between them in liferent, for their liferent use respectively allienarly, and in the event of any one of them deceasing without leaving lawful issue of her body, the share of deceased to be given and disposed and to belong to the daughter surviving in liferent, for her liferent use allienarly, but excluding the *jus mariti* of her present husband, or any future husband she may marry; and to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born, by my said two daughters, of their present or any future marriage, equally among them, share and share alike, any of whom failing, the share or shares of the deceiver or deceasers to the survivors, equally among them, share and share alike, my whole heritable subjects and estates before described in fee."

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The truster was survived by his widow, who died on 6th May 1859, and by his only children, Mrs Martha Melville or Simpson, wife of David Simpson, residing in Greenock, and Mrs Catherine Melville or King, widow of John King, a physician in Portrush, Ireland.

Mrs Simpson died on 1st December 1886.

At that date there were three surviving grandchildren of the testator, Mrs Marshall, Mrs Fraser, and John King, and two grandchildren, who had predeceased, were represented by their sons, David M. Simpson and John E. M. Simpson. The right of these five persons to equal shares of the estate liferented by Mrs Simpson was not disputed, but a question arose as to the rights of the representatives of Alexander Simpson and David King, two grandchildren who had died in 1853 and 1863 without issue, to share in the distribution.

This special case was accordingly presented to the Court.

The first parties were Mrs Marshall and others, who maintained "that the vesting of the properties did not take place until the death of Mrs Martha Melville or Simpson, or otherwise until a period subsequent to the deaths of Alexander Simpson in 1853 and David King in 1863, and that they should be divided into five equal shares, one of which should be conveyed to each of the said Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson."

The second parties were John King, the heir of the testator's grandchild David King, who died without issue, and David Melville Simpson, the heir of the testator's grandchild Alexander Simpson, who also died without issue, who maintained "that vesting took place *a morte testatoris*, or otherwise at a period prior to the deaths of the said Alexander Simpson in 1853 and David King in 1863, and that the subjects should be divided into seven shares, one of which should be conveyed to each of the said Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, leaving two shares to be dealt with as follows:—One to be conveyed to the said John King as heir of his deceased brother David King, and the other share to be conveyed to David Melville Simpson as heir of his father, who was heir of conquest of Alexander Simpson."

The third parties were the surviving trustees acting under the truster's settlement and codicil.

The questions of law were as follows:—"(1) Did the fee of the said Greenock properties vest in the testator's grandchildren or their issue at the testator's death, or otherwise at a period prior to the deaths of the said Alexander Simpson in 1853, and David King in 1863? or was vest-

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ing postponed till the death of his daughter Mrs Martha Melville or Simpson, or otherwise till a period subsequent to the deaths of Alexander Simpson in 1853 and David King in 1863? 2. Do the said Greenock properties fall to be divided into five equal shares, one of which is to be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, or into seven equal shares, which fall to be conveyed as follows:—One share each to Mrs Marshall, Mrs Fraser, and John Ewing Melville Simpson, and two shares to be conveyed to each of John King and David Melville Simpson, or in what other proportions or shares do the same fall to be divided among the beneficiaries?"

Argued for first parties;—The question here was what was to be done with the shares of the truster's estate, which he undoubtedly destined to the two grandchildren, Alexander Simpson and David King, who died respectively in 1853 and 1863. Had the first part of the clause stood alone there might have been vesting *a morte testatoris*. But it was followed by a clause of survivorship, and the effect of such a clause where there was an interposed liferent, was absolutely settled by a series of cases.<sup>1</sup> It postponed vesting till the period of distribution. Vesting, then, was postponed till the death of each of the truster's daughters, as regarded the half of their father's estate liferented by them respectively. Mrs King was still alive, but Mrs Simpson died in 1886, and her share therefore being set free by her death fell to be divided among the whole grandchildren of the testator or their issue then in existence.

Argued for the second parties;—The trustees were directed, as soon as they saw fit, to convey the estate in liferent and in fee respectively. It could not be said that because they did not in fact convey vesting was postponed. There was no case to be found where it had been held that such a discretion to the trustees affected the period of vesting. The words "any of whom failing" simply meant "any of whom failing prior to my death." An interposed liferent did not necessarily postpone vesting. In many cases it had been held that where there was a destination over, vesting was *a morte testatoris*. The shares, then, of Alexander Simpson and David King must be held to have vested in them at the truster's death, and their representatives were entitled to participate in the division of the share of the truster's estate set free by Mrs Simpson's death.

At advising,—

LORD PRESIDENT.—The clause requiring construction in this settlement is that which occurs in the seventh head of the deed. In construing this clause I do not think that we get much light from other portions of the deed, or even from the codicil. The testator contemplated generally that his two children, who were both daughters, should have the liferent of the properties mentioned, and that the fee should be equally divided amongst the children of those daughters. There were two grandchildren alive at the making of the settlement, one a daughter of Mrs Simpson, and the other a son of Mrs King, and they are mentioned in the clause as the parties to whom the fee of the properties is to be conveyed. The testator also makes provision for grandchildren *nascituri*, and they are obviously intended to be in the same position as those grandchildren

<sup>1</sup> Young *et al.* v. Robertson *et al.*, Feb. 14, 1862, 4 Macq. 314, per Lord Westbury, Ld. Ch., p. 319; Snell v. White and Others, May 24, 1872, 10 Macph. 745, 44 Scot. Jur. 198; M'Alpine, &c., March 20, 1883, 10 R. 837.

already in existence for whom the special provision is made. The clause is expressed in this way :—"My trustees shall, so soon as they see fit, give, grant, and dispo<sup>se</sup> to and in favour of the said Mrs Martha Melville or Simpson and Mrs Catherine Melville or King, equally between them in liferent, for their

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liferent use respectively alienably, and in the event of any one of them deceasing without lawful issue of her body, the share of deceased to be given and disposed and to belong to the daughter surviving in liferent for her liferent use alienably." Now, it may be as well to stop there for the purpose of disposing of this part of the clause. Mrs Simpson died in 1886, but she left issue, and therefore this part of the clause did not take effect: her liferent expired and did not transmit to her sister. That part of the clause then is out of the case altogether. The clause then proceeds to expressly exclude the *jus mariti* of any husband the surviving daughter might marry, and thereafter goes on to give the fee to the two grandchildren already in existence in these terms :—"To the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born by my said two daughters of their present or any future marriage equally among them, share and share alike, any of whom failing, the share or shares of the decessor or decessors, to the survivors equally among them, share and share alike."

Now, one party contends that the fee of this estate vested in the grandchildren *a morte testatoris*, and it is maintained that the effect of this is that all the grandchildren who either were in existence at the time of the testator's death, or came into existence afterwards, are entitled equally to share in the fee of the estate. That, it appears to me, is to ignore altogether the most important part of the provision—the clause of survivorship—which is expressed in terms impossible to construe but in one way,—“Any of whom failing” necessarily means any one of the grandchildren whether named in the deed or afterwards born. If any one fails, then his or her share goes to the survivors. It is needless to say that the grandchildren to be born could not very well fail by predeceasing the testator. The clause can then neither be applied nor construed in that sense. It must be construed as applying to those grandchildren who may fail at some other period than the death of the testator. When vesting did not take place at the death of the testator, the next inquiry is what is the period of distribution? If the term of vesting is not the date of the death of the testator, it is difficult to find any other period of vesting except the period of distribution, if we except some special cases where the testator has either expressly or by implication assigned a term of vesting other than the period of distribution. Such cases have occurred, but where no other period is suggested the term of vesting is either (1) the death of the testator, or (2) the period of distribution. Now, it appears to me that to take the death of the testator as the term of vesting is impossible and inconsistent with the undoubted nature and scope of the provision in the deed, and against the plain words of the clause.

The next thing accordingly is to consider what is the period of distribution, and I need hardly say that there may be more than one, as part of the estate may be distributed at one period and part at another. It seems to me that the result is that one portion of the estate is set free for distribution on the death of the first of the two liferentices. Mrs Simpson died in 1886, and that was the end of her liferent. She left children, and therefore the right of her sister to her liferent by survivorship did not come into existence. Accordingly, the liferent of Mrs King remains where it was, and the liferent of Mrs Simpson has



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been extinguished. Well then, it appears that there is nothing in the deed to prevent immediate distribution of that half of the estate liferented by Mrs Simpson, and accordingly by the necessary operation of the deed the period of distribution of that half of the estate is her death, and the period of distribution of the other half is postponed because of Mrs King's liferent. So long as Mrs King is alive, there can be no distribution of her half of the estate.

I am of opinion therefore that the parties claiming here are entitled to have a distribution as grandchildren in equal shares among them—that is *per capita*—of the one-half of the estate set free by the expiry of Mrs Simpson's liferent.

LORD MURE.—I agree with what your Lordship has stated, that at the date of the death of Mrs Simpson one half of the estate in question was set free for distribution in terms of the seventh purpose of the settlement, and that it is to go in equal shares to the grandchildren of the testator, being the families of his two daughters; and in that view I think that our answer to the first question ought to shew that Mrs King's child is to take a share with the children of Mrs Simpson.

The main question we have to deal with is one of vesting, and they are often puzzling. I am inclined to think that there was here, in one sense, a kind of vesting *a morte testatoris*—that is to say, that the fee vested in the families of the two daughters on the grandchildren being born. The fee was destined to them as a class, though no division could take place until after the death of the liferentrix, as there was no absolute vesting in individuals. That view, however, makes no difference as to the parties amongst whom the distribution now falls to be made. As to who these are, I agree with your Lordship.

LORD SHAND.—The trustees are directed by the testator in his deed to dis-pone his heritable estate to and in favour of his two daughters equally in life-rent; and I think it is clear from the terms in which this direction is made, that on the death of one of the two liferentrics leaving issue there was no access-ion of liferent to the other, but that one half of the estate became liable then to distribution. The question is how that half is to be distributed. The clause dealing with the fee directs that the conveyance is to be “to the said Catherine Melville Simpson and John King, my grandchildren, lawfully born; and other grandchildren to be lawfully born by my said two daughters of their present or any future marriage, equally among them, share and share alike.” If the clause had stopped there, there would have been vesting *a morte testatoris*, subject only to this, that any child coming into existence after the death of the testa-tor would have been entitled to share with those in existence before that event. And, in that case, I should have come to the conclusion that the property vested in each child, although his share might have been diminished by others subse-quently coming into existence. That would have been a vesting subject to a possible partial defeasance of the right. It is contended that this is the result of the deed. That view is, in my opinion, unsound however, because we have a survivorship clause of the ordinary kind following the clause which I have just read, and to this effect,—“any of whom failing, the share or shares of the de-ceaser or deceasers to the survivors equally among them, share and share alike.” There is to be an equal division of the estate, but the share or shares of any one who has died—that is, without issue, because the deed was granted

by the grandfather as a provision to children and grandchildren—are to go to the survivors share and share alike. I have heard no argument against the propriety of giving to that clause the usual interpretation which a clause of survivorship received in the case of *Young v. Robertson*. Accordingly I am of opinion that, as there were two children who did not survive the first liferentrix and who left no children, their shares accresced to the others under the clause of survivorship, and that therefore there are only five persons to take shares.

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LORD ADAM.—I am of the same opinion. There are only two possible terms of vesting. It might have been *a morte testatoris* or at the period of distribution. Now, looking at the terms of the clause of survivorship, I think there was no term at which it could have taken place but the period of distribution. One half of the estate being now set free for distribution by the death of one of the children, I am of opinion that it has now vested in the surviving grandchildren. As to the other half, there has been no vesting. This view suggests no difficulty as regards legal considerations, because the trustees hold the fee for whichever of the grandchildren shall survive the period of distribution. It is possible that none of the grandchildren may survive that period, in which case that purpose of the deed will lapse. If we were dealing here with such a question as occurred in the case of *Snell v. White*, where there was a direct conveyance by the testator, the presumption of a fiduciary fee might become necessary to satisfy the legal rule that a fee cannot be *in pendente*, but that would be just because there had been no trustees named by the testator himself. So also if the conveyance were now to be made by the trustees in the terms of the seventh clause of this deed, it would be necessary to presume a fiduciary fee in the daughters. But in this case trustees have been appointed to hold the fee for the purposes of the trust-deed, and one of those purposes is to make payment among the surviving grandchildren of the testator when the period of distribution arrives, so that no difficulties of that kind occur.

THE COURT pronounced the following interlocutor:—“(1) Find and declare that the fee of the Greenock properties did not vest in the testator's grandchildren or their issue at the testator's death, but that on the death in 1886 of his daughter Mrs Martha Melville or Simpson one half of the said properties fell to be distributed among the whole grandchildren of the testator or their issue then existing, and that the other half of the said properties has not vested in the grandchildren or their issue now in existence, but will fall to be distributed, on the death of Mrs King, among the whole grandchildren or their issue then in existence: (2) Find and declare that the said Greenock properties fall to be divided into five equal shares, one of which is to be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, and decern,” &c.

SMITH & MASON, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

JOHN M'PHEDRON AND JOHN CURRIE, Petitioners.—*Deas*.  
JOHN M'CALLUM AND OTHERS, Respondents.—*C. S. Dickson*.

No. 10.

Oct. 31, 1888.

*Ship—Arrestment—Recall of arrestment—Caution or consignment for expenses*.—In a petition at the instance of the owners of a ship praying the Court and Currie v. to recall arrestments laid on the ship upon the dependence of an action against M'Callum.

No. 10. them for payment of £176, and to prohibit any further arrestment on the dependence of the same action, the Court (following *Stewart v. Macbeth & Gray*, 10 R. 382) recalled the arrestments, and prohibited further arrestments as prayed for on the petitioners finding caution for £200 or consigning that sum.

Oct. 31, 1888.  
M'Phedron  
and Currie v.  
M'Callum.  
1ST DIVISION.  
M.

THIS was a petition by John M'Phedron and John Currie, owners of the steamship "Easdale," of Glasgow.

The petitioners stated that on 3d October 1888 a summons containing a precept of arrestment was served upon them for payment of the sum of £176, 8s. 11d. at the instance of John M'Callum and others, the owners of the steamship "Hebridean," of Glasgow, the respondents in the petition; and that on the 15th October following the ship, which was lying in Irvine harbour, was arrested and dismantled.

That the petitioners had offered to consign the sum sued for in the joint names of the parties' agents or in the hands of the Clerk of Court, to abide the issue of the action, which they proposed to defend.

That the "Easdale" was a coasting steamer carrying on trade for the most part between ports in the West Highlands of Scotland, and was under present engagement to carry cargo.

That the petitioners were in consequence of the arrestments suffering loss and damage.

The petitioners therefore prayed the Court "to recall the arrestments which have been used upon the dependence of the said summons of the said steamship 'Easdale,' and to prohibit and discharge any further arrestment from being used upon the dependence of the said summons, and that upon consignation in the hands of the Clerk of Court of the said sum of £176, 8s. 11d."

The respondents opposed the petition and contended that, as the condition of the recall of arrestments being granted, the petitioners should be ordered to find caution not only for the sum sued for, but also for expenses.<sup>1</sup>

The petitioners replied that the ship was registered in Glasgow, traded regularly with the West Highlands, and was therefore subject at any time to the jurisdiction of the Court. There was no allegation of impecuniosity or that the petitioners were *vergentes ad inopiam*. Neither of the petitioners were foreigners, both being resident within the jurisdiction of the Court. The claim was illiquid and disputed, and the sum offered for consignation was in the circumstances fair and reasonable.

LORD PRESIDENT.—I think we ought to follow the precedent in the case of *Stewart v. Macbeth & Gray*.<sup>1</sup> No doubt we have a discretion in the matter, but still I think regard must be shewn to the previous practice of the Court. I am for recalling the arrestments on the petitioners finding caution for £200, or consigning that sum.

LORD MURE.—I agree.

LORD ADAM.—And I also, and I may say that I am glad we have a case to follow.

LORD SHAND was absent.

THE COURT pronounced the following interlocutor:—"Recall the arrestments therein mentioned, and prohibit and discharge the use of further arrestments as prayed for upon the petitioners

<sup>1</sup> *Stewart v. Macbeth & Gray*, Dec. 19, 1882, 10 R. 382.

finding caution, in common form, to the extent of £200, or upon their consigning that sum in the hands of the Clerk of Court, and decern."

FODD, SIMPSON, & MARWICK, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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M'Phedron  
and Currie v.  
M'Callum.

MARY M'ELMAIL, Pursuer (Respondent).—*Sir Charles Pearson—Kennedy.* No. 11.  
ROBERT STARK LUNDIE AND OTHERS (Lundie's Trustees), Defenders  
(Reclaimers).—*Balfour—J. A. Reid.*  
JOHN LUNDIE JUNIOR, Defender (Reclaimer).—*Low.*

Oct. 31, 1888.  
M'Elmail v.  
Lundie's  
Trustees.

*Trust—Directions to trustees—Power of trustees to make or withhold payment—Vesting—Husband and Wife—Divorce for adultery—Wife's legal provision.*  
—A truster in the second purpose of his trust-settlement directed his trustees to pay an annuity to his widow, and to set apart a capital sum to secure it, which sum he directed "on the death of my said spouse" to be divided into six equal shares, of which two were to be paid over to two of his sons, but in the case of the third son, J. L., the trustees were to hold one share in trust for his use and behoof, and they "shall retain the same, or such part thereof as they may think proper, in their own hands for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments or in such portions and at such times as they may think fit, but so long as the said share, or any part thereof, shall not be paid over to my said son, the trustees shall pay to him the interest of such share or part thereof remaining unpaid up . . . aye and until the said share be wholly paid over to him and discharged." The other three shares he directed to be held for his three daughters in liferent and their children in fee. In the fifth purpose, he directed his trustees to apportion and divide the residue of his estate into six shares, repeating the above directions contained in the second purpose, with the exception of directing that payment of the shares was to be made "so soon as my estate shall be realised." The deed then provided,—"Declaring that the fore-said provisions to my said sons and the issue of my three daughters shall not become vested interests in them until the respective terms of payment thereof."

J. L. married, but was divorced by his wife, who thereupon claimed her *jus relictæ* out of her husband's estate, to which it was admitted that she was entitled.

In an action by her to have it declared that that estate included at the date of the dissolution of the marriage her husband's shares of his father's estate, held for his behoof by the trustees, it was held, on a construction of the deed, (1) that the terms of payment referred to by the testator in fixing the dates of vesting were in regard to the second purpose the death of his widow, and in regard to the fifth purpose the realisation of his estate, and that the special discretion given to the trustees to postpone payment of J. L.'s shares did not suspend vesting in his case; and (2) that J. L.'s shares under the second and fifth purposes had vested in him and formed, at the date of the dissolution of the marriage, part of his moveable estate, subject to *jus relictæ*.

JOHN LUNDIE, a pawnbroker in Glasgow, died in the end of July 1869, 1ST DIVISION.  
survived by his widow and by six children, leaving a trust-disposition and settlement, dated 23d July 1869. Lord Kinnear.  
B.

In the second purpose of the deed he directed his trustees, Robert Stark Lundie and others, to pay an annuity of £60 to his widow, Mrs Elizabeth Stark or Lundie, and to lay aside or invest a sufficient capital sum to provide for its due payment, "which capital sum shall, upon the death of my said spouse, be divided into six equal shares or portions, and my said trustees shall pay over one share thereof to my son the said Robert Stark Lundie, and one share thereof to my son James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and

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behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times as they may think fit; but so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly, by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." He then directed his trustees to "hold one share of the said capital sum in trust for the use and behoof of my daughter, Mrs Elizabeth Lundie or Thornhill, wife of William Thornhill, hatter, Argyle Street, Glasgow, in liferent for her liferent use allenary, and her lawful issue, equally between them, if more than one, share and share alike, in fee." In similar terms the trustees were directed to hold the two remaining shares for the truster's other two daughters, Mary Lundie and Jessie Lundie.

In the fifth purpose the truster disposed of the residue of his estate in the following terms:—"I ordain my said trustees to apportion and divide the whole of the free residue and remainder of my said heritable and moveable means, property, and estate, under deduction of expenses of management, incidental expenses, and all expenses in connection with this trust, into six equal shares, and so soon as my estate shall be realised, they shall pay over one share of said residue to my son the said Robert Stark Lundie: But declaring that the said Robert Stark Lundie shall account for and pay to my said trustees the sums of money due by him to me, as the same shall appear from my books or vouchers or be otherwise ascertained by my said trustees; and my trustees shall pay over one share of said residue to my son the said James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands for such period after the realisation of my estate as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times as they may think fit; but so long as the said share or any part thereof shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share or part thereof so remaining unpaid up, and that half-yearly by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." The trustees were then directed to hold one share of the said residue in trust for the use and behoof of each of the truster's three daughters, for their liferent use allenary, and their lawful issue, equally between them, if more than one, share and share alike, in fee, in terms similar to those used in the second purpose above quoted. There was this further provision,—“Declaring that the foresaid provisions to my said three sons and to the issue of my said three daughters shall not become vested interests in them until the respective terms of payment thereof: And, accordingly, upon the death of any of my said sons or daughters without leaving lawful issue, the said provisions of such of them so dying without leaving lawful issue, shall accresce and be paid to and divided equally amongst my surviving sons in fee, and my surviving daughters in liferent and their issue respectively in fee.”

John Lundie, the truster's third son, known as John Lundie junior, married Mary M'Elmail on 10th February 1870.

On 22d February 1887 Mrs Lundie obtained decree of divorce against her husband on the ground of adultery, and became entitled in conse-

quence to her legal rights of *terce* and *jus relictæ* out of his estate, just as No. 11.  
if the marriage had been at that date dissolved by his death.

On the death of Mr Lundie senior his widow claimed her legal rights out of his estate, and the claim was admitted and settled by the trustees, as also was a claim by one of the daughters for legitim. The whole interest of John Lundie junior in his father's estate under the second purpose amounted to about £6600, as at the date of his father's death. The trustees, with a view of starting him in business, had from time to time paid him on account of this capital about £1900. The balance of his share was, with the other trust-funds, retained by the trustees at the date of the decree of divorce.

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Mrs Lundie brought this action against the surviving and accepting and assumed trustees of Mr Lundie senior and against her husband to have it found and declared that "on the dissolution of the marriage between her and the said John Lundie, defender, by decree of divorce, in respect of his adultery, obtained before our said Lords, at her instance against him, dated the 22d day of February 1887, she became and is entitled to her legal provisions of *terce* and *jus relictæ* out of the estate, heritable and moveable, then belonging to the said John Lundie, defender; and that his said estate included and includes the share or shares of the trust-estate of the said deceased John Lundie carried to the other defenders, as trustees foresaid, by the said deceased John Lundie's trust-disposition and settlement, which share or shares are thereby, and particularly by the second and fifth purposes thereof, provided to and appointed to be held for the use and behoof of the said John Lundie, defender, therein designed John Lundie junior, and the profits, interests, or annual produce thereof, and all right, title, and interest in the estate of the deceased John Lundie subsisting, as at the said dissolution of the said marriage, in the said John Lundie, defender." The summons then contained conclusions for count, reckoning, and payment of £3000; "and, in the event of the said defenders claiming and being found entitled, and resolving to postpone payment of the amount due to the pursuer in respect of her legal rights as aforesaid out of the defender John Lundie's share or shares of the said estate of the deceased John Lundie, or any part thereof, or payment of the said share or shares, or any part thereof, then until the said amount due to the pursuer be wholly paid to and discharged by her, to make payment to the pursuer of one-half, or other proportion as may be determined, of the interest or annual produce of the said share or shares, or any part thereof, remaining unpaid as from the said 22d day of February 1887"; then followed conclusions against John Lundie junior, personally, for count, reckoning, and payment of £3500.

Separate defences were lodged by the trustees and by John Lundie junior.

The trustees maintained that, looking to the directions of the truster in the fifth purpose of the deed, John Lundie's share in his father's estate had not vested in him at the date of the dissolution of his marriage. They declared themselves willing to pay over the half of the income of the sum of £4700 which they retained in their hands under the second purpose of the trust, but they refused to allow the pursuer to participate in the capital.

John Lundie junior averred that he was willing to pay the pursuer year by year one-half of his income, although he had not succeeded in inducing the trustees to advance a sufficient sum from his share of his father's estate to enable him to settle with her.

The pursuer pleaded;—(1) The pursuer having become entitled, on the dissolution of her marriage with the defender John Lundie in respect of

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the latter's adultery, to terce and *jus relictæ* out of his estate, including his interest in his said father's estate, is entitled to declarator as craved. (2) The share or shares of the defender John Lundie in the trust-estate held by the other defenders under the provisions of the trust-deed, and also in respect of the funds set free by legal claims as aforesaid, being vested in him at the date of dissolution of his said marriage, are subject to the legal rights of the pursuer, as if the said marriage had been then dissolved by his death. (3) The defenders Lundie's trustees having intromitted with, and now holding, the said share or shares, are bound to produce accounts or statements shewing the amount thereof, and make payment, or in default of production, to make payment as concluded for, with expenses. (4) In the event of the trustees being found entitled to retain the said share or shares, the pursuer is entitled to termly payment of half the income, or a sum equivalent thereto, of the said share or shares, as fixed at the said date of dissolution, during the trustees' retention thereof. (5) The defender John Lundie being liable in payment of the pursuer's legal provisions, should be ordained to produce accounts of his estate, and make payment, or in default of production, make payment as concluded for, with expenses.

The trustees pleaded ;—(3) The share of the defender John Lundie in the trust-estate administered by the present defenders not having vested, they are entitled to absolvitor. (4) The pursuer having no higher right than the defender John Lundie in the trust-estate administered by the present defenders, they ought to be assoilzied. (5) The present defenders being bound to exercise the discretion conferred on them by the settlement, and having resolved to retain the balance of capital of the other defender's share, are entitled to absolvitor from the conclusions for count, reckoning, and payment.

On 23d February 1888 the Lord Ordinary (Kinneir) pronounced this interlocutor :—" Finds and declares, in terms of the declaratory conclusions of the summons, and appoints the defenders John Lundie's trustees to lodge an account, shewing the amount in their hands of the defender John Lundie's share of the trust-estate of the deceased John Lundie, and that *quam primum*."\*

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\* "NOTE.—I do not understand it to be disputed that on the divorce of a husband for adultery the wife has right to her legal or conventional provisions in the same manner as if the husband had died. It follows that the pursuer is entitled to claim her share of the defender's moveable estate in name of *jus relictæ*. The only question is, whether the defender John Lundie's share of his father's estate, in the hands of the other defenders, his father's trustees, is vested in him so as to form part of his moveable estate.

"It is maintained that nothing vests in him under his father's will except such portions of his share as the trustees may from time to time think fit to pay to him in the exercise of their discretion.

"I do not think this a sound construction. The trustees are directed to divide the estate on the death of the widow, and to hold one share 'for the use and behoof' of John Lundie from the period of division. They are to retain John Lundie's share for such time as they may deem expedient, and to pay it by such instalments as they may think fit. But the interest of the portion retained by the trustees is to be paid to him 'until the said share shall be wholly paid over to him and discharged.' Sooner or later, therefore, the whole is to be paid to him, and to him alone. There is no destination over with regard to any part, and in the event of his death before the whole has been paid the unpaid portion must go to his representatives. No one could take it except through him. It is true that it is declared that the provisions to the testator's sons and daughters shall not become vested interests in them until the respective terms of payment. But that must in my opinion be referred to the term of

The trustees reclaimed, and argued ;—On a sound construction of the trust-deed John Lundie junior's share of the residue of his father's estate had not vested in him so as to form part of his moveable estate at the date of the dissolution of his marriage. The truster had disapproved of his conduct, and had given the trustees such an ample discretion as to payment of his share of the residue as made it obvious that he intended that the period of payment as regarded him should be different from that in the cases of his two brothers. The trustees were directed to pay when and in what shares they thought fit—all at once, or after a lapse—no term at all was fixed by the truster. Indeed, no term could be fixed, because the trustees were to consider it from time to time. This discretion they had acted upon, making such payments as they thought expedient. It could not be said that in these circumstances John Lundie junior's whole shares had vested. It had been held that such a discretion suspended vesting.<sup>1</sup> If there was any doubt about the matter it was set at rest by the terms of the vesting-clause. The phrase "respective terms of payment thereof" clearly shewed that the truster contemplated different periods of vesting for different portions of his estate. In the cases relied on by the pursuer there was only an accidental or capricious delay in payment. Then, again, in the clause declaring that so long as John Lundie's share was not paid over to him, the trustees were to pay him the interest of it until the share was wholly discharged, the payment of any part of the share was coincident with the vesting of that part. *Quoad* the whole share, if the trustees did not exercise the powers of payment, he was to be a liferenter, but he might become a fiar if he was ever paid in full. [LORD ADAM.—Suppose John Lundie junior contracted debt, and a creditor brought an action of furthcoming seeking to get at the money in the hands of the trustees, *quid juris* ?] The case of *Chambers' Trustees*<sup>2</sup> was in point, and was *a fortiori*. There there was a general vesting in all the children, and the House of Lords held that the power of retention in the trustees prevented the estate being attached by such a creditor. Here the power to retain came first. The widow was in no better position than a creditor who had taken means to attach. If John Lundie had assigned, could the creditor assignee have forced payment when Lundie himself could not ? The former would have had to take the cedent's right *tantum et tale* as it stood in the cedent. Any vesting, then, was of such a qualified nature that nothing in the nature of a furthcoming could have been effectual.

Argued for the pursuer ;—There was one period of vesting as regarded John Lundie junior's share, and that was at the realisation of the estate, or at least when it could be divided into six shares by the trustees.

payment fixed by the testator himself. The trustees are empowered to pay to John Lundie at the same time as to the other sons. They are also authorised for his benefit to retain his share, or a part of it, and pay it by instalments. But that cannot be construed into a power to withhold it absolutely from him and his representatives. It is unnecessary to consider whether the discretion of the trustees could be effectually exercised against creditors during the lifetime of the beneficiary. It is certain that if the right has vested it can be of no effect against his representatives after his death, and the pursuer is placed by the divorce in precisely the same position as if she were a widow claiming *jus relictae* on the death of her husband. The principle laid down in *Beattie v. Johnston*, 5 Macph. 340, and in the later case of *Harvie*, appears to me to be directly applicable."

<sup>1</sup> *Smith's Trustees v. Smith, &c.*, July 11, 1883, 10 R. 1144.

<sup>2</sup> *Smiths v. Chambers' Trustees*, Nov. 9, 1877, 5 R. 97, rev. April 15, 1878, *ibidem* H. of L. 151.



No. 11. They had no power to withhold his share, but only a discretion given them as to the term of payment, for reasons which were personal to John Lundie junior, and which would be at an end at his death. The interest of his share retained by them was to be paid to him "until the share shall be wholly discharged." If he died before the whole was paid the unpaid portion must go to his representatives. The clause as to payment was indeed as imperative as the clause of retention. It was said that the vesting-clause shewed that the truster contemplated different terms of vesting for different children, and that the discretionary power to withhold John Lundie junior's share shewed his desire to defer vesting in his case. That involved the idea that his share only vested at the times the money was actually paid over to him by instalments, and this construction was not familiar, indeed it was contrary to the current of decision.<sup>1</sup> *Smith v. Chambers* differed *toto celo* from this case. In the House of Lords the deed in that case was read as giving a power to the trustees to re-settle the shares *pendente lite*, with a fee to the children. That was different from a direction to pay the capital by instalments. There was here no question as to what was the effect as against creditors of a power to cut down the fee. The manifest solution was that the testator had in his mind more than one term of payment. These were—1st, The widow's death, as regarded the capital sum set apart to meet her annuity; 2d, their mother's death, as regarded the fee to be taken by the daughters' children; 3d, the realisation of the estate as regarded the sons' shares of the residue. The very words "aye and until" shewed that the truster intended a temporary postponement only.

At advising,—

LORD PRESIDENT.—The pursuer of this action was the wife of the defender John Lundie junior. The marriage was dissolved on the 22d February 1887, the pursuer obtaining decree of divorce on the ground of her husband's adultery. The effect of this was, of course, to entitle her to her legal rights—that is to say, to her right of *terce* and *jus relictæ*,—in the same way as if her husband was naturally dead. There is indeed no question about this, but she contends that one great part, if not the whole, of her husband's moveable estate at the dissolution of her marriage was his right and interest in the trust-estate of his father, held and administered by the other defenders, the trustees; and she seeks to have it found and declared that she became entitled to her *terce* and *jus relictæ* by the decree of divorce, and that her husband's estate "included and includes the share or shares of the trust-estate of the said deceased John Lundie carried to the other defenders, as trustees foresaid, by the said deceased John Lundie's trust-disposition and settlement, which share or shares are thereby, and particularly by the second and fifth purposes thereof, provided to and appointed to be held for the use and behoof of the said John Lundie, defender, therein designed John Lundie junior, and the profits, interests or annual produce thereof, and all right, title, and interest in the estate of the deceased John Lundie subsisting, as at the said dissolution of the said marriage, in the said John Lundie defender."

Now, the Lord Ordinary has decerned in terms of the declaratory conclusions of the summons, and the trustees have reclaimed against his Lordship's judgment, on the ground that at the dissolution of the marriage by the decree of

<sup>1</sup> *Leighton v. Leighton*, March 8, 1867, 5 Macph. 561; *Hunter's Trustees v. Hunter*, Feb. 9, 1888, 15 R. 399, per Lord President, p. 406; *Ferrier v. Ferrier*, May 18, 1872, 10 Macph. 711; *Sutherland's Trustees v. Clarkson*, Oct. 29, 1874, 2 R. 46; *Scott, &c. v. Scott's Executrix*, Jan. 27, 1877, 4 R. 384.

divorce no part of Mr John Lundie junior's right in the estate of his father had vested, and therefore that it formed no portion of his moveable estate. No. 11.

The question depends upon the construction of the trust-deed of Mr John Lundie the elder. It contains several clauses which must be referred to in order that the question may be solved. Mr Lundie provided among other things an annuity to his widow, and directed that a capital sum should be set apart to secure it, which capital sum he further directed "shall upon the death of my said spouse, be divided into six equal shares or portions, and my said trustees shall pay over one share thereof to my son the said Robert Stark Lundie, and one share thereof to my son James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times as they may think fit; but so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof so remaining unpaid up, and that half-yearly by equal portions at the term of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." The truster then directs one share of the capital sum to be held for a married daughter, Mrs Thornhill, another for another unmarried daughter, and the sixth and remaining share for his third unmarried daughter; but there is provision in the cases of the daughters that the shares are to be to them in liferent and to their children in fee. This portion of the estate then fell to be divided into shares on the death of the widow, and at that time the proceeds of the security, or whatever it might be, was to be paid over, so far as regards two of his sons, but was to be held by the trustees for his third son, John Lundie junior. In the fifth purpose of the trust-deed the truster gives directions as regards the disposal of the residue of his estate, and repeats in terms the same provisions. He orders the trustees to apportion and divide the residue into six shares, "and so soon as my estate shall be realised they shall pay over one share of said residue to my son the said Robert Stark Lundie, . . . and my trustees shall pay over one share of said residue to my son the said James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior," and then the clause proceeds in the same words as were used in the second clause of the deed dealing with his share of the capital to be set free by the widow's death. The two elder sons are to have immediate payment, and John Lundie junior is to have his share held in trust for him.

Now, although all this does not throw much light upon the question of vesting, it is necessary to keep the precise provisions of these two clauses in view in dealing with the important clause regarding the vesting of the different interests. That clause runs thus,—“Declaring that the foresaid provisions to my said three sons and to the issue of my said three daughters shall not become vested interests in them until the respective terms of payment thereof; and accordingly upon the death of any of my said sons or daughters without leaving lawful issue, the said provisions of such of them so dying without leaving lawful issue shall accresce and be paid to and divided equally amongst my surviving sons in fee and my surviving daughters in liferent and their issue respectively in fee.”

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There are two things to be attended to here,—first, to ascertain what precisely the testator has assigned here as the term or terms of vesting ; and second, what is the effect of the death of any of the sons or daughters dying without issue before vesting takes place. As regards the latter, there cannot be much room for doubt that if before vesting takes place any of them die without leaving issue there is accretion to the survivors. But the words requiring particular construction are, “declaring that the foressaid provisions to my said three sons and to the issue of my said three daughters shall not become vested interests in them until the respective terms of payment thereof.”

Now, in the first place, it is quite clear that the testator had in his mind more than one term of payment, and also that these terms of payment were applicable either to different persons or to different portions of the estate. That is the idea suggested by the word “respectively.” We must therefore endeavour to ascertain what are the respective terms of payment as regards the subjects and objects of the gift in the prior clause of the deed. The trustees seem to try to bring their contention to this: that in so far as John Lundie junior is concerned, there can be no term of payment except the precise time at which the money actually passes out of the hands of the trustees into the hands of John Lundie junior, and therefore that every instalment paid under the direction of the previous clause is a separate term of payment. It appears to me that, *prima facie*, the expression “term of payment” refers to something the testator had already fixed by the provisions of the deed ; and consequently, in ordinary circumstances at least, we always look at the deed to ascertain what are the terms of payment in the mind of the testator. There are several about which there can be no mistake at all. First, as regards the payment of the capital sum set apart to meet the widow’s annuity, the term of payment there is the death of the widow. That is a separate matter from the term of payment of other parts of the estate. Then in the next place, as regards the children of the daughters, who are to take the fee, the term of payment there is in each case the death of their mother. That again is another and separate term of payment. Then as regards the two sons Robert Stark Lundie and James Buchanan Lundie, the term of payment in their case of their share of the residue is undoubtedly “so soon as my estate shall be realised.” These two sons are then to obtain immediate payment. The question remains whether that is not also the term of payment of the share destined to John Lundie junior. The trustees say that it is not, because they are not entitled then to pay over his share—they being directed to pay by such instalments as they shall think fit.

There is certainly a distinction between the two elder sons and the younger, but that does not quite solve the question whether the testator did not mean that the terms of payment of which he speaks in the vesting-clause were to be the same in the case of all his sons. It is true the trustees are not authorised to pay over the shares all at once. On the contrary, they are directed to do so by instalments, but in what number of instalments, or in instalments of what amount, is left to their discretion. Still, from the time the estate is realised, they are to pay to him as well as to the others. It may be that they may not pay for some time after that event. It may be that they may not have paid for a considerable time after the arrival of the period at which they are directed to pay to the other sons. But still it is the only term of payment as regards the residue of the estate, and there is none other to be found in the deed. We therefore come back to the vesting-clause, with this light thrown upon it from

the other provisions of the deed, that there are several terms of payment applicable to different sums and different persons, and we must see whether there is anything in the phrase "respectively" which can create for John Lundie junior a different term of payment from the terms at which his brothers are to receive their shares.

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I have come to the conclusion with the Lord Ordinary that the only terms of payment in the deed are those three which I have mentioned, viz., the terms of payment, 1st, of the capital set aside for the widow's annuity; 2d, of the provisions for the issue of the daughters; and 3d, of the residue; and there are no others in the deed. To say that the phrase "terms of payment" necessarily means in the case of John Lundie junior the times at which each particular instalment is handed over to him by the trustees is a false reading of the phrase. The time at which payment may be made is one thing, and the term contemplated by the truster is quite a different thing. The one is in the mind of the testator, and the other is the result of accident. We have seen cases where there is a provision that no vesting is to take place till the sums are actually paid over, and where the testator so expresses himself he leaves no room for doubt, and he means that until the money is placed in the hands of the beneficiaries the vesting is suspended. But this is not such a case.

**LORD MURE.**—I am of the same opinion. The judgment of the Lord Ordinary proceeds upon the footing that the share of John Lundie in the residue of his father's estate was vested in him at the date of the decree of divorce, and in this I think the Lord Ordinary is right. The clause providing for the disposal of the residue is pretty distinct. By it the trustees are to apportion and divide the whole free residue into six equal shares, and as soon as the estate shall be realised one share is appointed to be paid over under certain conditions to Robert Stark Lundie. James Buchanan Lundie is to get another share, and then the deed directs that the trustees are to "hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the realisation of my estate as they may deem expedient, and they shall pay the said share to him by such instalments or in such portions and at such times as they may think fit."

There is here, therefore, a distinct order to pay in certain proportions on the realisation of the estate; and then the deed proceeds to declare that so long as the share, or any part thereof, shall "not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share or part thereof so remaining unpaid up, and that half-yearly, by equal portions, at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." This share, therefore, of the realised estate the trustees are distinctly appointed to hold for behoof of John Lundie, though they have a discretion to pay it to him by instalments, upon which they have to some extent acted; and in the event of their so acting they are expressly directed to pay to him half-yearly the whole interest of the part of the share remaining unpaid. If that clause had stood alone, there would, I think, be no doubt as to the vested right of John Lundie in the share held for him. There is, however, a subsequent clause which declares that "the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment

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thereof," and in respect of this declaration it is maintained that because there is a discretion to pay at certain periods, there can be no vesting in John Lundie till the times at which each payment is made to him. I agree, however, in the opinion which your Lordship has expressed as to the meaning and effect of that clause, for I do not think that it can, on fair construction, be held to prevent the share of John Lundie from vesting in him in respect of the leading provisions of the deed.

LORD ADAM.—By the second purpose of the trust-disposition and settlement the truster provides an annuity to his widow, and a capital sum is set apart to meet this, and on her death he directs the capital sum to be divided as is there set forth. It is needless to consider that clause further. It contains the same provisions as the clause dealing with residue. The capital sum is to be divided in the same way as the residue, except that the division is to be on the death of the widow. Perhaps I may remark, as I agree with the Lord Ordinary's reasoning, that he seems to have thought that the whole estate was to be divided on the death of the widow. That makes, however, no difference in the reasoning on which he proceeds, but I merely point out that he does not distinguish between the two periods of division. In the fifth purpose of the deed there is a direction to divide the residue into six equal shares, and to pay, so soon as the estate is realised, one-sixth share to each of his two elder sons, but "they shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the realisation of my estate as they may deem expedient." Now, I agree with Sir Charles Pearson that that one share belongs to John Lundie, since, as Lord Mure points out, the clause goes on to say that "they shall pay the said share to him by such instalments, or in such portions and at such times as they may think fit." No option is given them as to whether they shall pay the whole share to John Lundie or not. He is to have the whole share. That is made still clearer by the next clause, which provides that "so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share or part thereof so remaining unpaid up, and that half-yearly by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged,"—that is to say, that so long as the whole or part of the estate is not paid over, the clear intention and direction of the testator is to give to John Lundie the absolute right to one-sixth share. That being so, if the question had stood on this clause alone, I should have thought that the mere direction to the trustees to pay as they thought fit would not have suspended the vesting in him. But then we have the vesting-clause, which declares that "the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." If we could put the construction on the phrase "terms of payment" that it meant the times at which the actual sums were to be paid in instalments to John Lundie junior, then there would be no vesting until they were so paid. But I agree with your Lordship that that is not the meaning of the phrase. The "terms of payment" meant by the testator are 1st, the death of the widow; 2d, the realisation of the estate; and 3d, the death of their mothers as regards the grandchildren. These are the "terms of payment," and

not the actual times at which the trustees happen to pay over his share to John Lundie junior. I do not think that the vesting-clause at all modifies the meaning of the previous clause, by which an immediate right is given to John Lundie in his share of the residue upon the realisation of the estate.

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LORD SHAND was absent.

THE COURT adhered.

CAMPBELL & SOMERVELL, W.S.—BUCHAN & BUCHAN, S.S.C.—MORTON, NEILSON, & SMART, W.S.—Agents.

CHARLES SMITH, Pursuer (Respondent).—*D.-F. Mackintosh—C. J. Guthrie.* No. 12.  
THE HIGHLAND RAILWAY COMPANY, Defenders (Appellants).—*Balfour*  
—*Low.*

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*Reparation—Culpa—Child killed on private line of railway—Reasonable precaution.*—On a line of rails, leading from a railway station to a private harbour, seven disconnected waggons were standing alongside a steamer lying at the quay. A boy of eleven, who had been standing on a narrow space left between the rails and the edge of the quay, while attempting to cross the line, was crushed between two of the waggons which had been set in motion by a train which was being moved backwards for the purpose of attaching the waggons. The driver of the train, which was 128 feet from the nearest waggon, had before starting it given two loud and prolonged whistles, and moved the train at a pace not exceeding three miles an hour. It was accompanied by two porters on foot, one of whom had coupled two of the waggons before the accident happened. In an action of damages by the boy's father against the railway company the Court *assolizied* the defenders on the ground that no fault on their part had been proved.

IN terms of an agreement with William Young, proprietor of the 1st DIVISION. harbour, Burghead, the Highland Railway Company laid down from their station at Burghead, Morayshire, a line of rails for goods traffic, to the end of the south pier or quay of the harbour, in order that waggons might be loaded from steamers lying at the quay. Sheriff of Inverness, Elgin, and Nairn. M.

On 28th February 1887 seven waggons stood on this line of rails, with open spaces between each of them. A boy of eleven years of age named George Smith, who had been standing on the narrow space between the rails and quay, and opposite one of the waggons, was killed in attempting to cross the line through one of the open spaces just as a train was being shunted down to the waggons for the purpose of bringing them back to the station.

His father thereupon raised an action of damages against the railway company, alleging that his son had been killed by the fault of the defenders, or of those for whom they were responsible, in conducting the operations of moving the waggons in an improper manner, and in failing to use reasonable care, caution, or skill, or to take due precautions to secure the safety of the public.

This averment the defenders denied, averring that the injury, if not purely accidental, was caused or materially contributed to by the negligence or want of ordinary circumspection and care of the boy himself in placing himself in a position in which there was obvious danger.

A proof was allowed, the result of which sufficiently appears from the opinions of the Judges and from the following findings in fact contained in the interlocutor of the Sheriff-substitute (Rampini), dated 14th January 1888:—"Finds that the pursuer is a farm-servant at Rosevalley, in the parish of Duffus, and the defenders are the High-

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land Railway Company, incorporated under Act of Parliament, and that they have a station at Burghead, and a line of rails for goods traffic only, running therefrom to the end of the south pier or quay of the harbour of Burghead; that the distance between the outside of the line of rails and the edge of the quay is 3 feet 11½ inches; and that waggons standing upon them overlap the said space of 3 feet 11½ inches to the extent of 1 foot 5½ inches; that the said south pier or quay is the property of William Young, Esq. of Burghead, and that the defenders have laid down rails thereon, and possess the right to use the said quay under the agreement: That the space between the outside of the said line of rails and the edge of the quay is not a public thoroughfare, but that the use of it by the public is not objected to either by the said William Young or by the defenders: Finds that on Saturday the 28th day of May 1887, the pursuer's son George—a boy of about eleven years of age—was sent into Burghead by his parents on a message, and that about six o'clock of the evening of that day he was standing on the said quay opposite the after-hold of the steamer "Ranger," which was lying alongside the quay: That there was at this time on the rails seven waggons, of which the four westmost and the two eastmost were loaded with coals, and one—being that lying between the fore and aft holds of the said steamer—was unloaded: That this waggon was separated from the four westmost waggons by a small open space: That the whole of the said seven waggons were standing on the rails, with spaces between them: That while the waggons were in this position a train of eighteen or twenty empty waggons was started from the station: That the said train was propelled by a locomotive in the charge of Paul Junor, its driver, and Angus Thomson, its fireman; and that the said train was accompanied by Donald Budge and William Clark, servants in the employment of the defenders: That the said William Clark gave the signal to start, and the train was started accordingly by Paul Junor, the driver—after he had whistled twice in a sufficiently long and loud manner, to give warning that the train was about to start: That the train accordingly started at a pace not exceeding three miles an hour: That Clark and Budge preceded the train on foot: That while the train was in motion a person on board the steamer called the attention of the boy George Smith to the approach of the train, and that the boy thereupon moved to jump on board the steamer, but that, apparently changing his purpose, and seeing the opening between the empty waggons and the first of the four loaded waggons to the west, he turned to cross the line through that space, and in doing so was caught by the buffers of the said waggons, which being set in motion by the train of empty waggons coming up against the two eastmost waggons, he was crushed between the said buffers, and received such injuries that he subsequently died therefrom: Finds that the shunting of the trucks was conducted by those acting on behalf of the defenders with due care and caution, and according to the usual manner of such an operation."

The Sheriff-substitute further found in law "that the accident was entirely attributable to the conduct of the said George Smith, and not to any neglect on the part of the defenders: Therefore assoilzies them from the conclusions of the petition."

On appeal, the Sheriff (Ivory) recalled the interlocutor appealed against, and, after findings in fact, further found "that the deceased was killed through the fault of the defenders or their servants, who conducted the operation of shunting the said train without using reasonable care, or taking due precautions to secure the safety of the deceased or other members of the public walking on or otherwise using the said quay."

The defenders appealed, and argued;—The Sheriff's interlocutor was not supported by the evidence, and proceeded on an erroneous opinion as to the duties incumbent on the defenders. On the other hand, the interlocutor of the Sheriff-substitute contained an accurate statement of the facts of the case. The *locus* of the accident was not a public thoroughfare. If the public went there, they did so at their own risk. Consequently there was no obligation on the railway company to take special precautions.<sup>1</sup> The method of shunting adopted was the usual one, and was carried on with all the usual precautions. Due notice was given by whistling, and it was incumbent on the pursuer to prove that the whistle was not sounded.<sup>2</sup> The train went at a slow rate. It had only to go 128 feet before it came to the first of the seven waggons, so that it could not have got up a high rate of speed. The medical man who saw the boy after the accident was of opinion that he had been slowly squeezed. Two porters accompanied the train. Budge preceded it, and had actually coupled two waggons before the accident happened. In these circumstances, it was clear that no fault had been established on the part of the defenders. Further, even assuming that there was such fault proved, the boy was himself to blame. He had no right to be there at all, and if he had taken ordinary care, and remained where he was standing, no accident would have happened.<sup>3</sup>

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Argued for the pursuer;—The harbour was a public place where persons were in the habit of congregating, and the best proof of this was that all sorts of people were proved to have been there when the accident occurred. A special obligation then was placed on the railway company to see that the public safety was attended to.<sup>4</sup> There was no proof that the whistling had been long and continuous, as was held necessary in *Russell, &c. v. Caledonian Railway Co.*<sup>5</sup> There was a discrepancy in the evidence as regards the speed of the train, some witnesses saying five or six miles, others saying two miles per hour. The probability was that it was travelling at the undue rate of four or five miles an hour. There ought to have been one man to attach the empty waggons to the two full ones, and another to attach these to the empty waggon opposite the quay. The case of *Balfour v. Baird and Brown* was not in point. The boy there brought the disaster on himself. In this case he had not started the engine. In the case of *Grant v. Caledonian Railway Co.*, the child had omitted the most obvious precautions for his safety.

LORD PRESIDENT.—In some respects this case is in an unsatisfactory condition. It is certainly difficult to find out what is the ground of action. There is none disclosed on record, and it is very much to be regretted that when the case was before the Sheriff-substitute, and the record closed, he did not advert to it, and either throw out the action altogether or call upon the pursuer to amend his record. That would have been of less consequence, so far as we are concerned, if the ground of action had been clearly disclosed in the evidence, but

<sup>1</sup> *Balfour v. Baird and Brown*, Dec. 5, 1857, 20 D. 238, per Lord Justice-Clerk, p. 242; *Forbes v. Aberdeen Harbour Commissioners*, Jan. 24, 1888, 15 R. 323.

<sup>2</sup> *Grant v. Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258, per Lord President, p. 270.

<sup>3</sup> *Fraser v. Edinburgh Street Tramways Co.*, Dec. 2, 1882, 10 R. 264.

<sup>4</sup> *Morran v. Waddell*, Oct. 24, 1883, 11 R. 44; *Shaw v. Croall & Sons*, July 1, 1885, 12 R. 1186; *Illidge v. Goodwin*, Dec. 22, 1831, 5 Carrington & Payne, 190.

<sup>5</sup> *Russell, &c. v. Caledonian Railway Co.*, Nov. 5, 1879, 7 R. 148.



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I confess it is very puzzling in reading the proof to find it out precisely. The findings on which the Sheriff's judgment proceeds are some of them not justified at all by the evidence, and seem to have been suggested by the Sheriff himself from his own knowledge or opinion. On the other hand, the findings of the Sheriff-substitute commend themselves more to my mind, because I do find a fairly well digested series of facts brought out.

I do not think it is necessary or desirable to go into a minute examination of the evidence, except in so far as it is necessary to shew the ground of judgment which commends itself to me. I think this poor lad had no right to be where he was, and by his having no right I mean that as one of the public he had no business occupation to take him to the harbour at all. The harbour works are intended for the occupation of persons with business to transact, and for no one else, and the public have no right to be there unless they are there with such occupation. It is therefore vain to represent this space as a public highway. It is nothing of the kind. It is plainly devoted to a particular kind of business, and no one has any right to go there unless he is engaged in that business. This lad was there for no purpose but an idle one, and he was therefore in a place where the defenders were not bound to expect him to be. He was there without any legitimate occupation, and as he must have known that the place was dangerous he took the risk of the ordinary perils attending the place. But then if it can be shewn that the railway company conducted the shunting at the harbour in an unusual or reckless manner, and in such a manner as to cause unnecessary danger to persons legally there on business, it would raise a case of a different kind. But I must take leave to state that as the result of my examination of the evidence I can find nothing in the proof which is inconsistent with the ordinary practice and use of railway companies in their shunting operations. We all know that the process of shunting depends greatly on how much accommodation there is for siding, *e.g.*, here, if there had been ample siding accommodation into which waggons might be shunted, probably the empty waggons would have been put there, and the shunting at the quay would only have been done with an engine. But then it is not proved that there was a siding, or that the shunting could have been done otherwise than it was. To justify an allegation that it had been recklessly done, would require the most minute investigation. Of that we have no sort of evidence. The conclusion which I draw from the evidence, and it is the only possible one, is that it has not been proved that the shunting operations were conducted recklessly. I am therefore for altering the judgment of the Sheriff, and for reverting to that of the Sheriff-substitute.

LORD MURE.—I am of the same opinion. It is plain that this poor boy went through curiosity to see the ship which was lying in the harbour, and was on the edge of the quay at the time the shunting was going on. He was apparently not aware that he was exposed to risk, but the moment he was warned of his danger, he seems to have got flurried. He tried to get into the ship, but changed his mind, and attempted to cross the rails through the opening between the waggons, and so was crushed. It is also plain, I think, that if he had known more about the localities he would have stayed where he was, for two boys Hendry and Mitchell, who had before seen shunting carried on, and saw the accident, have deposed distinctly that he would have sustained no injury if he had done this. In these circumstances, it would, I think, require very clear proof of negligence in the shunting operations on the part of the railway company to establish liability

against them. Mr Guthrie put three points very clearly in which he maintained that they had failed in their duty. In the first place, he maintained that no one was in front of the waggons when they were being shunted along the quay. Now certainly Budge was as close in front as he could well be, because he had succeeded in coupling the waggons. Secondly, he argued that there was insufficient whistling. But I do not know that any amount of whistling would have been intelligible to this boy. Lastly, he maintained that the speed at which the waggons were shunted was too great. But in this contention also I think he has failed. I am therefore of opinion that no fault has been proved sufficient to render the defenders liable.

No. 12.

Nov. 1, 1888.  
Smith v.  
Highland  
Railway Co.

LORD ADAM.—The pursuer must establish fault on the part of the railway company before he can recover in this case, and unless he does establish such fault, the question of contributory negligence on the part of the pursuer does not arise. I agree with the Dean of Faculty that in this case it is not necessary to consider this question, because I am very clearly of opinion that the pursuer has not proved fault on the part of the railway company. It is not very clear from the proof how the accident happened; I think, however, it happened in this way: The engine and empty waggons went down the quay a few feet—or rather, I should say, along, for it is not proved that there is any incline, and the whole distance was only 128 feet—until they came into contact with the two loaded waggons which were standing opposite the quay. I think it is proved that they came along without any undue speed. Clark came down on one side of the empty waggons, and Budge came down on the other side, but before them. I think it is proved that at the crossing, which is immediately above this part of the quay, Budge had crossed in front of the going waggons and went along with them till they came into contact with the standing waggons, and then the whole train was set in motion, but not at a fast rate of speed. I think it is also proved that in the meanwhile Budge proceeded to couple, and had actually coupled, the first and second loaded waggons, and that the train, moved on slowly and steadily till it came into contact with the empty waggon, without any shock or rebound, but with steady onward progress, crushed the boy between the buffers. I think the medical evidence shews no appearance of anything except slow and steady crushing, and that being so, and these being to my mind the facts, I can find no fault on the part of the railway company. So far as I can see, they left nothing undone which they ought to have done. I can therefore see no fault in this case, and I think, therefore, that we must return to the Sheriff-substitute's interlocutor, the findings of which I think are quite satisfactory.

LORD SHAND was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff appealed against: Adopt the findings in fact contained in the interlocutor of the Sheriff-substitute, and hold the same as repeated herein *brevitatis causa*: Affirm the said interlocutor: Of new assolvie the defenders from the conclusions of the action, and decern."

GIBSON & PATERSON, W.S.—J. K. & W. P. LINDSAY, W.S.—Agents.

No. 13.

Nov. 3, 1888.  
Lawrie v.  
Pearson.

MRS EMILY M'GUIRE OR LAWRIE, Pursuer (Respondent).—*M'Lennan*.  
DAVID PEARSON, Defender (Reclaimer).—*J. A. Reid—Macdonald*.

*Process—Expenses—Caution—Defender.*—As a general rule the Court will not ordain an insolvent defender to find caution for expenses.

2D DIVISION.  
Lord Fraser.  
1.

ON 28th February 1888 Mrs Emily M'Guire or Lawrie, Greenside Row, Edinburgh, brought an action of count, reckoning, and payment against David Pearson, solicitor, Kirkcaldy, sole surviving trustee under the trust-disposition and settlement of Mr and Mrs Greig, under which the pursuer was one of the beneficiaries, concluding for an account of his intromissions as trustee, whereby the sum due to her might be ascertained, or, failing an accounting, for payment of £500.

The pursuer alleged, *inter alia*, that the defender was personally responsible for certain investments of the trust funds. The defender denied that he was liable as averred, and stated that he had fully accounted to the pursuer.

After the action had been raised the pursuer ascertained that the defender had, before the date of the action, executed a trust-deed for behoof of his creditors. She in consequence added this plea,—(1) The defender being insolvent, and having divested himself of his whole estates, is not entitled to defend this action without finding caution for expenses.

On 16th May the Lord Ordinary (Fraser) appointed intimation to be made to the defender's trustee.

The trustee having declined to sist himself, the Lord Ordinary, on 6th July, ordained the defender to find caution for expenses within eight days.

On 19th July, the defender having failed to find caution, the Lord Ordinary pronounced this interlocutor:—"In respect the defender has failed to find caution for the expenses of process as ordered by the interlocutor of 6th July current, on the motion of the pursuer, and in respect the pursuer restricts her claim under the alternative conclusions of the summons to the sum of £250 (said sum being exclusive of and in addition to the sums which the defender has already transferred to the pursuer in the course of the process), decerns against the defender for payment to the pursuer of the sum of £250 under the said alternative conclusion of the summons, reserving to the pursuer her right in and against the various funds in which the trust-estate under the defender's charge is or may be invested, and decerns: Finds the pursuer entitled to expenses," &c.

The defender reclaimed, and argued;—The question of caution for expenses was one for the discretion of the Court, and in the case of defenders the Court would readily dispense with caution. This was peculiarly a case for such dispensation, as the defender was sued as trustee, a capacity with which his trustee had nothing to do.<sup>1</sup>

Argued for the pursuer;—The action was raised before the pursuer knew of the granting of the trust-deed. The question was one for the discretion of the Court,<sup>2</sup> and that in the case of defenders as well as pursuers.<sup>3</sup> The defender though sued as a trustee was sought to be made personally liable, and as he had divested himself of his estate there was nothing which the pursuer could arrest.

<sup>1</sup> Taylor v. Fairlie's Trustees, March 1, 1833, 6 W. and S. 301; Goudy on Bankruptcy, 355.

<sup>2</sup> Stevenson v. Lee, June 4, 1886, 13 R. 913.

<sup>3</sup> Thom v. Andrew, June 26, 1888, 15 R. 780 (per Lord Young).

No. 13.

**LORD YOUNG.**—I cannot avoid coming to the conclusion that the Lord Ordinary has fallen into error in the view he has taken of this case. It is an action of count, reckoning, and payment against Mr Pearson, a writer in Kirkcaldy, as trustee under the testamentary trust of a Mr and Mrs Greig. Mr Pearson defends the action, and he says that he has already sufficiently accounted—that he is not indebted to the pursuer; and we have been informed that the question really turns upon the point whether the defender is personally responsible for certain investments of the trust-money which are said to have turned out badly. Before the action was raised, but, as we were informed very properly by Mr McLennan, without the knowledge of the pursuer, Mr Pearson had executed a voluntary trust-deed with a view to the judicious management of his affairs and the payment of his debts; and the pursuer now puts in this plea,—“The defender being insolvent, and having divested himself of his whole estates, is not entitled to defend this action without finding caution for expenses.” On this plea being brought under his notice the Lord Ordinary ordered intimation to be made to the trustee, and as the trustee declined—and very properly declined—to have anything to do with the case, the Lord Ordinary pronounced an interlocutor appointing the defender to find caution for expenses. It was here, I think, the Lord Ordinary fell into error. In my opinion Mr Pearson is absolutely entitled to defend himself without finding caution. The trust is a voluntary trust, although it would not have affected my opinion if this had been a sequestration. No trust-estate in which the defender acted as trustee and executor would have been affected by his sequestration any more than by his voluntary trust; the trust-estate would have remained in his hands, and he would have been responsible to the beneficiaries for it, and neither the trustee upon a voluntary trust executed by him nor the trustee under his sequestration could with any propriety have interfered. I therefore think that the Lord Ordinary's view was erroneous, and I should propose to your Lordships that we should recall the Lord Ordinary's interlocutor appointing the defender to find caution, and also the subsequent interlocutor granting decree against him for £250, and remit the case to the Lord Ordinary to proceed.

**LORD LEE.**—There are two questions to be considered in a case like the present. The first is, whether the defender has so completely divested himself of his estates as to have no title to defend. But it is not said here that the defender has completely divested himself of his estates, at least no question of his title to defend the action was raised in argument; the only question was, whether he should be ordained to find caution before he can be allowed to defend. I do not say that there may not be cases in which the defender may be called upon to find caution, but the general rule as to caution which applies to pursuers does not apply to the case of defenders. There is no better illustration of this than the well-known case of *Stephen v. Skinner*, May 31, 1860, 22 D. 1122. Here I entirely agree that no ground has been shewn to us why the defender should be made to find caution as a condition of defending the action.

**LORD JUSTICE-CLERK.**—I entirely concur, and only wish to add that if this doctrine of making the defender in an action find caution were to be carried to its limits it would amount to intolerable hardship. If we were to affirm that principle it would amount to this, that where an action of any kind is brought against a bankrupt or against a person who has placed his property under a

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voluntary trust, he would be compelled either to find caution or to allow decree to go against him for any amount that might be asked. I therefore concur in the judgment proposed.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the reclaiming note for the defender against Lord Fraser's interlocutor of 19th July last, recall the said interlocutor and the previous interlocutor of 6th July 1888: Repel the first plea in law for the pursuer: Find the defender entitled to expenses from the date of the interlocutor reclaimed against: Remit to the Auditor to tax the same, and to report; authorise the Lord Ordinary to decern for the taxed amount thereof, and remit the cause to his Lordship accordingly, and to proceed otherwise as accords."

ROBERT BROATCH, Solicitor—W. G. L. WINCHESTER, W.S.—Agents.

## No. 14.

Nov. 9, 1888.  
Australasian  
Mortgage and  
Agency Co.,  
Limited, v.  
Commissioners of In-  
land Revenue.

THE AUSTRALASIAN MORTGAGE AND AGENCY COMPANY, LIMITED,  
Appellants.—*D.-F. Mackintosh—J. C. Lorimer.*

COMMISSIONERS OF INLAND REVENUE, Respondents.—*Lord-Adv. Robertson—A. J. Young.*

*Revenue—Stamp—Bill of Exchange—Coupon—Renewal of debenture—Stamp Act, 1870 (Act 33 and 34 Vict. cap. 97), sec. 48, and schedule, voce Bill of Exchange.*—Under the schedule to the Stamp Act, 1870, dealing with bills of exchange, there is exempted from the ld. stamp duty exigible upon bills of exchange payable on demand (9) "coupon or warrant for interest attached to and issued with any security."

*Held* that that exemption did not cover interest coupons which were attached to the original security upon its being renewed by minute for a further term of years after its original term of endurance had expired, and that they fell to be stamped with the ld. stamp.

1st DIVISION.  
M.

ON 2d May 1883 the Australasian Mortgage and Agency Company, Limited, issued a debenture bond for £2000, bearing five per cent interest, in favour of Mr R. E. Scott, C.A., the date of payment being 15th May 1888, "or upon such subsequent date as may hereafter be mutually agreed upon by minute to be indorsed hereon." The debenture was stamped with a £2, 10s. stamp, being the *ad valorem* duty applicable to a mortgage.

Unstamped coupons or warrants for the interest payable each half year during the currency of the debenture down to and including 15th May 1888 were attached to and issued with the debenture.\* These were detached and payment made upon them as each half year's interest fell due.

When the debenture fell due at Whitsunday 1888 it was arranged by the parties that it should be renewed, and a minute of renewal for five

\* The Stamp Act, 1870 (Act 33 and 34 Vict. cap. 97), sec. 48 (1) enacted,—*"The term 'bill of exchange,' for the purposes of this Act, includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note), entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned."*

Under the head "bill of exchange" in the schedule to the Act appear certain exemptions, and the ninth of those exemptions is as follows:—"Coupon or warrant for interest, attached to and issued with any security."

years was indorsed upon the debenture, and a new set of coupons or warrants for the interest issued.\* The minute of renewal was stamped with a 6d. agreement stamp. No. 14.

This was a case stated by the Commissioners of Inland Revenue, at the instance of the Mortgage Company, on appeal against the determination of the Commissioners, in which the question was whether each of these coupons was "liable to the duty of one penny applicable to a bill of exchange payable on demand, or if not, whether it is liable to any duty, or whether it is exempt from duty as 'a coupon or warrant for interest attached to and issued with any security.'"† Nov. 9, 1888.  
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The case bore that "these coupons were attached to the debenture by being pasted thereto, and both debenture and coupons were thereupon delivered to the holders or their agents."

It was further stated,—"There is a provision in section 18 of the said Act that nothing in the said section contained shall be deemed to authorise the stamping after execution thereof of any instrument prohibited by law from being so stamped, and the instrument in question being regarded as a bill of exchange payable on demand, it would come under this provision, but the instrument being already stamped with the duty of one penny, the said Commissioners expressed their opinion that it was a bill of exchange payable on demand and properly stamped with the duty of one penny, and it was stamped with the particular stamp provided by the said Commissioners under the said Act to denote and signify that the full amount of stamp-duty with which the document was by law chargeable had been paid. But the said Australasian Mortgage and Agency Company, Limited, declared themselves dissatisfied with the determination of the said Commissioners on the ground that the coupon in question falls within the exemption above quoted of a 'coupon or warrant for interest attached to and issued with any security,' and is not liable to any stamp-duty. They therefore required the said Commissioners to state specially and sign the case on which the question with respect to such duty arose, together with their determination thereon, which the Commissioners do hereby state and sign accordingly."

Argued for the appellants;—The coupons attached to the original debenture required no stamp. The new coupons were precisely in terms of those originally issued. A coupon was not a promissory-note. It was not an order to pay, and it added nothing to the debenture. It was merely a form of receipt which might be presented by bearer, and was accepted without indorsation as an absolute voucher. The statute had therefore permitted coupons to escape both a bill of exchange and receipt duty. The duty on the debenture was fixed without reference to the date of repayment, and there was no reason why a debenture with a stipulation as to renewal should be on a different footing. It was in-

\* The minute of renewal was,—"Edinburgh, 14th May 1888.—It is hereby agreed that the term of payment of this debenture shall be extended from the 15th day of May 1888, being the date of payment within mentioned, to the 15th day of May 1893, and coupons for interest at the rate of 4½ per centum per annum have been delivered to the said m/c trustees of Mr and Mrs John Bruce of Sumburgh, for the interest to become due at and prior to the date of payment hereby agreed on."

† The coupon was in the following terms:—"No. 1. The Australasian Mortgage and Agency Company, Limited, (£42, 10s.),—will pay to the bearer at the office of the Royal Bank of Scotland, Edinburgh or London, on surrender of this coupon, the sum of forty-two pounds ten shillings stg., on the 11th day of November 1888, for interest due at that date on debenture No. 2711. R. & E. SCOTT, Secretaries."

**No. 14.** tended that it should be in the same position (except as regarded the payment of an agreement stamp upon the minute of renewal) as if the extended period had been specified in the original debenture. So, too, in the case of the coupons. They were by implication issued with the original debenture. The new security was formed by the old debenture taken along with the agreement of renewal. The exemption, therefore, applied to renewal coupons. The original debenture in reality expired, and was re-issued and revived by the minute of renewal. Coupon meant something that was to be cut off; the essence was that it should be issued along with the obligation.

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Argued for the respondents;—Coupons were bills of exchange; this was clear from the terms of the Stamp Act, 1870. The debenture was the security; and admittedly the coupons issued with it were not subject to duty. The minute of renewal contained no new obligation to repay. It was only a minute of agreement, and the security was the original debenture. The new coupons were not "issued with" the security; they were re-issued, and therefore fell to be stamped with the 1d. stamp exigible upon bills of exchange payable on demand.

At advising,—

**LORD SHAND.**—The question for determination in this case is whether a coupon or interest warrant for £42, 10s., issued by the Australasian Mortgage and Agency Company, Limited, on 14th May last, and payable on the 11th of the present month, is liable to the duty of 1d., as the Commissioners have held it to be, or is exempt from duty, as maintained by the company.

There is no doubt that the document is a bill of exchange within the meaning of that term as defined by section 48 of the Stamp Act of 1870, and it is certainly liable in duty unless it falls under the 9th exemption in that part of the schedule of the Act which deals with bills of exchange and specifies the duty to which they are liable. The exemption is thus expressed,—“Coupon or warrant for interest attached to and issued with any security.”

The Australasian Company, on 2d May 1883, issued a debenture for £2000, having a currency for five years, on which they undertook to pay interest half-yearly at 5 per cent. This document was impressed with a stamp for £2, 10s., being the stamp appropriate to a debenture for the amount of the loan, and attached to and issued with the document or security there were coupons or interest warrants for the ten half-yearly payments of interest to become due before the loan became repayable. These coupons were clearly exempt from all stamp-duty under the words of the exemption already quoted.

Immediately before the debenture became due it was arranged between the company and the creditors that in place of repayment of the money being made, the period of endurance of the loan should be extended for other five years, that the rate of interest for this extended time should be  $4\frac{1}{2}$  per cent, and that coupons for interest at that rate should be issued, payable half-yearly as before. Accordingly a minute embodying this arrangement was indorsed on the debenture, having affixed to it an agreement stamp of 6d., and a new set of coupons was attached to the debenture “by being pasted thereto, and both debenture and coupons were thereupon delivered” to the creditors.

The appellants maintain that these coupons were exempt from duty under the statute, because they were attached to and issued with the security, but I am of opinion with the Commissioners that this contention is unsound, because though the coupons were attached to the security, they were not issued with it

as the first set of coupons was, and it is a condition of the exemption allowed No. 14.  
by the statute that the coupons shall be issued with the security.

When the debenture came to maturity the parties might have arranged that it should be given up and cancelled, and the money should be again lent to the company under the new arrangement on a new debenture, issued with its appropriate coupons attached to it. In that case there must have been a payment of a stamp, as for a new debenture, of £2, 10s., or the proper *ad valorem* amount, and of course the coupons issued with and attached to this debenture would have been exempt from duty.

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But that was not the course which the parties took. The debenture was never given up by the creditors. On the contrary, by the arrangement made the obligation of the company under the terms of that document still subsists, with this alteration on these terms, that the period of the loan is extended and the rate of interest reduced. On the assumption that the transaction is not to be regarded as a new debenture, the document embodying the arrangement has been impressed with an agreement stamp of 6d. only. The form and scheme of this transaction is not, according to the view of the parties, a new loan and a new security or document of debt granted for it, but an extension of an existing loan on somewhat altered terms. The agreement expressly bears that "the term of payment of this debenture shall be extended," and each coupon bears that the payment is made for interest due "on debenture No. 2711," being the debenture due at Whitsunday 1888, the term of payment of which had been extended.

This being so, I think it follows that the coupon in question, though attached to the debenture by the company, was not issued with that document or security. The debenture was issued in May 1883. Nor can it be said that there was a second issue or re-issue of the debenture. That document was never given up to the company, for that would only have been done on repayment of the amount, or in exchange for a new debenture, and so it could not be issued a second time. The debenture in its terms bore that the money should be repaid at Whitsunday 1888, or at such date as might "be mutually agreed on by minute to be indorsed hereon," but this stipulation seems to be of no account in the present question. An agreement to extend the period of payment would be of equal effect though the debenture had no such clause, and would be equally effectual though written not on the debenture but on a separate paper.

It is not easy to understand why a coupon or warrant for interest which is by statute held to be a bill of exchange, and which in practice serves also as a receipt or discharge for money, should in any circumstances be free from stamp-duty, while a receipt for interest on a heritable security must bear a stamp. But the exemption given is not universal but limited. The coupon must be "attached to and issued with any security." The only explanation of this limitation which occurs to one is that the privilege or exemption is only to be given where the coupons are issued with the original debenture, which has paid debenture duty, and not to be given where, as here, no such duty has been paid, but the transaction stands on the debenture as originally issued,—modified only in its terms by an agreement bearing an agreement stamp only.

On these grounds I am of opinion that the determination of the Commissioners should be affirmed.

LORD ADAM.—I am of the same opinion. The document in question is



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an ordinary coupon, and there is no doubt that a coupon is just a bill of exchange, and that under the Stamp Act of 1870 it is liable to the duty of 1d. unless it can be shewn that it belongs to one of the class of documents dealt with in the clause of exemptions appended to that statute. This, then, becomes the question which we have to deal with—Does this coupon fall under the clause of exemption? And the answer must depend upon the language of the clause, which is, “coupon or warrant for interest attached to and issued with any security.” Can it be said that this coupon was “attached to and issued with any security”? Now, the only two documents which have any bearing upon this question are the debenture and the minute of renewal. The only security for the £2000 is the debenture, and it is the existing security. It is in the words of the schedule to the Act under the heading “mortgage,” “the only or principal or primary security” for this money. The minute of renewal contains no obligation to repay, but only an extension of the time within which the £2000 is to be repaid. That brings us then to the further question, Was this coupon “attached to and issued with” the security? It certainly was attached to the security by a process of pasting, but it was not issued with it. For that purpose the debenture would require to have been given up to the company, and a new one would require to have been issued. It is clear, therefore, that this coupon was not “issued with” the security, and it is equally clear that under the Act of 1870, not being under the clause of exemptions, it must pay the stamp-duty of 1d.

What may be the reason of the exemption under the statute I do not know. But the point which has been raised is *positivi juris*, for reasons which I have not been able to discover, and that being so, I can only say that in terms of the Act the exemption does not cover the case of a re-issue of coupons upon the same security.

LORD MURE.—Under the statute of 1870 the only case in which coupons are to escape the duty of 1d. payable on bills of exchange is when, under the clause of exemptions, they are “attached to and issued with any security.” It cannot be said in the present case that the coupons in question were “issued with” this debenture. It was issued in 1883, but the coupons were not then in existence. They were not therefore issued with the security, in the sense in which I read the statute, but under an agreement to prolong the loan. If it had been the intention of the Legislature that coupons of the class now before us should escape the duty of 1d. payable on bills of exchange, the words of the clause of exemption would, I think, have been different. They might have been “Coupon attached to and issued with any security or on any renewal thereof.” But there are here no such expressions; and in the absence of any such words I agree with your Lordships in thinking that this coupon does not fall under the clause of exemption.

The LORD PRESIDENT was absent.

THE COURT affirmed the determination of the Commissioners.

MENZIES, COVENTRY, & BLACK, W.S.—THE SOLICITOR OF INLAND REVENUE—Agents.

THE TEXAS LAND AND CATTLE COMPANY, LIMITED, Appellants.—*Balfour* No. 15.  
—*J. C. Lorimer.*

COMMISSIONERS OF INLAND REVENUE, Respondents.—*Lord-Adv. Robertson* Nov. 9, 1888.  
—*A. J. Young.* Texas Land and Cattle Co., Limited, v. Commissioners of Inland Revenue.

*Stamp—Revenue—Transfer of debenture—Customs and Inland Revenue Act, 1888 (Act 51 and 52 Vict. cap. 8), sec. 13—Stamp Act, 1870 (Act 33 and 34 Vict. cap. 97), sec. 2—Marketable security.*—By the Stamp Act, 1870, and the Customs and Inland Revenue Act, 1888, a marketable security is defined as meaning “a security of such a description as to be capable of being sold in any stock market in the United Kingdom.”

*Held* that debentures of a land and cattle company incorporated under the Companies Acts fell within that definition, and that transfers on sale thereof were therefore liable, under the 13th section of the Customs and Inland Revenue Act, 1888, to a stamp-duty of 10s. per cent on the price as conveyances on sale.

On 16th May 1887 the Texas Land and Cattle Company, Limited, issued a bond or debenture, No. 895, for £200 in favour of the Reverend John Gillies for three years at five per cent. The bond was issued in terms of the company's articles of association. 1ST DIVISION.  
M.

On 30th May 1888 a transfer of the bond was executed by Mr Gillies's testamentary trustees in favour of Miss Ellen Parkin.

On 11th June following the transfer was sent to the Commissioners of Inland Revenue, whose opinion was asked as to the stamp-duty with which it was chargeable. The Commissioners were of opinion that the debenture was a “marketable security” under the Act 33 and 34 Vict. cap. 97, and that under the Act 51 and 52 Vict. cap. 8, section 13, the transfer was chargeable with *ad valorem* conveyance on sale duty.\* They accordingly assessed the *ad valorem* conveyance on sale duty of £1 upon the transfer

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\* The Act 33 and 34 Vict. cap. 97, sec. 2, defines, “. . . Marketable security means a security of such a description as to be capable of being sold in any stock market in the United Kingdom. . . .”

By the schedule of that Act there are charged the following stamp-duties:—“Mortgage, bond, debenture, covenant, warrant of attorney to confess and enter up judgment, and foreign security of any kind,—(1) Being the only or principal or primary security for the payment or repayment of money not exceeding £25, 8d., . . . exceeding £50, not exceeding £100, 2s. 6d. . . . (3) Transfer, assignment, disposition, or assignation of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment. For every £100, and also for any fractional part of £100 of the amount transferred, assigned, or disposed, 6d.”

By the schedule of that Act there are also charged the following stamp-duties, viz.:—“Conveyance or transfer on sale of any property (except such stock or debenture stock, or funded debt as aforesaid), where the amount or value of the consideration for the sale does not exceed £5, 6d.,” and so on.

The Act 51 and 52 Vict. cap. 8, sec. 13, provided,—“(1) There shall be charged upon a transfer, assignment, disposition, or assignation, otherwise than on mortgage, of any mortgage, bond, debenture, or covenant (being a marketable security), or of any security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company (being a marketable security), the following duties:—That is to say, where the transfer, assignment, disposition, or assignation is on sale, the same *ad valorem* duties as are now charged under the Stamp Act, 1870, upon a conveyance or transfer on sale of any property by relation to the amount or value of the consideration for the sale. . . .”

By sec. 10 the part of the Act relating to stamps is to be construed as one with the Stamp Act, 1870.

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in respect of the consideration of £200, and the instrument being already stamped with the duty of 1s., they required payment of the further sum of 19s.

The company thereupon paid the 19s., and the instrument was stamped accordingly, but being dissatisfied with the determination of the Commissioners, "on the ground that the bond and debenture transferred by the instrument in question was not a 'marketable security,' and that therefore the transfer was not chargeable under the Act 51 Vict. cap. 8, with *ad valorem* conveyance on sale duty, but was chargeable under the Act 33 and 34 Vict. cap. 97 with the duty of 6d. per £100, or fraction thereof, of the amount in the bond or debenture transferred," they demanded a case.

The question for the opinion of the Court was,—“Whether the said instrument is liable to be assessed and charged with the said *ad valorem* conveyance on sale stamp-duty charged under the Stamp Act, 1870, or with the said *ad valorem* duty of 6d. per £100, or fraction thereof?”

The appellants argued;—The debenture was nothing more than an acknowledgment of indebtedness and an obligation to repay in three years to the lender. There was nothing to enable the Court to say that this was a marketable security. If it were so, the provision might equally cover I O U's and personal bonds. The words must therefore have a restricted meaning, and the Legislature must have contemplated that there were many securities which were not capable of being sold upon the Stock Exchange, for the terms “stock market” and “stock exchange” were synonymous. Besides, “any” stock market meant “all” stock markets. The security must have a universal and not a local currency. Further, the words “capable of being sold” were probably construed by the Commissioners without any reference to the rules or constitution of the different exchanges. But a taxing Act fell to be strictly construed, and a subject was entitled to demand the warrant for his being made liable to a tax. It was not stated in the case that this debenture stock was quoted or sold on any exchange. There were indications in the Stamp Act of 1870 itself and elsewhere that the kind of security contemplated as being “marketable” was one of a class or group—such as bank shares or stock which was numbered. Where the security was capable of being quoted on the Stock Exchange its value could be ascertained. Sec. 12 of the Act of 1870 shewed that it was a security having an average price that was intended, and sec. 124 shewed that policies of insurance were not to be deemed “marketable securities.” Other sections of the Acts where the words “marketable security” occurred, *e.g.*, sec. 71 of the Act of 1870 and sec. 16 of the Act of 1888, did not throw light upon their meaning. The result of the Commissioners' finding here was very anomalous, for while the stamp upon the debenture still remained at 2s. 6d. per cent the transfer was said to require four times as high an amount, *viz.*, 10s. per cent.

Argued for the Inland Revenue;—What was meant by the term “marketable security” was that it must be of a kind which was likely to be saleable. A debenture could not be assimilated to a personal bond, and debentures by an individual were unknown. The term as used throughout the Act of 1870 meant any security which was capable of being sold in a stock market and had a fluctuating value. Stock market did not necessarily mean stock exchange, and it was not necessary that securities should have a quotation to enable them to be sold on a stock market. There were dealings in the non-quoted stocks which would fall to be taxed just as much as in the others. It was for the appellants to say where a distinction was to be drawn.

At advising,—

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LORD SHAND.—The question in this case is, whether the transfer of a debenture of the Texas Land and Cattle Company (Limited) is chargeable with the stamp-duty applicable to an *ad valorem* conveyance on sale under section 13 of the Act 51 and 52 Vict. cap. 8, or is only chargeable with a duty of 6d. for every £100 and for any fractional part of £100 of the amount transferred, as a transfer or assignment of a debenture under the Stamp Act of 1870 (33 and 34 Vict. cap. 97), and relative schedule under the head “Mortgage, Bond, Debenture,” &c., head 3? I am of opinion with the Commissioners that the instrument is chargeable with the higher duty under the Statute of 51 Victoria.

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The decision of the question turns on the point whether the debenture in question is a “marketable security” within the meaning of the statutes. By the Act of 1870 a transfer of a debenture was liable only for the smaller duty of 6d. on each £100 or part of £100; but by the later Act it was provided (sec. 13) that in substitution of this duty there should be an *ad valorem* charge the same as is charged under the Act of 1870 on a transfer on sale of any property “by relation to the amount or value of the consideration for the sale” on a “transfer, assignment, disposition, or assignation, otherwise than on mortgage, of any mortgage, bond, debenture, or covenant (being a marketable security), or of any security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company (being a marketable security).” If then the debenture in question be a “marketable security” within the meaning of the statute, then the transfer of it on a sale is liable to *ad valorem* duty.

Now, the Statute of 1870, sec. 2, assigns to the words “marketable security” a particular meaning. The words of the provision are—“Marketable security means a security of such a description as to be capable of being sold in any stock market in the United Kingdom.” If the debenture assigned by the transfer in question falls within this definition or description of a marketable security, then the *ad valorem* duty is chargeable on the instrument of transfer.

The debenture is printed, and forms part of the case. The company registered as a limited company under the Companies Acts has power under its articles of association to issue debentures under certain specified conditions, one of these being that a register of debentures shall be kept, in which entries shall be made of every debenture issued, and of all transfers of debentures, and another that the total amount shall not exceed the unpaid capital of the company, and the debenture itself, which bears to be No. 895, is in the terms in which such such documents are frequently expressed. As authorised by the articles of association it contains an obligation by the company for the repayment of the sum of £200 lent, and periodical interest, and embodies a reference to the articles of association conferring a right on the debenture-holders to a proportional part with each other of the securities and assets of the company, and the free proceeds of the lands of the company in the event of these being sold.

The Commissioners, in the case stated under the appeal, have given no statement beyond a narration of the articles of association and of the terms of the debenture and transfer, and no information as to whether the debentures of this company are *de facto* in use to be sold in any stock market in the United Kingdom. Their judgment is rested on the view that the debenture in question is a marketable security “under the definition above quoted.”

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For the appellants it was maintained that in order to be a marketable security within the meaning of the statutes (which are to be read as one statute) the security must either be one which has a quotation on the stock exchanges or stock markets, or at least must be one of a mass issued by a company as distinguished from a single deed or instrument such as the debenture in question, which might be the only debenture issued by the company.

It is clear that the term "marketable security" is used to designate a class or kind of securities. The words of the clause of definition are "a security of such a description." The words defining what the description embraces immediately follow, and the test provided by the statute is this—Does the instrument fall within the description? What then is the description? Such a description "as to be capable of being sold in any stock market in the United Kingdom." It must be observed on these words that it is not made the test of a security as being marketable (1) that it is a debenture, bond, or covenant of a company whose debentures, bonds, or covenants are in point of fact sold in a stock market, nor (2) that it is a debenture forming one of a class or series issued by a company. If the security be one of that general class of securities which is capable of being sold in stock markets, it is then a marketable security within the meaning of the statute. The test is whether the security is capable of being so sold. Now, in one sense every security might be included under this description, for I suppose any kind of security, if of value, may find a purchaser in the stock markets through the medium of agents or brokers. But it seems to be clear that the language of the statute is not to be interpreted so as to have this wide signification, for so to read it would be to include all securities of a class having any value, whereas the statute by the expression used professes and intends to include only securities of a particular description, viz., such as are "capable of being sold in any stock market."

It seems to me that the true interpretation of the clause must be to include as marketable securities all securities of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought. This will, on the one hand, exclude such securities as mortgages on land or proper heritable bonds, but, on the other hand, will include debentures of companies. If a holder of such a security as a debenture of a public company, which is the description of the security here in question, desire to sell it during its currency, while no doubt he might be able at times to procure a purchaser otherwise, he would, in the general case, resort to an agent or broker who transacts business on the stock markets, and so find a purchaser, and it is notorious that railway bonds and debentures are dealt in on the stock markets, for the quotations for many of these are daily published in the stock lists appearing in the newspapers. This is enough to shew that a debenture of a company is not only in a wide but in a proper sense a security of such a description as to be capable of being sold in a stock market.

It may be noticed that in section 69 of the Statute of 1870, and the schedule under the head "Contract-Note," the term "marketable security" is used with reference to the subject of a broker's or an agent's transactions, and it cannot, I should think, be doubted that debentures of railway or other companies bought or sold by a broker would be entered in his contract-note in the same way as debenture stock or shares of a company. It may further be observed that if the provision of section 13 of the Act 51 Victoria is not to include such a debenture as is here in question as a marketable security by or on behalf of a corporation

or company, it is not easy to give the words of the statute any practical effect, for by other provisions of the statutes the transfer of all shares and stocks of companies have been otherwise expressly made liable to *ad valorem* duties. No. 15.

On the whole, I am of opinion that the determination of the Commissioners is right, and should be affirmed, and that the transfer in question is liable to be assessed and charged with *ad valorem* conveyance on sale stamp-duty charged under the Stamp Act, 1870. Nov. 9, 1888. Texas Land and Cattle Co. Limited, v. Commissioners of Inland Revenue.

**LORD ADAM.**—The materials for the decision of this question are contained within a very narrow compass. The security transferred was a debenture of the Texas Land Company, and what we have to decide is, whether such an instrument is a “marketable security” within the meaning of the Act 33 and 34 Vict. cap. 97. If it is, the stamp-duty chargeable is 10s. per cent, if it is not, then the transfer escapes with a duty of 6d. per £100.

The Act supplies us with a definition of the words “marketable security.” It is defined as meaning “a security of such a description as to be capable of being sold in any stock market in the United Kingdom,” and the question comes to be whether the transfer of this debenture bond was a security “capable of being sold in any stock market of the United Kingdom.” Now, I can hardly imagine more comprehensive words. There must be some limitation contemplated by the Legislature, but I do not know where it is to be found. As regards the present case, however, there can be no doubt that this is a security which is saleable in a stock market. The transfer is of a bond numbered 895 of a series of such bonds, and it appears to me that a stock market is just the place to take such a security in order to sell it. The words of the clause “capable of being sold” point to a kind or description of security, and it certainly appears to me that the transfer of a debenture bond is a security which is capable of being sold in a stock market. I therefore think that this security falls to be dealt with under the Act 51 and 52 Vict. cap. 8, and is liable to the same duty as is charged on a conveyance on sale.

**LORD MURE** concurred.

The **LORD PRESIDENT** was absent.

THE COURT affirmed the determination of the Commissioners.

**MORTON, NEILSON, & SMART, W.S.**—THE SOLICITOR OF INLAND REVENUE—Agents.

**ANDREW YUILE MACFARLANE AND OTHERS** (Pattison's Trustees),  
Pursuers and Real Raisers.—*Boyd.*

No. 16.

THE UNIVERSITY OF EDINBURGH, Claimants.—*Lee.*

**MRS MARGARET MACGREGOR AND OTHERS**, Claimants.—*R. V. Campbell.*

FREE CHURCH OF SCOTLAND, Claimants.—*C. J. Guthrie.*

ROYAL COLLEGE OF SURGEONS, Claimants.—*Strachan.*

**MRS ROBINA RITCHIE OR GIDDINGS**, Claimant.—*Strachan.*

**RODERICK URQUHART AND OTHERS**, Claimants.—*Low—Baxter—Kennedy—Crole.*

Nov. 9, 1888.\*  
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*Writ—Testament—Deletions—Marginal additions.—Per Lord M'Laren, Ordinary.*—(1) If a will or codicil is found with the signature cancelled, or lines drawn through the dispositive or other essential clause of the instrument, then

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on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held as revoked; otherwise it is to be treated as a subsisting will. (2) If a will or codicil is found with one or more of the legacies or particular provisions scored out, that raises no case for inquiry as to the testator's intention to revoke the instrument in whole; a question is raised only as to his intention to revoke the particular provision, which will not be held to have been revoked unless upon evidence that the scoring was done by the testator himself or by his direction with the intention of revoking the clause, and the authentication of the deletion by the testator's initials is sufficient evidence of such intention. (3) Marginal or interlineal additions, apparently in the testator's handwriting, will not be held part of the instrument unless authenticated by his signature or initials, for until such authentication he cannot be supposed to have finally resolved to make the addition. (4) When a will or codicil contains words scored out and others inserted in their place the cancellation is conditional on the substituted words taking effect, so that if the substituted words are rejected for want of authentication the will is to be read as if there had been no deletion.

OUTER-HOUSE  
Lord M'Laren.

THE trustees acting under the trust-disposition and settlement, with relative codicils, of the late Dr Thomas Hill Pattison, brought this action of multiplepinding for the distribution of his estate. Claims were lodged by the University of Edinburgh, and other public bodies and individuals, raising various questions regarding the construction of the settlement, and also certain questions relating to the authentication of alterations in portions of the writings. The latter questions, which alone form the subject of this report, depended on the following considerations, appearing *ex facie* of the writings as produced or by admission of the parties.

On the margin of the trust-disposition and settlement (which was dated 12th April 1876) there was written in pencil,\* opposite to a legacy (numbered "*decimo quarto*") of £100 left to Mrs Robina Ritchie or Giddings, the letters "Pd." There was no evidence or admission that these letters were holograph of the testator. It was not disputed that Mrs Giddings had not received £100 from the testator.

On the margin of the same deed, opposite to the beginning of the last purpose (being a bequest of the residue to the Royal Infirmary of Edinburgh), were the words (admittedly holograph of the testator) "Delete—T. H. Pattison," and on the margin at the end of the same purpose these words (also holograph) were repeated.

At the end of the trust-disposition and settlement were two short codicils, dated respectively 19th August 1880 and 10th July 1882. They were both deleted by the pen being drawn across them, and at the end of the last was this note, admittedly in the writing of the deceased, and referring to both codicils, "The last eleven lines (11) are hereby delete. T. H. Pattison."

At the end of the words just quoted was another codicil, dated 10th March 1885, which was held to be proved in a petition to the Court under the Conveyancing Act, 1874.

There were also two codicils on separate sheets of paper.

In the first, which was dated 12th August 1880, certain bequests in favour of the Edinburgh Royal Infirmary, in supplement of the residuary bequest in the trust-disposition, were deleted, but the deletions were not authenticated by signatures or initials, nor were there any marginal additions opposite to them. There was also this bequest, as (apparently) written originally,—“If any of the family of Mr Joseph M'Gregor, accountant, Edinburgh, are alive, I would like them to receive Two

\* All the other alterations after mentioned were in ink.

thousand pounds sterling." In the codicil as produced the word "Two" No. 16. was deleted and the word "One" written on the margin opposite with a caret prefixed. There were also certain marks across the word "Two," Nov. 9, 1888. Pattison's Trustees v. University of Edinburgh. which the trustees in their print of the will interpreted to be the initials of the testator, thus,—<sup>T.</sup> "Two," but which the Lord Ordinary, from an <sup>H. P.</sup> inspection of a photographic copy of the deed deciphered to mean / 2, being a stroke of deletion and a caret mark with a cipher above it. This codicil was tested, and was admittedly probative under the Conveyancing Act, 1874.

The other separate codicil, dated 22d May 1881, was a holograph deed, by which, *inter alia*, all the bequests to the Edinburgh Royal Infirmary were revoked.

The Lord Ordinary (M'Laren), on 11th August 1888, pronounced this interlocutor:—"Having considered the cause, Finds that the will of the deceased Dr Thomas Hill Pattison consists of the following writings—(1) Trust-disposition and settlement dated 12th April 1876; (2) codicil dated 12th August 1880; (3) codicil dated 22d May 1881; and (4) codicil dated 10th March 1885: Finds, with respect to the contents of the said trust-disposition and settlement, that no effect is to be given to the marginal note 'Pd.' written opposite to legacy '*decimo quarto*,' and that it is unnecessary to treat the residuary clause of said deed as cancelled by the marginal inscription written opposite to it, in respect that the said residuary clause is formally revoked by the codicil dated 22d May 1881: Finds, with respect to the contents of the codicil dated 12th August 1880, that the word 'Two,' part of a legacy of £2000, in the fourth line counting from the foot of the first page, is deleted, and the word 'One' written in the margin substituted therefor by the usual marks of deletion and induction; but that these alterations, not being authenticated by the testator's subscription or initials, have no testamentary effect, and the codicil is to be read as containing a legacy of £2000 in favour of the family of Mr Joseph Macgregor: Finds further that the other words deleted in said codicil are to be read as part thereof, notwithstanding such deletion, reserving the effect of subsequent variation of the purposes of the codicil under these heads: Appoints the case to be further heard on the question of the interpretation or construction of said testamentary writings, and grants leave to reclaim."\*

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\* "OPINION.—In this action of multiplepointing there are really two cases, or causes, a case of probate, and a case of interpretation.

"In introducing a new term into the vocabulary of the law of Scotland (which, as a contributor to the literature of this subject, I may be permitted to do), I must begin by defining its meaning. By 'probate' I, of course, do not mean a copy of the will and codicils on stamped vellum. Nor do I use the term in any sense having relation to the practice or procedure of the division of the High Court of Justice, which takes cognisance of questions of probate in England. I mean by probate simply the proof or ascertainment in law and fact of what are the words and writings which constitute the will of the deceased person whose estate is under administration. This is a question which necessarily takes precedence of questions of interpretation; because the meaning of a particular clause or provision may be different, according as the deed containing it is to stand by itself, or to be controlled by some other deed or writing under the testator's hand (which may or may not be entitled to testamentary effect). In the present action, it appears to me to be impossible to come to a satisfactory determination of the questions of interpretation which have been argued, until it is first settled what are the actual terms of the testator's will



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and codicils. To avoid the confusion which is likely to result from trying to do two things at once, I have, in this interlocutor, confined my decision to the question of probate, in the belief that if the parties wish this question to be considered by a higher Court, they will find it advantageous to have this part of the case reviewed at the present stage, after which the questions as to the effect to be given to cumulative provisions in favour of certain legatees can be more conveniently considered.

"I. The writings which have been laid before the Court consist of a regularly attested will and five codicils. Three of the codicils are written on the last page of the will, and there is a separate paper containing two codicils. In regard to the first of these, and also as to the will itself, a question arises as to the effect to be given to deletions and alterations, which are not, except in one instance, authenticated by the testator's subscription.

"(1) As to the will, which is dated 12th April 1876, the only question is that of the effect to be given to the deletions. This point will be afterwards considered.

"(2 and 3) At the end of the will the testator had written two codicils, apparently holograph, dated respectively 19th August 1880 and 10th July 1882. These have been cancelled, apparently by the testator himself, by drawing the pen across the lines, and writing these words below them, 'The last eleven lines (11) are hereby delete. T. H. PATTISON.' It is admitted that this docquet is holograph of the testator, whence it results that the codicils of 19th August 1880 and 10th July 1882 do not form part of Dr Pattison's will.

"(4) The first of the two codicils, which are written on a separate paper, is dated 12th August 1880, and is signed by Dr Pattison, in presence of witnesses who append their designations to their signatures. This codicil is accordingly a probative writ under the provisions of the Conveyancing Scotland Act, 1874; and the only question to be considered at the present stage is the effect to be given to deletions.

"(5) The second of the two codicils which are written on the separate paper is admitted to be holograph. It is therefore a part of Dr Pattison's will.

"(6) The codicil of 10th March 1885, written on the last page of the will, has been proved under a petition to the Court, as set forth in condescendence 20 for the trustee.

"II. I pass to the consideration of the effect to be given to the deletions and alterations which have been put upon the will and the codicil of 12th August 1880. Although the questions which have arisen are not altogether new, I cannot find that the subject has been systematically considered, in previous decisions, and it appears to me to be eminently desirable that rules should be laid down of general application to such cases. My view on this subject may be stated in four propositions, all of which appear to be necessary for the decision of the case before me:—

"(1) If a will or codicil is found with the signature cancelled, or with lines drawn through the dispositive or other essential clauses of the instrument, then, on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held revoked; otherwise it is to be treated as a subsisting will. So much appears to be established by the decisions, amongst which the older decisions of the English Courts may be referred to in illustration of what I conceive to be a principle common to the systems of law of England and Scotland.

"(2) If a will or codicil is found with one or more of the legacies or particular provisions scored out, I should hold that this raises no case for inquiry as to the testator's intention to revoke the instrument in whole, but that a question is raised as to the intention to revoke the particular provision; and I should not hold the provision revoked unless upon evidence that the scoring was done by the testator himself or by his direction with the intention of revoking the clause. If the deletion were authenticated by the testator's initials, recognisable as his handwriting, I should hold this to be sufficient proof that the deletion was the act of the testator, the full signature being only necessary to an act of posi-

five disposition or bequest. It is hardly necessary to give reasons for denying effect to unauthenticated and unproved deletions, because to hold the contrary would be equivalent to saying that anyone who could get access to a will might increase the interest of the residuary legatees by drawing his pen through the legacy clauses.

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"(3) If a will or codicil is found with marginal or interlineal additions, apparently in the testator's handwriting, I should not hold these to be part of the instrument, except in so far as they are authenticated by the signature or initials of the testator. My reason is that our law does not give any effect to unsigned writings even when holograph. This may be right or may be wrong. I think it right; but the principle is that until the signature is adhibited the trust is supposed not to have declared his intention to be in the terms written down. Now, I cannot see that there is or ought to be any difference of principle in regard to the necessity of subscription between the case of a codicil written at the end of a will or on a separate paper, and the case of a marginal or interlineal addition, which if written after the execution of the instrument can only receive effect as a codicil. Having regard to previous decisions, I think that in the case of marginal additions or interlineations the authentication may be by initials; on the ground that the subscription at the end of the writing covers everything, and that the initial letters of the grantor's name suffice to authenticate the new matter as part of the instrument.

"(4) When the will or codicil contains words scored out and others inserted in their place, I think that the cancellation of the words in the original writing is conditional on the substituted words taking effect. Accordingly, if the substituted words are rejected on the ground that they are unsigned, the deletion is also to be rejected, and the will ought to be read in its original form.

"Having explained my views as to how deletions and additions made after the execution of a will or codicil ought to be treated, I shall now, without farther comment, apply the rules above set forth to the points of the case.

"(1) In the will or trust-disposition, appendix, p. 50, opposite the legacy of £100 to Mrs Robina Giddings, someone (apparently the testator) has written the abbreviation 'Pd.' It is averred by the legatee, p. 45, and her statement is not disputed, that she did not in fact receive a gift of £100 from the deceased. This case offers an excellent illustration of the justice of the rule contained in my third proposition, that no effect should be given to unsigned marginal additions. Doubtless Dr Pattison intended to make a gift of the £100 to Mrs Giddings in his lifetime, and he wrote the word 'Pd.' on the margin to remind himself that on this being done the legacy might be cancelled. But he did not put his initials to the docquet, and that being so, I find that there is no cancellation of this legacy.

"(2) On the margin of the same deed, appendix, p. 60, opposite the beginning and the end of a bequest of the residue of his estate to the Edinburgh Royal Infirmary the testator has written 'Delete. T. H. Pattison.' It is not necessary to make a formal finding to the effect that the residuary clause is cancelled, because by the holograph codicil of 22d May 1881 the testator revoked all gifts to the Edinburgh Royal Infirmary. But had the revocation depended on the signed marginal note alone, I should have held this to be an effectual revocation.

"(3) In the codicil of 12th August 1880, two provisions in favour of the Edinburgh Royal Infirmary are scored. As already stated there is a valid revocation by codicil of all bequests to that institution. It is, therefore, unnecessary to inquire whether these two lines were scored by the testator with the intention of cancelling the bequests.

"(4) In the same codicil, in a bequest to the family of Mr Joseph Macgregor, there is an alteration which raises the whole question as above considered. The print (p. 63 D), does not, in my judgment, accurately represent the alteration, and I accordingly refer to the photographic copy, p. 1, line 4 from foot of page.

"The legacy in question is a legacy of £2000 to the family of Mr Joseph Macgregor, accountant, Edinburgh. The word 'Two' is delete, and the word

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'one' is written in the margin with a mark of induction or 'caret' prefixed to it. The theory of the trustee, by whom the print of the deeds is furnished, is that the marks written across the word 'Two' are the initials of the testator's name, and it is so printed (p. 63 D). To my eyes the mark appears to be this, /  $\frac{2}{\Delta}$ , a vertical stroke obliterating the first letter of the word 'Two,' and a caret with a cypher over it to indicate that the word written in the margin is to be taken in at this place. If I could recognise these marks as a possible representation of the testator's initials, then, in accordance with my third proposition, I should hold the alteration to be the equivalent of a codicil substituting a legacy of £1000 in place of the original legacy of £2000. But not only do I fail to recognise the testator's initials in these markings, but I do not believe that they were put there as a symbolical representation of the testator's name. I believe they are what I have stated, a combined deletion and induction mark. That being so, I consider that this is an unauthenticated alteration, and that in accordance with my fourth proposition no effect ought to be attributed either to the marginal addition or to the deletion of the word 'Two,' which deletion I conceive to be conditioned on the valid substitution of the word 'One' written in the margin."

This interlocutor was not reclaimed against.

ROBERTSON & WALLACE, S.S.C.—W. & J. COOK, W.S.—MAITLAND & LYON, W.S.—COWAN & DALMAHOY, W.S.—JAMES ROBERTSON, Solicitor—PETER DOUGLAS, S.S.C.—GORDON, PRINGLE, DALLAS, & Co, W.S.—HAMILTON, KINNEAR, & BEATSON, W.S.—TAIT & CRICHTON, W.S.—WILLIAM HAMILTON, Solicitor—Agents.

## No. 17.

Nov. 9, 1888.  
Morley v.  
Jackson.

AGNES MARY MORLEY, Pursuer (Respondent).—*Strachan*—*J. Wilson*.  
JAMES ALLEN JACKSON AND OTHERS, Defenders (Reclaimers).—*Murray*.

*Jurisdiction—Arrestments ad fund. jur.—Summons—Amendment—Status.*—The daughter of A B deceased raised an action against the trustee under his deed of settlement, C B his widow, and his sister, concluding (1) for declarator of legitimacy; (2) for payment of legitim out of his estate; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The pursuer averred that her mother had been regularly married to A B in ignorance of the fact that he was married to C B. None of the defenders were resident within the jurisdiction of the Court, but as regarded the trustee the pursuer averred that jurisdiction had been constituted against him by arrestments *ad fundandam jurisdictionem*. The defenders pleaded that the arrestment did not found jurisdiction as the action raised a question of status, and that A B had been domiciled in England, and that the law of England did not recognise legitimacy by a putative marriage. At adjustment the pursuer amended the summons by deleting the averments as to C B's marriage to A B, and stating that A B's marriage to the pursuer's mother was a lawful marriage.

The Court *dismissed* the action, holding that it raised a question of status, and that jurisdiction could not in such an action be founded by arrestments *ad fundandam jurisdictionem*.

*Opinions, per Lord Shand and Lord Adam*, that if a summons as served is bad for want of jurisdiction it cannot be made good by subsequent alterations.

*Jurisdiction—Forum conveniens.*—The child of a deceased person raised an action concluding (1) for declarator of legitimacy; (2) for payment of legitim out of his estate; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The action was directed against the trustee of the deceased under his deed of settlement, his widow, and his sister, the two latter of whom were interested in respect of their pecuniary rights and interests in the estate of the deceased. All the defenders were in England, but the pursuer alleged that she had used arrestments to found jurisdiction against the trustee.

*Opinions, per Lord Shand and Lord Adam*, that in the absence of the widow and sister, who were the real parties interested in the action as defenders, the

Court of Session was *non forum conveniens* to try the question with the trustee, No. 17. who was only interested as a holder of funds.

AGNES MARY MORLEY, residing with her mother, Mrs Agnes Newberry <sup>Nov. 9, 1888.</sup> or Morley, at 21 Salisbury Street, Edinburgh, raised this action against <sup>Morley v. Jackson.</sup> James Allen Jackson, of the burgh of Kingston-upon-Hull, as sole surviving trustee under the deed of settlement of the late Mr Thomas Morley, <sup>1st Division.</sup> and also against Catherine Anderson or Morley, "presently residing with <sup>Lord Lee.</sup> John Anderson, 26 Queen Street, Carlisle, widow of the said deceased Thomas Morley," and also against Mrs Mary Ann Morley or Jackson, <sup>B.</sup> Hull, sister of the deceased.

The pursuer concluded (1) for declarator that she was the lawful child of the deceased Thomas Morley, and as such entitled to all the rights and privileges of a child born in lawful wedlock as regards inheritance, succession, or otherwise. (2) For exhibition by Jackson of an account of his intromissions as trustee. (3) For decree ordaining him to pay her legitim out of the estate of the deceased. (4) For decree ordaining him to pay her an annual sum of £10 of aliment in the event of her not obtaining decrees under the first two conclusions of the summons.

The pursuer averred;—(Cond. 2) "The late Mr Morley first married Helen Hunter, who belonged to Dumfries. She died without issue; and thereafter, in or about March 1868, he married the defender, Catherine Anderson. He lived with her in lodgings, first at Newcastle-on-Tyne, and afterwards at Carlisle, until about 1873, when owing to disagreements between them they separated. They never lived together again, and they had no communication thereafter with each other. No children were born of the marriage with the said Catherine Anderson. After the separation Mr Morley returned to Scotland." (Cond. 3) "Whilst living in Edinburgh in 1876 and the beginning of 1877 Mr Morley courted Agnes Newberry, daughter of William Newberry, fishing-rod maker, Canongate, Edinburgh, with a view to marriage. He fraudulently represented himself as being free to marry, telling her that he was a widower; and she, being in complete ignorance that he had then a living wife, relying upon his representations, and *bona fide* believing that no impediment existed, agreed to marry him. Accordingly, after due proclamation of banns, they were regularly married by the Reverend James Macnair, minister of the parish of Canongate, on 28th April 1877."

The pursuer further averred that her father and mother lived together as husband and wife in Edinburgh, and on 22d December 1877 she was born of the marriage, and that her father registered her birth as that of his lawful child. That her father and mother continued to live together as husband and wife at various places in Edinburgh till Mr Morley's death in 1887. "During all that time the said Agnes Newberry or Morley was kept in entire ignorance of the fact that there was a surviving wife of a previous marriage. She became aware of that circumstance only after Mr Morley's death."

None of the defenders were resident in Scotland, and there was no averment that jurisdiction had been constituted against Mrs Morley and Mrs Jackson. With regard to Jackson, however, the pursuer averred that she had used arrestments *ad fundandam jurisdictionem* against him, conform to execution thereof, attaching furniture and effects belonging to him as trustee foresaid.

The defenders pleaded, *inter alia*;—(1) No jurisdiction, in respect that, 1, no funds belonging to the defenders or any of them were attached by the arrestment; and 2, that an arrestment *ad fundandam jurisdictionem* does not subject questions of status to the jurisdiction of the Court. (3) The deceased Mr Morley having been a domiciled Englishman, and the

No. 17. English law not recognising legitimacy by a putative marriage, the pursuer cannot obtain decree of declarator as concluded for.  
 Nov. 9, 1888. Morley v. Jackson.

The defenders averred that Thomas Morley was a domiciled Englishman.

At the adjustment of the record the pursuer amended her averments to the following effect :—(Cond. 2) “ The late Mr Morley first married Helen Hunter, who belonged to Dumfries. After the marriage they lived for many years in Dumfries in a house of their own. Helen Hunter died on or about 25th February 1870, without leaving issue. The statement in the answer that Mr Morley married Catherine Anderson is denied.” (Cond. 3) “ On 28th April 1877 Mr Morley married Agnes Newberry, daughter of William Newberry, fishing-rod maker, Canongate, Edinburgh. The ceremony of marriage was performed, after due proclamation of banns, by the Reverend James Macnair, minister of the parish of Canongate. Thereafter the parties lived together as husband and wife at 27 Elder Street, Edinburgh, and on 22d December 1877 the said Agnes Newberry or Morley gave birth to the pursuer there.” The pursuer then repeated the concluding averments in cond. 3 as originally framed. Articles 4 and 5 of the condescendence contained averments as to the articles and funds said to have been arrested to found jurisdiction against Jackson.

The defender Jackson in answer 2 averred that on the 15th March 1870 Mr Morley had married Catherine Anderson, and in answer 3 he averred that the marriage between Mr Morley and the pursuer's mother was bigamous, and that the latter was fully aware of this at the date of the marriage.

In his answers Jackson disputed the averments in conds. 4 and 5 for the pursuer, and further averred ;—“ Further, an arrestment *ad fundandam jurisdictionem* does not subject to the jurisdiction of the Court a question of status. The defenders are domiciled in England, and are not subject to the jurisdiction of the Scotch Courts. *Quoad ultra* denied. Explained further that the pursuer, by means of altering the condescendence at adjustment, has attempted entirely to change the nature of the action. Reference is made to the condescendence as originally served with the summons. The summons as laid was a declarator of legitimacy upon the ground of a putative marriage, and the condescendence recognised and admitted the marriage of Catherine Anderson. The summons is now sought to be used as equivalent to a declarator of marriage, and the person vitally affected thereby, viz., Catherine Anderson, is not subject to the jurisdiction of the Court.”

The pursuer pleaded, *inter alia* ;—(1) The pursuer, as the only lawful child of the late Mr Morley, is entitled to a share of his moveable estate, and the defender, Mr Jackson, having intromitted therewith, is bound to account to her therefor. (3) In the event of the pursuer failing to obtain decree of count, reckoning, and payment as concluded for, she is entitled, as the child of the late Mr Morley, to aliment as concluded for. (4) *Separatim*, In the event of the defenders succeeding in establishing as valid the alleged marriage of the deceased with the defender, Catherine Anderson, decree of declarator of legitimacy ought to be pronounced as concluded for.

On 12th July the Lord Ordinary allowed the summons to be amended at the bar by the deletion of the words “ widow of the said deceased Thomas Morley.” Further, having heard counsel in the Procedure Roll, and considered the cause with the minute for the tutor *ad litem*, before further advising allowed to the pursuer and to the defender James Allen Jackson a proof of their respective averments in articles 4 and 5 of the conde-

ascendence and answers thereto, so far as relating to the jurisdiction as against the said defender. No. 17.

The defender reclaimed, and argued;—It was quite clear that the action as originally laid was a declarator of legitimacy upon the ground of a putative marriage. It involved therefore a question of status. There was admittedly no jurisdiction against Mrs Morley and Mrs Jackson, and there was also none in point of law against the other defender. Arrestment *ad fundandam jurisdictionem* had been used against him, but it was quite settled that such would not constitute jurisdiction in a question of status.<sup>1</sup> The Lord Ordinary had erred in allowing the amendment, the obvious purpose of which was to convert the action into a declarator of marriage. Even, however, as amended, the action was in its leading conclusion and in its character a declarator of legitimacy. The other conclusions were clearly ancillary, and decree could not be pronounced in them unless on the assumption of the first conclusion being given effect to. The *de quo queritur* was whether Catherine Anderson was married or not, and that question lay behind any pecuniary claim by the child. Even then as amended the plea of no jurisdiction as against Jackson fell to be given effect to. But assuming that jurisdiction had been properly constituted against him, this was not a *forum conveniens* to try the question, which was complicated with the interests of the other two defenders. The interest of the widow was to be before the world as Mr Morley's legal wife, and the interest of his sister was to get the fee of her brother's estate on the expiry of the liferent of the widow. These respective interests would be prejudiced if the pursuer succeeded in this action. They were admittedly not subject to the jurisdiction of the Court, and as Jackson was only interested as a holder of funds the question could not be tried with him in their absence.<sup>2</sup>

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Argued for the pursuer;—The action was now mainly a petitory one, and the arrestments used were quite sufficient to found jurisdiction as against Jackson in such an action.

At advising,—

LORD MURR.—The pursuer of this action sets forth in the summons that she is the daughter and only child of the deceased Thomas Morley, and concludes, first, for declarator of legitimacy; second, for count, reckoning, and payment; and, third, for payment of a sum as aliment in the event of the pursuer not obtaining decree in terms of the two first conclusions of the summons. The parties called are Mr Jackson, a trustee under two marriage-contracts of the pursuer's father in the English form, Mrs Catherine Anderson or Morley, designed in the summons as it was originally brought as "widow of the deceased Thomas Morley" (the pursuer's father), and Mrs Mary Ann Morley or Jackson. These parties are all resident in England, and this Court has plainly no jurisdiction against them, unless something has been done to create that jurisdiction. It is alleged that jurisdiction has been founded by arrestments *ad fundandam jurisdictionem* against Mr Jackson, but there is no such allegation as to the other defenders. In these circumstances the defenders all plead "no jurisdiction." Their first plea in law is,—“No jurisdiction, in respect that (1) no funds belonging to the defenders, or any of them, were attached by the arrestment, and (2) that an arrestment *ad fundandam jurisdictionem* does not subject questions of status to the jurisdiction of the Court.” Now, the first branch of this plea is

<sup>1</sup> Scruton v. Gray and Another, Dec. 1, 1772, M. 4822.

<sup>2</sup> Brown's Trustees v. Palmer, Dec. 17, 1830, 9 S. 224.

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plainly good as regards the two defenders Mrs Morley and Mrs Jackson, as they are resident in England, and no arrestments have been used against them. In a question, then, with them the jurisdiction of this Court cannot be maintained, and they are entitled to have the action dismissed as regards them on that ground.

The case of Jackson is different. Certain funds have been arrested, and the pursuer says that she has thus constituted jurisdiction against him. It is with the view apparently of disposing of that question that the Lord Ordinary has pronounced the interlocutor reclaimed against, by which his Lordship "allows to the pursuer and to the defender James Allen Jackson a proof of their respective averments in articles 4 and 5 of the condescendence and answers thereto, so far as relating to the jurisdiction as against the said defender." This allowance applies solely to the question whether there had been arrestment of funds sufficient to constitute jurisdiction, and if we were dealing with a purely petitory action the course taken by the Lord Ordinary would have been the natural one to follow, having regard to the contradictory statements of the pursuer and defender as to the funds which have been arrested. This, however, is not an ordinary action of payment, but in substance and in its leading conclusion it is an action to constitute the status of legitimacy. That being the nature of the action, the defenders have brought the interlocutor of the Lord Ordinary under review, on the ground that his Lordship was mistaken in allowing proof, because no jurisdiction could be founded by the arrestments, as the action was one for regulating status, and in such an action jurisdiction cannot be constituted by arrestment. We have heard parties on this plea, and have been referred to certain authorities, and in particular to the case of *Scruton v. Gray*, M. 4822, in support of the plea. Now, it appears to me that substantially the same question as that here raised was raised and decided in that action. The action was one for declarator not of legitimacy but of marriage, brought against a native of Ireland, who had been a student in Glasgow, and who was alleged to have entered into some engagement with the pursuer, and to have been married there. There was a conclusion for declarator of marriage, and a petitory conclusion for aliment in the event of the conclusion for declarator of marriage not being established. The objection was raised that jurisdiction could not be constituted by the arrestment of funds belonging to a foreigner when the action on which the arrestment was used raised a question of status, and the Court had that matter very deliberately brought under its consideration. The case was first argued before the Commissaries, who repelled the objection. There was then a hearing in presence, when their Lordships unanimously came to the conclusion that jurisdiction could not be founded by arrestment in order to try a question of status. There is, I think, nothing in the circumstances of the present case to take it out of the rule there laid down. That action was for declarator of marriage, and in the event of that declarator not being obtained, for aliment; this action is for declarator of legitimacy, and in the event of that not being obtained, for aliment. It therefore appears to me that there is no necessity for doing what the Lord Ordinary has done, and I think that, on the authority of the case I have mentioned, we ought to recall the interlocutor, and dismiss the action on the plea of no jurisdiction.

LORD SHAND.—I have had no difficulty in coming to the same conclusion. It was scarcely contended that the action as laid and originally brought into

Court was one in which the Court had jurisdiction. At all events, I should **No. 17.**  
 without difficulty decide against any such contention, because the pursuer set forth  
 expressly that her purpose was to have it decided by decree of declarator that **Nov. 9, 1888.**  
 she was legitimate, because of a putative marriage between Agnes Newberry, her **Morley v.**  
 mother, and the deceased Mr Morley. The pursuer, on record, stated that at **Jackson.**  
 the time of her mother's marriage to Morley in 1877, he had been previously  
 married to a lady in England still living. In the summons we find this lady,  
 the defender Catherine Anderson or Morley, designed as the "widow of the  
 deceased Thomas Morley," and in the narrative of facts, it was stated by the  
 pursuer that Mr Morley, her father, had in 1868 married Catherine Anderson,  
 and had lived with her as her husband for five years.

Another defender is the sister of Mr Morley, who was represented as being  
 interested in respect of her legal rights in her brother's estate, which she would  
 lose in the event of the putative marriage, and alleged legitimacy of the pursuer  
 being established.

In the case then as so presented, it is quite clear, in the first place, that this  
 was an action for declarator in regard to status, and in the second place, that the  
 proper defenders were not the defender Jackson, who is a mere holder of funds  
 which belonged to the deceased Mr Morley, but the widow of the deceased and  
 his sister. These latter were the parties really interested in the question of  
 status raised, which, if decided in the pursuer's favour, would seriously affect  
 their pecuniary rights and interests in Mr Morley's succession. It is not sug-  
 gested that there was any ground of jurisdiction against these defenders. But  
 farther, no jurisdiction was created even against Jackson, because arrestments of  
 the funds of one not subject to the jurisdiction of this Court are of no avail to  
 create jurisdiction in questions of status. It is therefore clear that the action as  
 laid, served, and called was subject to the fatal plea that there was no jurisdiction.

But it is said that after the defenders had appeared and pleaded that the Court  
 had no jurisdiction, the pursuer has got rid of the force of that plea by extensive  
 alterations and amendments made on the summons and record, and made it a  
 good action. No doubt an extensive power of amendment is allowed by the  
 Court of Session Act of 1868. The Act enjoins the Court to allow such amend-  
 ments as will enable the real question between the parties to be tried. It seems  
 to me, however, that the extensive amendments here made have been designed  
 to avoid the trial of the real question in controversy which is the legitimacy or  
 illegitimacy of the pursuer. The pecuniary conclusion is now put in the fore-  
 ground, and the declarator of legitimacy is said to be ancillary merely. Even  
 in its altered state I do not think the true nature of the action has been  
 changed. The true question is still one of status. If the pursuer were held to  
 be a legitimate child her rights of succession would be clear. I am therefore  
 of opinion with your Lordship that the Court has still no jurisdiction in the  
 case as it is now presented.

But I am further of opinion that if an action is in all its conclusions bad,  
 because there is no jurisdiction over the defenders when it is served, it cannot  
 be made good by subsequent alterations on the summons and record. It would  
 indeed be an anomalous proceeding if in an action where the Court had at first  
 no jurisdiction, it being truly a declarator of status, it were possible to introduce  
 amendments which would convert it into a mere pecuniary claim, and thus  
 create jurisdiction for the first time after the defenders had appeared in Court  
 in an action which they were entitled to have at once dismissed.



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I may add that even if there had been jurisdiction against Jackson, because of residence in this country, I should have had great difficulty in holding that the action could be allowed to proceed, looking to the fact that the real defenders are out of the jurisdiction. I should in that case have been disposed to hold that the action should be dismissed on the ground of *forum non conveniens*, as the proper and indeed the only parties to try the real question,—that of legitimacy,—are resident in England, and not subject to the jurisdiction of this Court.

LORD ADAM.—I am of opinion that no alteration on the conclusions of the action as originally brought can affect the question of jurisdiction. When it was served and called it was an action of declarator of legitimacy, and nothing else. The other conclusions were quite clearly ancillary to the leading conclusion. That was the time at which to consider the question of jurisdiction. It is obvious that if the Lord Ordinary had no jurisdiction then he had no power to write an interlocutor in the cause, except perhaps such as might be necessary to expiscate the question of jurisdiction. His only course was to dismiss the action. If he had not then jurisdiction, he had no power to allow amendments to be made on the summons, or to pronounce a binding order, and, therefore, the proper time to decide the question of jurisdiction was when the action was brought into Court. I am then of opinion that there was no jurisdiction in this case as the action was originally brought.

But if we are to take the action as now laid, I am still of opinion that there is no jurisdiction, because in its main conclusion, and in its real character, it is an action of declarator of legitimacy. That being so, on the authority of the case of *Scruton v. Gray*, M. 4822, as Lord Mure has pointed out, arrestments have no effect in founding jurisdiction in a question of status.

I also agree with Lord Shand that if we had jurisdiction against Jackson, we have no jurisdiction over the parties really interested as defenders, viz., the widow and sister of the deceased Thomas Morley; and I think that this is not a *forum conveniens* to try the case with a party alleged to be merely interested as a trustee.

LORD MURE.—I reserve my opinion on the question of *forum non conveniens*. I did not consider the question to have been raised, and I do not know what course the parties may take in the future.

The LORD PRESIDENT was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and dismissed the action in respect of no jurisdiction.

ANDREW NEWLANDS, S.S.C.—JOHN CLEBK BRODIE & SONS, W.S.—Agents.

## No. 18.

Nov. 9, 1888.  
Henderson v.  
Henderson.

MRS ISABELLA MIDDLEBURY BURD OR HENDERSON, Pursuer.

ANDREW HENDERSON, Defender.

ANDREW HENDERSON, Pursuer (Respondent).—*J. C. Thomson—Rhind.*

MRS ISABELLA MIDDLEBURY BURD OR HENDERSON, Defender (Reclaimer).—

*A. J. Young—Salvesen.*

*Husband and Wife—Divorce—Wife's expenses—Separate estate.*—A wife is not entitled to the expense of unsuccessfully defending an action of divorce if she is possessed of separate estate.

In cross actions of divorce for adultery the Lord Ordinary granted decree of divorce in both. The husband did not reclaim. The wife did, but was un-

successful. She had saved £500 out of her earnings in business when living apart from her husband, he contributing nothing to her support. *Held (diss. Lord Young)* that she was possessed of separate estate in the sense of the above rule, and consequently that she was not entitled to the expenses of her defence. No. 18.  
Nov. 9, 1888.  
Henderson v.  
Henderson.

ON 25th January 1888 Mrs Isabella Middler Burd or Henderson brought an action of divorce for adultery against her husband Andrew Henderson, and on 12th March he brought an action against her on the same ground. The actions were conjoined. 2D DIVISION.  
Lord Lee.  
M.

On 22d June the Lord Ordinary (Lee) granted decrees of divorce in both actions, found the wife entitled to expenses in the action at her instance, and *quoad ultra* found neither party entitled to expenses.

Mrs Henderson reclaimed.

The Court having delivered opinions adhering on the merits, Mrs Henderson moved for expenses.

It was admitted that Henderson had left his wife, and did not contribute to her support; that she had since then maintained herself by carrying on business as a farmer and shopkeeper; and that out of her earnings she had saved a sum of £500.

Mrs Henderson argued;—A wife though guilty was entitled to defend an action of divorce at the expense of her husband if she had no separate estate,<sup>1</sup> and though the £500 here was in law separate estate it was not, looking to its origin and amount, sufficient to take the case out of the general rule. The expenses of a reclaiming note were on the same footing, unless the reclaiming note was utterly groundless, which could not be maintained here.

Henderson argued;—Mrs Henderson had £500 of separate estate, and that brought her within the well-settled exception.<sup>2</sup>

**LORD YOUNG.**—In my opinion the general rule is, as stated by Mr Young, that where a husband raises an action of divorce against his wife he must pay not only his own expenses but hers also, even although her defence has been unsuccessful. That is the general rule, and it was stated with some emphasis by the Lord President in a recent case which was cited to us, where a wife had unsuccessfully defended the action in the Outer-House, and had unsuccessfully reclaimed; and yet she was held entitled to get her whole expenses in both Courts, and that too although she alone had been the guilty party. I understand that an exception to this general rule is recognised where the wife has separate estate,—that is, where she is a person of independent means. I should be loth to bring within that exception, which the Court may or may not act upon in its discretion in the particular circumstances, the case of a deserted wife who has maintained herself by her own industry for many years, and has out of these earnings laid by some small savings, and to hold that because she has laid by these small savings she is a person possessed of separate estate, as a person of independent means. I am unable so to regard her. If out of these savings she were to pay her expenses in this action, it would leave her practically with nothing to live upon. I think that we should not take this case out of the general rule merely because the defender has a balance in the bank in her favour, the fruits of her own industry; and I cannot keep out of view the conduct of her husband, who has deserted her, who has not supported her, and to whose desertion and neglect of her it is due that she has been driven to earn

<sup>1</sup> Hoey v. Hoey, June 6, 1884, 11 R. 905.

<sup>2</sup> Fraser, Husband and Wife, pp. 1231 and 1235.

**No. 18.** her own livelihood, and to make these small savings, which now he seeks to take advantage of, in order to relieve him of a liability which otherwise the law would undoubtedly impose on him. I think he ought to be subjected to the whole expenses of this action.

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**LORD RUTHERFURD CLARK.**—There is, I think, no doubt about the general rule. A wife, even although she is the guilty party, is entitled to her expenses in the Outer-House, and to her expenses in the Inner-House also if she has reasonable grounds for reclaiming. There is an exception to that general rule, where the wife has separate estate of her own. The question here is whether this case is within that exception. The Lord Ordinary was of opinion that it was, for he did not find the wife entitled to expenses in the action at her husband's instance, in which she was unsuccessful, and it is now admitted that she has separate estate to the extent of £500. I am not disposed to hold that a wife, who has such estate of her own, and is guilty of adultery, is entitled to throw on her husband the whole expense of an action of divorce on account of that adultery. I therefore think we should affirm the Lord Ordinary's interlocutor as regards the Outer-House expenses, and of course it follows that the defender is not entitled to her expenses here.

**LORD LEE.**—I concur with Lord Rutherford Clark.

**LORD JUSTICE-CLERK.**—I concur with the majority of your Lordships. I think that there is not much room for sympathy with either party. The wife has separate estate, she is in fault, and is therefore bound to pay her own expenses.

THE COURT adhered to the Lord Ordinary's interlocutor, and as regarded the expenses of the reclaiming note, found neither party entitled to expenses.

**WILLIAM OFFICER, S.S.C.**—D. HOWARD SMITH, Solicitor—Agents.

**No. 19.** **DAVID ROSS, Pursuer (Appellant).**—*Watt—Menzies.*  
**WILLIAM KEITH, Defender (Respondent).**—*J. C. Thomson—Salvesen.*

Nov. 9, 1888.  
Ross v. Keith.

*Reparation—Precautions for the safety of the public—Pond in private ground—Children.*—A private road, about 25 yards long, led from a public road to a dwelling-house behind which was a pond. There was no gate at the entrance to the private road, but a fence separated the private road and the house from the pond. There was a gate in the fence close to the house.

Some children who had left the high road and gone along the private road, and through the gate (which was open), fell into the pond and were drowned.

In an action of damages by their father against the proprietor of the pond, held that the death of the children was not due to the fault of the defender.

2D DIVISION.  
Sheriff of  
Aberdeen-  
shire.

I.

**DAVID ROSS, joiner, Pitmuxton, near Aberdeen,** brought this action against **William Keith, granite merchant, Aberdeen,** for damages on account of the loss of two of his children, who were drowned in a pond at Pitmuxton, on the property of the defender.

The pursuer averred that his children were drowned in consequence of the carelessness and culpability of the defender, or of those for whom he was responsible, in allowing the pond, which was unsafe and dangerous, to remain unfenced and unprotected, and in giving unrestricted access thereto, without using effectual measures to protect young children.

The defender denied this averment, and stated that the ground was pro-

perly fenced; that it was his private property; and that it was not a place of public resort. No. 19.

The pursuer pleaded;—(2) The pursuer's said children having been drowned through the negligence, carelessness, and inattention of the defender, or of those for whom he is responsible, in allowing the said hole to remain unfenced and unprotected, he is liable in damages and *solatium* to the pursuer as sued for. (3) The defender being in the knowledge that children were in the habit of frequenting the pond in question for amusement was bound to take effective means to prevent them from doing so, or to protect them from accidents. Nov. 9, 1888.  
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The defender pleaded;—(2) The defender having sufficiently enclosed the area containing the pond, and having used all other due and reasonable measures for excluding trespassers, and the children having been trespassing when the accident happened, no fault is attributable to the defender. (3) There being no right of access to or thoroughfare in the area containing the pond, the defender was not bound to fence the pond or use any further precautions than he did use to prevent accidents. (4) The pursuer's negligence in having permitted his children to stray without proper guardianship, and especially after he, or, at least, his wife, had become aware of the children having already found their way to the pond, having materially contributed to the accident, the defender is not liable in reparation to the pursuer.

A proof was allowed. It appeared from the evidence that the pond covered the area of a disused brick-work. It was about 25 yards off the Hardgate, a public road leading to Aberdeen. The line of the Deeside Railway bounded the field in which the pond was situated on the south; on the east it was separated from the public road by a considerable tract of cultivated ground; on the north there was a stone wall; and another stone wall separated it from the Hardgate on the west. In this second stone wall there was an opening, 15 feet wide, giving access from the Hardgate to a house belonging to the defender, which was built on ground overlooking the pond. From the opening in the wall to the house ran a railing which thus shut off from the pond the house and the area of ground on which it stood, as well as the road leading to it from the Hardgate. Originally the paling had been continuous, but the tenant of the house had for his convenience placed a gate in it, which thus gave direct access to the pond to persons from the house, and, consequently, also to persons leaving the public road and using the road to the house. This gate was 4½ feet wide, and was secured by a loop of rope which, after being fastened to it, was passed over an upright stob in the paling. The paling itself was partly four barred and partly three barred, and was in good condition. The ground was sometimes resorted to by children and by full-grown people, but whenever they were observed they were warned off by the defender's tenants, who had his instructions to do so.

On the day in question Mrs Ross, the wife of the pursuer, had gone into Aberdeen leaving her children at home. The eldest was a girl eight and a-half years old, and the youngest another girl of two and a-half. The children went along the Hardgate and passing through the opening in the wall, and thence through the gate in the paling, which was open, reached the pond. While playing on the bank, at its steepest point, which was in a direct line from the paling gate, one of the younger children fell in and was drowned; the eldest was also drowned in an attempt to save her sister. The water was about 5 feet deep.

On 28th April 1888 the Sheriff-substitute (Brown) pronounced this interlocutor (after findings in fact):—"Finds in law that the defender is

**No. 19.** in fault, either personally or through the failure of his servants, in not shutting off the opening in the Hardgate from the public, and in allowing a gate to be placed in the said paling, and without providing appliances for its being kept shut when not in use: Finds, further, that contributory negligence on the part of the pursuer has not been established: Therefore finds the defender liable to the pursuer in damages: Assesses these at the sum of £100," &c.

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On 23d May 1888 the Sheriff (Guthrie Smith), on appeal, recalled his Substitute's interlocutor, and assoilzied the defender.

The pursuer appealed to the Court of Session.<sup>1</sup>

**LORD JUSTICE-CLERK.**—The pursuer in this case sues for damages for the loss of his two children, who were drowned by falling into a pool of water in a dis-used clay-field belonging to the defender. There is a question whether this piece of ground with the pond in it was a place of public resort, or at least a place where the presence of the public was tolerated. I do not think that this was a place of public resort. It appears to me to be the effect of the evidence that the defender, both by himself and by his servants, did all that could reasonably be expected of him to prevent people from frequenting this ground. The import of that evidence is that people, and particularly children, were driven off by the defender's servants, and that even at the time when they most frequently came, namely, during frost, when people will trespass over any ground in order to get to a sheet of ice. No doubt people did come at times, children particularly, but so far as the evidence goes they came from all quarters, and over all obstacles that might be put in their way. There is evidence of this now in the case of the two poor children who were so unfortunately drowned. They had been seen only the day before clambering over a high stone wall to get to this very piece of water. I cannot hold that the proprietor or his tenant was bound to do more than use all reasonable endeavours to prevent children getting to the pond, and to shew that they did not intend to allow people to enter the ground. The question is, seeing that children did in fact come there sometimes, whether all reasonable care was taken to warn them not to do so, and by fencing off the dangerous locality to prevent them from straying into it.

I think it may be taken that the faults which the pursuer says are imputable to the defender in this matter are three in number. The first is that the fence separating this ground from the public road, which was a stone wall, had an opening in it which was not secured against the entrance of the public by any gate. In the second place, it is stated that the fence which enclosed the portion of the field containing the pond, as well as a house in the occupation of tenants of the proprietor—a stob and rail fence—had a gate in it which could easily be opened by anyone, even by a young child. Third, it is made matter of complaint that there was no special protection by fencing off the dangerous portion of the pond, where the bank was abrupt and the water deep.

As regards the first of these alleged faults, it appears that the opening was made in the stone wall so as to give an entrance to a house which had been

<sup>1</sup> *Balfour & Baird v. Brown*, Dec. 5, 1857, 20 D. 238, 30 Scot. Jur. 124; *Galloway v. King*, June 11, 1872, 10 Macph. 788, 44 Scot. Jur. 449; *Beveridge v. Kinnear*, Dec. 21, 1883, 11 R. 387; *Findlay v. Angus*, Jan. 14, 1887, 14 R. 312; *Forbes v. Aberdeen Harbour Commissioners*, Jan. 24, 1888, 15 R. 323; *M'Feat v. Rankin's Trustees*, June 17, 1879, 6 R. 1043; *Murray v. Lanarkshire Road Trustees*, June 12, 1888, 15 R. 737; *Clark v. Chambers*, April 15, 1878, L. R., 3 Q. B. Div. 327; *Black v. Cadell*, Feb. 20, 1812, 5 Pat. App. 567.

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built on the ground inside the stone wall. It was an opening for the convenience of the inhabitants of that house, the tenants of the defender, and I think there was no obligation upon the defender to place, and that it would have been contrary to reason and practice to require him to place, any gate or fence at the wall to close this opening. It was just a *cul de sac* road, leading off the public road, for the benefit of the inhabitants of the house, and for nothing else. A private house standing in its own grounds may have a gate at the entrance to the avenue, but that is from a desire for privacy, and not from any regard to the safety of the public, and that there must be a gate across the entrance to the road leading to a house like that here in question is a proposition which in my opinion cannot be maintained. I am of course here assuming that there is no dangerous place along the road near the house, and accessible by the opening in the railing at the house, which is insufficiently fenced against members of the public who may happen to come in at the opening. That brings me to the second question.

That question relates to the fencing of the ground containing the pond. Now, there was a fence separating off that ground, and the question is whether this fence was not, unless disregarded, a sufficient protection of the ground fenced off on the assumption that it was dangerous. Originally it appears to have been a continuous fence, but one of the former tenants, who had a cabbage yard in the ground beyond the fence, inserted a small wicket gate into it—probably a hurdle gate—with a hinge of rope at one side, and on the other a loop passing over the nearest stob of the fence. Was that a sufficient fencing off of the dangerous piece of ground? In my opinion it was quite sufficient. I do not see what other fence could have been put up, unless it is contended that it was the duty of the defender to put up an impassable fence, that is to say, one which children could not get beyond either by climbing over or creeping between the bars. I cannot hold that it is the duty of the proprietor to make his ground practically impregnable to children. I am unable to hold that there is any duty on him to do more than indicate to the public when they are passing beyond what is intended for their use, and a stob and rail fence is in my opinion quite sufficient for that purpose. To hold that every piece of ground which contains some place or some thing that might be dangerous to children must be so fenced that children can enter only by what is practically a mode of siege would be to lay an intolerable burden on proprietors. That is my view of the case, on the footing that the fence had remained as it originally was, a continuous fence. Does the fact that a wicket gate was made in it make any difference? In my opinion it does not. I think children of eight, or even younger, can be instructed not to go through such gates leading to dangerous places, but even if they cannot be so instructed, it would in my opinion be to lay too heavy a burden on proprietors to hold that they must so fence that children cannot get in. It is hard no doubt upon poor people who cannot afford to hire persons to look after their children and to keep them out of danger, that their little ones are exposed to more risk than those of others, but I cannot see that the burden of protecting such children should on that account be laid on the neighbouring proprietors, and as my brother Lord Young remarked in the course of the discussion, it is wonderful how few children meet with accidents of this sort notwithstanding the absence of protection. I cannot hold that the existence of this gate, whether it was opened by these children themselves or was left open by other children who had gone in before them, is a ground for making the defender liable, as being in fault.

No. 19. That leaves only the third objection, that there was no special fence at the pond itself. If the opinion that I have already given that the fence was a sufficient warning to the public not to enter be sound, the proprietor was entitled to assume that the public would not disregard his warning, and consequently he was not bound to erect any special fence round the pond itself. No doubt there have been cases in which it has been held that the proprietors or tenants of dangerous places, such as quarries, are bound to erect fences, so that persons may not unwittingly fall into such a place, and so be injured or even killed. But then, I think, these cases proceed upon the principle that such places must be protected because persons in the exercise of their lawful calling, or in the use of the public highway, have to go so near that a slight deviation in the dark would lead them into the danger unless the spot is properly fenced. That, I think, is the principle of the case of *Black*, 5 Pat. Apps. 567, where there was a pit only some four yards from the public road, at a point where the road forked off in two directions, and there was no fence or anything to warn the public of the proximity of the danger. That is a very different case from the present. This hole into which these children fell is not a place of public resort; it is not on the road to any place, or dangerously near the road to any place, and as I have already said, the public were in the day-time sufficiently warned by the stob and rail fence not to go there, and there is no suggestion that people were in the habit of going near the pond at night. It is said, however, that such a place, because it is dangerous, must be child-proof, so that children should be unable to creep through or climb over, even although they can only get at it by passing fences. I cannot assent to such a doctrine. The question is whether the place was reasonably safe—whether such precautions were taken as are in accordance with the rules of common sense, and I think it would not be in accordance with the rules of common sense to require the approach to all places like this to be made child-proof.

There is another class of cases from which the present is easily distinguishable. I mean cases in which articles are left in such a position as to be a source of danger if interfered with, and so as to be a temptation to children or idle persons to interfere with them. If children by touching an article which is lying in a place they are in the habit of frequenting, and to which they have easy access, may bring down a heavy weight on their heads, or cause a dangerous explosion, it may well be that the proprietor should be held liable for having left this source of danger exposed. Similarly there is the sort of combination of circumstances which occurred in the case of *Beveridge v. Kinnear*, 11 R. 387, where the flap-door of one floor of a warehouse was knocked on to the street by a bale of goods which was being lowered into a cart from a higher floor, and killed a boy in the cart. There the Court held—and in my opinion most properly held—that it was the duty of the proprietor of the flat, from which the door fell, to have the door fastened in such a way as to meet all reasonable contingencies, of which the lowering of goods from the flat above was one, and that as he had failed in this duty he was liable in damages for the accident. Cases like these seem to me easily distinguishable from the present.

On these grounds I have come to the conclusion that the judgment of the Sheriff is right, and ought to be adhered to.

LORD YOUNG.—I am of the same opinion, and substantially upon the same grounds. This is not the case of a danger which people may come upon

unawares and so receive injuries. The typical case of such a danger is that which your Lordship has put, of an unfenced pit in a field into which people might excusably step unawares and be injured ; in such a case it is, generally speaking, the duty of the proprietor to see that the source of danger is removed. There is nothing of that kind here. A pond of water is quite a different thing ; its dangers are manifest, just like those of the sea, or a loch, or a river, and the notion that anyone who has a picturesque loch or piece of river in his grounds is bound to put up a fence round to protect any children who may stray into his grounds is utterly extravagant. There is nothing that the public desires so much as free access to river banks, and they would resent bitterly any fencing which kept them from these banks, although no doubt children do sometimes get drowned when playing beside rivers.

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The accident in this case occurred in broad daylight, and these children had not strayed unwittingly into the danger ; they went intending to overcome any obstacle in their way to this piece of water. Even if this piece of water had been in quite an open piece of ground, and the proprietor had invited or at least permitted the public to go there, I should for myself have doubted whether he thereby became responsible if children were drowned. The danger of going near the water is obvious, and if the parents permit their children to go to such places I am at a loss to see the ground on which it can be suggested that the proprietor is liable if the children are drowned. What about the lochs near Edinburgh ? Is St Margaret's fenced, or Dunsappie, or Duddingston ? and yet I think both children and grown-up people have been drowned there. Some people even trespass over a proprietor's grounds in order to get to some ornamental piece of water, but it could not be said that the proprietor of the ground over whose lands they thus trespassed was liable for any damage that happened to the trespassers. If my view of the law is right the pursuer's case is not stateable. If it be wrong, then we must hold that every piece of water, even the sea, must be fenced where children go to play, and where they might fall in and be drowned.

LORD LEE.—I think it well settled that the mere property of a subject from which damage arises is not sufficient by itself to render the proprietor responsible for the damage. There must be negligence on the part of the proprietor. He must have failed to perform some duty which the circumstances imposed upon him and the neglect of which led to the accident. If one digs a pit on his property close beside a public road he may be liable for the damage suffered by another who falls into it, on the ground that such use of his property in the circumstances imposed on him an obligation to use reasonable precautions against an obvious danger to the public using the road. But the mere existence upon a man's private property of a pit, a pond, or a precipice, will not create liability ; and I do not think that the case of *Black v. Cadell*, 5 Pat. App. 567, has ever been regarded as establishing any doctrine to the contrary. The question then here is, whether the defender was guilty of any negligence ? On that question (which is a question of fact) I concur in the opinion that the evidence does not shew that the accident to these poor children occurred through any fault of his. It does not shew that the place was insufficiently enclosed, or that the pursuer's children fell into the water through any neglect for which the defender is responsible. I think he cannot be held responsible on account of a gate having been left open by someone in the absence of proof that he is



No. 19. answerable for the negligence of the person who so left it. The case is essentially different both from the case of *M'Martin v. Hannay*, 10 Macph. 411, and *Ross v. Keith*, from that of *M'Feat v. Rankin's Trustees*, 6 R. 1043.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Find in fact (1) that on 13th July 1887, Dorothea Ann, and Violet, children of the pursuer, aged respectively eight and a-half and four and a-half years, were drowned in a pond on the defender's property at Pitmuxton, covering the area of a disused brickwork; (2) that the pond was not a place of public resort, and that it was sufficiently fenced off from the public road: Find in law that the death of the said children is not attributable to any fault on the part of the defender: Therefore dismiss the appeal, affirm the interlocutor of the Sheriff appealed against," &c.

ANDREW URQUHART, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

No. 20.

WILLIAM YOUNG (Young's Executor) AND OTHERS, Petitioners.—  
*M'Lennan*.

Nov. 13, 1888.  
Young.

*Bankruptcy—Trustee—Appointment of new trustee—Nobile Officium*.—Where a bankrupt and the trustee in his sequestration had both died,—neither having been discharged,—and there remained, more than eighty years after the sequestration, certain funds for distribution, the Court, on the petition of the representatives of one of the commissioners, *remitted* to the Lord Ordinary on the Bills to appoint a meeting of creditors to be held for the election of a new trustee.

1st Division.  
B.

THE estates of Robert Murray were sequestrated in 1808 under the Act 33 George III. cap. 74, and Alexander Stronach was appointed trustee. The estate was in part distributed and certain dividends paid—a sum of £230 remaining in bank in 1826 to meet contingencies and a balance due to the trustee. The bankrupt, trustee, and commissioners being all dead, and neither bankrupt nor trustee having been discharged, the representatives of one of the commissioners, with concurrence of the trustee's testamentary trustees, now brought a petition for revival of the sequestration with a view to distribution of the balance of the estate, amounting to £1362, 10s., founding, *inter alia*, upon the 3d section of the Bankruptcy (Scotland) Act, 1856, and appealing to the *nobile officium* of the Court. The representatives of the bankrupt having stated that they had no interest to oppose the application, the Court pronounced this interlocutor<sup>1</sup>:—

"ORDER and direct that in future the proceedings in the process of sequestration of the estates of the late Robert Murray shall, from and after this date, be regulated by the Bankruptcy (Scotland) Act, 1856, 19 and 20 Vict. cap. 79, and Acts explaining and amending the same: Further, remit to the Lord Ordinary officiating on the Bills to appoint a meeting of the creditors of the said Robert Murray to be held at such time and place as his Lordship may fix, to elect a trustee or trustees in succession and commissioners on the said sequestrated estates, with the whole powers conferred by the said statutes, and to appoint said meeting to be

<sup>1</sup> *Authorities cited*.—Thomson, Dec. 17, 1863, 2 Macph. 325; Gentles, Nov. 22, 1870, 9 Macph. 176.

advertised in the *Edinburgh Gazette*, and with power to remit to the Sheriff of the sheriffdom of Inverness, Elgin, and Nairn at Elgin to proceed further in said sequestration in manner mentioned in the statutes; and direct that the expense of this petition, and of the proceedings to follow thereon, shall form a final charge upon the funds of the estate."

THOMAS LIDDLE, S.S.C., Agent.

No. 20.

Nov. 13, 1888.  
Young.

REVEREND HUGH MUNRO, Pursuer (Reclaimer).—*Murray—Shennan*.  
WILLIAM AND JAMES M'GEOGH, Defenders (Respondents).—*H. Johnston*.

No. 21.

Nov. 15, 1888.  
Munro v.  
M'Geogha.

*Lease—Possession—Abatement of rent—Liquid and Illiquid.*—In an action for payment of rent the defender alleged that the landlord had in the missives of lease bound himself to give possession of certain farm buildings in tenantable condition, and that he had failed to do so, and that the tenant was entitled to an abatement of rent. Held that the defence was relevant.

THE REVEREND HUGH MUNRO, of Barnaline, Argyllshire, sued William and James M'Geogh, joint tenants of the farm of Barnaline, for certain arrears of rent alleged to be due by them. The lease was for nineteen years from Whitsunday 1885, at a rent of £125, and stood upon missive letters passing between the pursuer's factor and the defenders.

1ST DIVISION.  
Lord Kinnear.  
B.

The defenders stated, *inter alia*;—"Admitted that the lease has not been signed by the defenders, *inter alia*, because it makes them accept as 'having been put into tenantable repair by the landlord' buildings which were so ruinous as to be untenable, which by the agreement contained in said missive-letters the pursuer was taken bound to put into good tenantable order, and which the pursuer has not up to the present date, in spite of constant demands by the defenders, both personally and through their agents, repaired." Their loss from the insufficiency of the buildings they estimated at £50 per annum. They further alleged that the pursuer had failed to supply timber as agreed on for repairing and making fences, and they put their loss on this head at £40 per annum.

They further stated;—"In respect of the pursuer's failure to implement his obligations under the agreement between him and the defenders, and to give them possession of the subjects contracted for, the defenders are entitled to abatement from their rent to the extent of said sums of £50 and £40, or £90 in all, per annum, for the years of their occupancy. The said sum considerably exceeds the sums retained by the defenders from their rent."

The pursuer pleaded, *inter alia*;—(2) The defenders' claim being merely one of damage, and illiquid, cannot be set off against the pursuer's claim for rent.

The defenders pleaded, *inter alia*;—(3) The pursuer having failed to implement his agreement with the defenders, to put the buildings of the farm in repair and supply wood for fencing, whereby the defenders were deprived of the beneficial use and enjoyment of the subjects let to an extent exceeding the sums retained by them from their rent and now sued for, the defenders are entitled to retain said sums, and are now entitled to be assoltized from the conclusions of the summons.

The Lord Ordinary (Kinnear), on 26th July 1888, allowed a proof.\*

\* "NOTE.—The pursuer maintains that he is entitled to decree without inquiry into the disputed matters of fact, on the ground that a tenant is not entitled to retain rent on account of an illiquid claim of damages. But the defender is in possession under missives of lease by which it is stipulated that the barn, byre, and stable shall be handed over to him in tenantable repair. These

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The pursuer reclaimed, and argued ;—There was no relevant statement of defective possession.<sup>1</sup> Even if there were, the inquiry ought not to be a general one, but should be confined to the question of abatement only, and not extend to the damages.

The defenders were not called on.

LORD PRESIDENT.—I do not entertain the smallest doubt that there is a relevant defence set forth in this case against the landlord's demand for rent, on the ground that the tenant has not got possession of the entire subjects let, and is therefore entitled to an abatement of rent corresponding to the amount of the possession not delivered. That is a doctrine which has been recognised in a great number of cases, and it does not admit of doubt. The principle is very well stated by Lord Fullerton in the case of *Graham v. Gordon*, 5 D. 1211—“Rent is not liquid in the sense that a sum due by bond is. It is a matter of contract in consideration of something to be done. It is paid for possession of the subject let. If the tenant says he has not got entire possession, that is a good answer to the claim for rent.” This proposition has been affirmed over and over again; it was very emphatically affirmed in the case of *Muir v. M'Intyre* (14 R. 470), which was decided only last year, and where the claim for abatement was rested upon the ground of the accidental destruction by fire of a portion of the subjects let. The difficulty in that case was that there was no fault on either side, and the landlord accordingly maintained that as the fact that a portion of the subject had ceased to exist was due solely to accident, he was entitled to fulfilment of the entire contract. But we held that the destruction of a part of the subject let put the case in the same position as if part of the subject let had not been delivered, so that it is clear that the case of *Muir* was a *fortiori* of the present case, and of every case where part of the subject let has not been delivered. The Lord Ordinary has stated very clearly the ground of judgment, and I have no doubt of the soundness of it. But, as the parties have expressed their willingness to have a judicial reference regarding the matters at issue, I think the case should stand over in the meantime to admit of their taking the necessary steps to have this done, and in the first place, to allow them to agree upon a referee.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

The case having been again called upon November 20th, and it having been intimated by the parties that they were unable to agree upon a referee, the Court then pronounced this interlocutor :—

“RECALL said interlocutor, and remit to the Lord Ordinary before

buildings are portions of the subject let, and are indispensable for the beneficial occupation of the farm. If the defender's averments are true in fact, he has not received full possession, and it follows that the landlord's claim is not liquid, because he has not delivered the subjects in the state agreed upon. The case appears to me to be distinguishable from those in which it has been held that a liquid claim for rent cannot be met by an illiquid claim of damages for breach of a collateral obligation, and to fall within the rule laid down in *Graham v. Gordon*, 5 D. 1211, which has been followed in subsequent cases. The facts might probably be ascertained more economically than by a proof, but the pursuer declines in the meantime to consent to a reference or remit.”

<sup>1</sup> *M'Rae v. M'Pherson*, Nov. 19, 1843, 6 D. 302; *Dods v. Fortune*, Feb. 4, 1854, 16 D. 478-9.

answer to allow the defenders a proof of their averments in support of their claim for abatement of rent, and to allow the pursuer a conjunct probation: Find the defenders entitled to expenses," &c.

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Munro v.  
McGeogha.

GILL & PRINGLE, W.S.—PETER ADAIR, S.S.C.—Agents.

GEORGE WHYTE, Pursuer (Respondent).—*Gloag—Watt.*

DAVID HILL MURRAY, Defender (Reclaimer).—*Sol.-Gen. Darling—Sym.*

THE COMMERCIAL BANK OF SCOTLAND, LIMITED, Defenders.

No. 22.

Nov. 16, 1888.  
Whyte v.  
Murray.

*Bankruptcy—Discharge of trustee—Radical right of bankrupt—Title to sue.*—Where the trustee in a sequestration has been discharged, and no other trustee has been appointed, the bankrupt, although not reinvested, has in virtue of his radical right a good title to sue for behoof of his estate.

*Marriage-Contract—Power of Appointment—Fee and Liferent.*—By antenuptial marriage-contract the wife conveyed to herself in liferent, and failing her to her husband in liferent, exclusive of the *jus mariti*, and in either case to the children of the marriage in fee, certain bank shares, subject to a power in the husband, and failing his exercising it, in the wife, to divide the provisions made for them among the children. There were three daughters and one son. By his settlement the husband conveyed his whole estate to trustees to pay certain special legacies to the daughters, and to hold "the whole residue and remainder of my estate, heritable and moveable, for behoof of my son," declaring that he had made this division in virtue of the powers in the marriage-contract. The husband predeceased the wife, who thereafter executed a transfer of the bank shares to herself in liferent alienably, and the children equally among them in fee. The son assigned in security to a creditor his whole interest "in the residue and remainder of the heritable and moveable estate of the said deceased G. W." (his father), "and all my right and interest of whatever kind or description under the same." In a question between the son and the assignee—held that the latter had no right to the bank shares, these having formed no part of the father's estate, and the father's settlement not being an effectual exercise of the power.

MR GEORGE WHYTE was married to Miss Isabella Mess in 1843. Miss Mess was possessed of certain shares in the Commercial Bank of Scotland, and she, by antenuptial contract, in respect of certain obligations by her husband, disposed, *inter alia*, these shares "to herself in liferent, but exclusive of the *jus mariti*, and failing her by death, to the said George Whyte in liferent, and in either case to the children of the marriage equally among them, if more than one, in fee, subject to the powers of division and other conditions hereinafter mentioned."

1ST DIVISION.  
Lord Lee.  
B.

The marriage-contract also contained these clauses,—“Notwithstanding the foresaid destination, the said Isabella Mess shall at all times have full power, with consent of the said George Whyte, as liferenter, or after his death, of his children, or their tutors and curators, as fiars, to sell the said subjects, and to uplift and discharge the said sums of money, she being bound, with consent foresaid, to reinvest the prices and sums received in the same line of destination: . . . And it is further declared, that in case there be more than one child of this marriage, the said George Whyte shall have the power, and failing his dying without exercising it, the said Isabella Mess shall have the power, while she remains his widow, at any time of his or her life, or on deathbed, to divide the provisions hereby made for children in such manner as he, and failing him she, may direct by any writing under hand, and failing any such division, the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share.”

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The marriage was dissolved by the death of Mr Whyte in 1869. There were three daughters and one son of the marriage.

Mr Whyte left a trust-disposition and settlement by which he conveyed his whole estates, heritable and moveable, to trustees, and after making certain provisions in favour of his daughters, directed his trustees "to hold the whole residue and remainder of my heritable and moveable estate for behoof of my only son George Whyte and the heirs of his body.

... And I hereby declare that the provisions above written in favour of my said children shall be in full of all that they can ask or demand by and through my decease out of my real or personal estate, or out of ... my said wife's fortune which may be found standing in her name at the time of my death, in name of legitim, portion-natural, executry, or otherwise, or by virtue of my said contract of marriage; and I declare that I have made the division above written among my children in terms and in virtue of the powers conferred upon me by said contract of marriage."

By transfer dated May 1870, and registered in the books of the Commercial Bank, Mrs Whyte, in implement and corroboration of the transfer by her in the marriage-contract, assigned the shares in the bank to herself in liferent for her liferent use alienarly, and to the children of the marriage *nominatim* in fee, and the children accepted the transfer, but under the proviso that "the acceptance of this transfer is not to affect the rights and interests of the children of the said deceased George Whyte *inter se* under the said marriage settlement and the trust-disposition and deed of settlement of the said deceased George Whyte, bearing date," &c.

By bond and disposition and assignation in security, dated 10th February 1876, George Whyte, the son, in security of a loan of £2000 to him by James Robertson, bank-agent in Huntly, assigned, "All and Whole the residue and remainder of the heritable and moveable estate of the said deceased George Whyte, provided to me by the said trust-disposition and deed of settlement, and all my right and interest of whatever kind or description under the same."

Mr David Hill Murray, S.S.C., Edinburgh, came to be in right of this bond.

On 7th June 1882, the estates of George Whyte junior were sequestrated, and Mr J. A. Robertson, C.A., Edinburgh, was appointed trustee.

On 18th March 1884 the bankrupt obtained a discharge without composition, and on 4th November 1887 Mr Robertson, as trustee, obtained a discharge.

Mrs Whyte, the bankrupt's mother, died in January 1887.

In December 1887 George Whyte junior raised an action against the Commercial Bank of Scotland, and against Murray for declarator (1) that the pursuer had right to one-fourth part of thirteen £100 shares of stock of the Commercial Bank, and (3) that the defender Murray had no right, title, or interest in the remaining three-fourth parts of these shares, reserving to the pursuer all claims competent to him to these remaining three-fourth parts.

The pursuer alleged that the shares formed part of his mother's estate, and that on her death he became sole owner of them in virtue of the contract of marriage, and the power of division exercised by his father in his trust-disposition and settlement, whereby the rights of the pursuer's three sisters in the shares were excluded by the provisions in their favour.

Defences were lodged for the bank (which need not be farther referred to), and also for Murray. Murray, in his defences, alleged that the shares

in question formed part of the residue of the estate of the bankrupt's father, and that the bankrupt's interest in them had in consequence passed to him (Murray) as in right of the bond above mentioned.

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The defender Murray also pleaded ;—(1) No title to sue.

The Lord Ordinary (Lee) pronounced this interlocutor :—"The Lord Ordinary, having considered the debate and whole cause, finds that the bank shares referred to in the summons formed no part of the estate of the deceased Mr George Whyte: Finds therefore that the assignation founded on by the defender Mr David Hill Murray is insufficient to support his claim to the said shares, and that he has no title to oppose the conclusions of the summons: Therefore repels the defences for the said David Hill Murray, and decerns and declares in terms of the first and third conclusions of the summons, but without prejudice to any claims upon said shares, so far as belonging to the pursuer, competent to the defenders the Commercial Bank, or to creditors upon the pursuer's sequestrated estate: Finds the defender David Hill Murray liable to the pursuer in the expenses of process, and remits," &c.

The defender reclaimed, and argued ;—(1) The Lord Ordinary had erred in considering not the title to sue, but the title to defend. The first question was whether the pursuer had any title to challenge the defender's right under the assignation. The defender might have to defend his right in a question with the pursuer's creditors, who were proceeding to revive the sequestration,\* and he should not be called on to discuss it with the bankrupt, who had not been reinvested in his estate. (2) The bank stock fell within the residue conveyed to the pursuer under his father's settlement. A power of division might be exercised by implication in the settlement of the donee of the power.<sup>1</sup> Here, however, the testator, in terms, stated that he intended to exercise the power, so that he regarded as included in his estate, and consequently in the residue of it, not merely his own property but also the subjects of the power of division. In any view, the pursuer's right to the bank shares vested in him on his father's death, or at least, under the transfer of 1870, and so passed to the defender under the bond and disposition in security.

Argued for the pursuer ;—(1) The pursuer had a title to sue. No doubt he had not been retrocessed in his estates, and perhaps might yet have to give this estate up to his creditors, but in the meantime he had the only title to pursue the action. He had the radical right in his estate, and there was no trustee with an active title to protect it. A bankrupt in such a position was not bound to allow the estate which was radically his to be carried off by a person who had no right to it. That was the position of the defender, and the Lord Ordinary was right in considering whether the defender had any right to interfere with this estate. (2) The assignation could not carry these bank shares unless they were part of the residue of the pursuer's father's estate. They did not form part of the "residue and remainder of my estate" in the sense of the pursuer's father's will, because they had never at any time been the father's. They were his wife's, at least until she transferred them by the transfer of 1870. His professed exercise of the power of division made no difference, for a man could not by dividing an estate over which he had a power of division make it part of the residue of his own. The case of *Smith v. Milne*<sup>1</sup> was no authority for the defender. There the testatrix had nothing

\* See petition, reported *infra*, p. 100, which was presented to the First Division prior to the hearing on the present reclaiming note.

<sup>1</sup> *Smith v. Milne*, June 6, 1826, 4 S. 685; *Mackie v. Mackie's Trustees*, July 4, 1885, 12 R. 1230.

No. 22. whatever of her own, and the meaning of her settlement could only be that she was dividing an estate she had a power to divide. But the pursuer's father had means of his own which he had acquired during the marriage.

Nov. 16, 1888.  
Whyte v.  
Murray.

LORD PRESIDENT.—When Mr George Whyte senior and his wife were married the lady was possessed of some fortune, embracing certain shares in the Commercial Bank of Scotland. The form of marriage-contract which was entered into by the spouses was not a conveyance in trust, but was a direct conveyance whereby the lady, in respect of certain obligations by her husband, which are of no materiality, disposes, *inter alia*, these shares “to herself in liferent, but exclusive of the *jus mariti*, and failing her by death, to the said George Whyte in liferent, and in either case to the children of the marriage equally among them, if more than one, in fee, subject to the powers of division and other conditions hereinafter mentioned.” I think there is no doubt that the effect of that conveyance was to leave the fee of the bank shares in the lady herself, and to create a prospective right of liferent in the husband, and to settle them subject to that right of liferent upon the children of the marriage in fee. The fee of the shares remained in Mrs Whyte down to 1870, when she conveyed them to herself in liferent for her liferent use alienably, and to her then existing children in fee. Such is the history of the shares; there has been no change since that date, and the lady dying in 1887, the liferent then came to an end, and they now belong to the children in fee.

The defender Murray has now advanced a claim to the shares, and has intimated it to the Commercial Bank, and accordingly it has been thought necessary by the pursuer to raise an action to have it declared that Murray has no right to the shares.

The first objection which the defender takes is that the pursuer has no title to sue. I think that objection is ill founded, and I regret that the Lord Ordinary did not think fit to dispose of it. The pursuer's estates were no doubt sequestrated, and he has not been discharged on a composition or reinvested in his estates. They have been ingathered and divided so far as the trustee and creditors desired to do so, and the trustee has been discharged. It is now said that the pursuer's right may still be realised for the benefit of his creditors, and that is true; but at the same time it does not affect his title to sue. No one but the pursuer has at present a title to sue this action. His title is his radical right to the estate, which revives by the trustee's discharge. The discharge of the trustee puts an end to the adjudication in his favour, which transferred to him the estate of every description which belonged to the bankrupt. The trustee's title, then, being at an end, the only person having a right to sue such an action as the present is the bankrupt. No doubt the creditors have claims which are still unsatisfied, but their remedy is to revive the sequestration or proceed against the bankrupt in some other way to make these good. The bankrupt's right has revived and will avail as a title to the shares, except in so far as it may be subject to meet the still outstanding debts of creditors. Accordingly I am for repelling the objection to the pursuer's title to sue.

Upon the merits, although the case has at first sight an appearance of complication, I have not much difficulty in reaching the same result as the Lord Ordinary. The defender is in right of the subject of a security which is constituted by a deed granted in 1876, by which Mr George Whyte, the pursuer, acknow-

ledged to have borrowed a sum of £2000, and granted, *inter alia*, in security No. 22.  
 "the residue and remainder of the heritable and moveable estate of the said deceased George Whyte"—who was his father,—“provided to me by the said <sup>Nov. 16, 1888.</sup> Whyte v. Murray.  
 trust-disposition and deed of settlement, and all my right and interest of whatever kind or description in the same.” It appears to me that there can be only one construction of these words which I have read. What is conveyed in security by the borrower is his interest, whatever that was, in the residue and remainder of the estate belonging to his father. Of course that must mean the residue and remainder in so far as it was settled upon him, but that residue and remainder could not comprehend what was vested in another. It could not therefore comprehend the bank stock, of which Mrs Whyte, the pursuer's mother, was undivested owner. It would be doing violence to the terms of the settlement of Mr Whyte senior if the Court were to hold that it comprehended estate belonging to someone else.

It is vain to appeal to the authority of the cases of *Smith*, 4 S. 679, and of *Mackie*, 12 R. 1230. In the former case the old lady who was held to have exercised the power of division had no estate of her own, and could only exercise the power of division which was given to her by her husband's will. It was not possible for her to do anything else, for she had no estate to deal with, and when she made a will she could not be supposed to be doing anything else than exercising the power of division. That judgment proceeded upon reasonable and intelligible grounds, but where a person is engaged in disposing of his own estate by will, and is possessed of a power of dividing his wife's estate, he must exercise that power in a very different way than by leaving the residue and remainder of his estate in general terms to his son, as is done here. No doubt Mr Whyte senior says at the end of the deed that he has exercised the power which was given to him by his wife. The simple answer to that is that he has not exercised it, and that upon no reasonable construction of the deed can it be held that he has exercised such a power.

That being the foundation of Mr Murray's title, I do not think the bank stock is carried as part of the security held by him. I am of opinion, therefore, that his claim to the bank stock cannot be maintained, and that the defences should be repelled.

**LORD MURK.**—It is clear that under the assignation to the defender nothing was conveyed except the residue of the pursuer's father's estate. But that residue never included the bank shares. They belonged to the pursuer's mother, and remained with her after her husband's death. There is no ground therefore on which the defender can successfully maintain that he ever acquired any portion of those shares.

The only difficulty which occurred to me was that the Lord Ordinary had not disposed of the objection to the pursuer's title to sue. That however has been obviated by what your Lordship has suggested; and I think the plea that the pursuer has no title to sue ought to be repelled. The pursuer's right to the bank shares was no doubt carried to the trustee under his sequestration. But this trustee never claimed these shares, and the sequestration has now been brought to an end, and the trustee discharged. The radical right however to these shares remained with the pursuer during the sequestration, and now that the trustee is out of the way, I think that the pursuer is entitled to vindicate that right either for his creditors or for himself.



**No. 22.** **LORD ADAM.**—I confess that from the time that we were put in possession of the facts of this case I have thought it a simple one. The title of the reclamer, Mr David Hill Murray, rests upon an assignation to a bond and disposition by George Whyte, by which he conveyed in security of a sum of £2000 "the residue and remainder of the heritable and moveable estate" as provided to him by the trust-settlement of his father. And the question is, whether the bank shares in question ever were part of the residue of Mr George Whyte senior's estate? I think not. I think they remained part of his wife's estate. And even if he had disposed of them in his trust-settlement, I do not think that would have been a good conveyance of them. Any intention so to do would have been of no avail unless it was shewn that the true character of them was other than I have stated. Accordingly, I do not think that the reclamer has by the assignation any title to these shares.

Nov. 16, 1888.  
Whyte v.  
Murray.

I also concur with your Lordship in thinking that the Lord Ordinary's interlocutor is defective, for his Lordship ought to have dealt also with the pursuer's title to sue. I have no doubt of that title. The only reason on which it is contended that he had no title is that the bank shares in question passed to the trustee upon the pursuer's sequestrated estates and to his creditors. If there had been an existing trustee he would have been here to vindicate his rights. But the trustee having been discharged the pursuer's radical right revives, and is a sufficient title to him to vindicate the right to these shares either for himself or for his creditors. Even if there had been a trustee, and he had declined to come forward, the bankrupt himself might have come forward to assert his right, and might have insisted—on certain terms as to caution—in pursuing an action of this kind.

**LORD SHAND** was absent.

**THE COURT** repelled the objection by the defender Murray to the pursuer's title to sue; *quoad ultra* adhered.

**ANDREW URQUHART, S.S.C.**—**D. HILL MURRAY, S.S.C.**—**MELVILLE & LINDERAY, W.S.**—Agents.

**No. 23.** **NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY, LIMITED, AND OTHERS, Petitioners.**—*D.-F. Mackintosh—C. S. Dickson.*  
**GEORGE WHYTE, Respondent.**—*Gloag—Watt.*

Nov. 21, 1888.  
Northern  
Heritable  
Securities In-  
vestment Co.,  
Limited, v.  
Whyte.

*Bankruptcy—Nobile officium—Discharge of both trustee and bankrupt—Appointment of new trustee—Abandonment of claim.*—Certain creditors upon a sequestrated estate on which both the trustee and the bankrupt had been discharged, the latter without composition, presented a petition for a remit to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a new trustee, averring that there were funds belonging to the sequestrated estate which had not been recovered, and that the petitioners had not been paid their debts in full. It was objected that all claim to these funds had been abandoned by the trustee. *Objection repelled, and petition granted.*

*Observed, per the Lord President, that if there was a question whether there were funds falling under the sequestration or not, it was a matter for the trustee when he was appointed, and not for the Court to determine under such a petition.*

*Observed, also per the Lord President, that before there can be abandonment of a claim to a fund alleged to fall within a sequestration, it must be shewn that the claim in question came up definitely for consideration at a meeting of the creditors.*

**1ST DIVISION.** **B.** **THIS** petition arose in the circumstances narrated in the immediately preceding report. It was a petition by the Northern Heritable Securities

Company, Limited, and other creditors of Whyte, for a revival of the sequestration, and for a remit to the Lord Ordinary on the Bills to order a meeting of the creditors for the election of a new trustee.

The petitioners stated that the whole estates of the bankrupt, so far as known at the time, or believed to fall under the sequestration, had been realised by the trustee prior to his discharge, that a dividend of 7½d. per pound had been paid, that since the death of the bankrupt's mother, Mrs Isabella Mess or Whyte, on 18th January 1887, and the subsequent discharge of the trustee, it appeared that Whyte had right to 3¼ shares in the Commercial Bank of Scotland, which right had vested in him prior to the death of his mother, and that the creditors were entitled thereto.

Whyte lodged answers.

On a construction of the deeds quoted in the preceding report, he maintained that the shares vested in him at his mother's death in January 1887, and never fell within the sequestration, he having been discharged on 18th March 1884.

He also averred,—“The trustee and creditors in said sequestration, who were well aware of the position of the said 3¼ shares, did not, betwixt the date of the death of the respondent's mother, and the termination of the sequestration on 4th November 1887, take any steps to have the 3¼ shares found to belong to them, and they accordingly abandoned all right (if any) which they may have had to them. They, however, renounced their pretended right to these shares by the trustee and commissioners having been parties to certain articles and conditions of roup, dated 18th September 1883, under which they were alleged to be sold to David Hill Murray, solicitor, Edinburgh, along with the residue and remainder of the heritable and moveable estate of the bankrupt's deceased father, George Whyte of Meethill, in the county of Aberdeen. The assignation in favour of the said David Hill Murray, in implement of the said sale under said articles and conditions of roup, is dated 13th November 1883, and the said trustee and commissioners are parties to it.”

Argued for the petitioners;—(1) It was enough that there were *prima facie* grounds for believing that there was estate which fell under the sequestration. Here, however, there really was such estate. A claim of debt as against the mother vested in the children under the marriage-contract. Under that deed vesting took place at the dissolution of the marriage, subject to defeasance. Besides, the transfer, by which in 1870 Mrs Whyte transferred the bank stock to herself in liferent allenary and her children in fee, clearly created a vested interest in the children. It was not necessary to determine whether it had vested in Whyte before his mother's death or not. At anyrate, it vested at her death.

(2) Abandonment must be express abandonment on the part of the creditors and in favour of the bankrupt of an asset known and ascertained at the time.<sup>1</sup> There was nothing of that kind here.

Argued for the respondent;—1. The fact of the respondent's right to the bank stock was known to the trustee before his discharge as an available asset, and the existence of the right was brought to the knowledge of the creditors. The trustee and commissioners were parties to the articles of roup of the sale of the assignation to the residue of the late George Whyte's estate referred to in the answers. If the creditors or the trustee knew of the claim, they had abandoned it, and discharged the trustee, and they must suffer for that. The trustee was bound to make up his mind, and having failed to do so he must take the consequences. It was not correct to say that the Court had held in *Walker's case*<sup>1</sup> that

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<sup>1</sup> Fleming v. Walker's Trustees, Nov. 16, 1876, 4 R. 112.

No. 23. there must be express abandonment. When a sequestration was closed the Court would not open it up again where there had merely been a mistake in law. There was no case where a new trustee had been appointed when the estate which was said to come under the sequestration had been known to the first trustee prior to his discharge.<sup>1</sup>

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LORD PRESIDENT.—This is an application to revive a sequestration in which both the bankrupt and the trustee have been discharged, and there is no doubt that it is an application which is properly addressed to the Court in the exercise of its *nobile officium*. We have followed the course which we are here asked to take and have granted the prayer of such petitions in a great many similar cases, beginning with that of *Thomson* (2 Macph. 325). All that is required to sustain such an application, in circumstances similar to the present, is that it shall be averred that there are funds belonging to the sequestrated estate; that the bankrupt has been discharged, not upon a composition, but only by reason of the efflux of time, or by the consent of creditors; and that the petitioners making the application shall be creditors who have not been paid in full.

The first objection stated to the present application is that there is no fund belonging to the bankrupt estate to be recovered. But it would be an awkward matter to establish as a precedent that a question of that kind must necessarily be determined in a petition like the present. Of course if it could be conclusively determined that there is nothing to be recovered, the petitioners would lose all interest to carry the matter further. But if it is a question whether there are funds or not, it would be very inconvenient to determine it in the present proceedings. It is rather a matter for the trustee when he comes to be appointed.

But in the present case I do not think there is much room for doubt that there is a fund which forms a part of the sequestrated estate. The Commercial Bank shares, which are said now to fall under the sequestration, were settled in the marriage-contract in this way. There was no trust. Mrs Whyte conveyed them directly to herself in liferent, and to her children in fee. Mrs Whyte, the original owner of the shares, was thus left an undivested *fiar*, and her children had no right in the shares other than a mere *spes successionis*. But after her husband's death she executed a transfer of the shares, and the whole question now is, what is the effect of that transfer. She transferred the shares to herself in liferent *allenary*, and to her children *nominatim* in fee. A complete change in the right of property in the shares was thus brought about, and the fee belonged to the children as soon as they accepted the transfer.

It is said that there is a clause in the deed of transfer which must receive some meaning, and is said to affect the right of fee which would otherwise be in the children. But I do not find anything which qualifies or diminishes the rights of the *fiars*. It is said in the deed of transfer,—and this is a stipulation in favour of the transferees themselves,—“that the acceptance hereof was not to affect the rights and interests of the children of the deceased George Whyte *inter se* under the said marriage-settlement, and the said trust-disposition and deed of settlement of the said deceased George Whyte.” But the trust-deed of their father, as we have already held,\* does not carry the right to these shares. And

<sup>1</sup> *Thomson*, Dec. 17, 1863, 2 Macph. 325, 36 Scot. Jur. 162; *Taylor v. Charteris and Andrew*, Nov. 1, 1879, 7 R. 128.

\* *Ante*, p. 95.

the marriage-contract affects them only in so far as it provides that the shares of the children in the estate carried by it are to be equal. That affects the rights of the children *inter se*. There is a further provision in the marriage-contract giving a power to the father, and failing him to the mother, to divide the children's provisions in such manner as either of them might direct, "and failing any such division, the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share." If that is the clause which is intended to be referred to in the transfer, I confess that it does not appear to me to prevent vesting in each of the children to whom the fee is given *nominatim* in the deed of transfer. } No. 23. Nov. 21, 1888. Northern Heritable Securities Investment Co., Limited, v. Whyte.

*Prima facie*, so far as I can see the question which will fall to be determined in the revived sequestration, there seems to be no dispute or difference about it. The respondent had from and after 1870 a full right of fee in the shares in question, and that right of fee consequently formed part of his sequestrated estate at the date of his sequestration. If this be quite clear, it may be said that the trustee ought to have taken up that right, and made it available to the creditors. That is the first step in the consideration of the question of abandonment. But the evidence of abandonment in the present case is of a very peculiar kind. As regards the trustee, no doubt he was very naturally in a state of great perplexity; because Mr Hill Murray maintained that he had a right to the bank shares under a deed of assignation in his favour, conveying to him "the residue and remainder of the heritable and moveable estate" of the deceased George Whyte, so far as falling to the respondent under his father's trust-disposition and settlement, and a serious question was raised between Murray and the respondent, which was only decided a few days ago. The trustee might therefore be in considerable difficulty as to whether this was or was not an asset of the bankrupt estate. The knowledge of the existence of this asset, and the intention to abandon it, are ascribed by the respondent to the trustee. But the trustee has no right to abandon an asset. That must be done by the creditors or by the trustee with consent of the creditors. I know of no case where the existence of such an asset has not been brought home to the creditors, and dealt with at their meetings, and then and there disposed of in one way or another.

But here it is not even averred that it was brought under their notice, or that it received any consideration from them. I therefore think that the notion of abandonment is excluded by that consideration alone. There must be an assent of the creditors to the abandonment. So that this second answer to the present petition fails altogether upon the facts. X

I think, therefore, that there are no grounds for departing from the course which has been taken in previous cases.

LORD MURK.—I am of the same opinion, and that for the reasons so clearly expressed by your Lordship. If the right to the bank shares was in Whyte at the date of his sequestration there can be no doubt that it passed to his trustee, so that the shares would form an asset for division among the creditors. And what the petitioners propose is that the sequestration should be revived in order that this fund may be made available for distribution. This is opposed by the respondent on the grounds (1) that the bank shares were not carried to the trustee; and (2) that even if they had been, they were abandoned by the trustee before his discharge.

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Whyte.

As regards the first of these objections, I agree with your Lordship that the shares vested in the children, including the respondent, under the deed of transfer executed by their mother in 1870 after their father's death. But I do not think that there is any evidence to shew that the trustee was aware of the terms of that deed, or that the fee of the shares had passed to the children; and that was, I think, the position of matters at the time when the bankrupt and the trustee were discharged.

In these circumstances I am unable to see that there is any evidence of anything having been done by the trustee and creditors which can be held to amount to an abandonment of this claim. It does not appear that before his discharge in 1887 the trustee had taken any steps to have this estate brought within the sequestration, or that he or any of the creditors knew what the position of that part of the estate was. In these circumstances it is impossible, I think, to hold that there has been any abandonment of this claim.

LORD FRASER concurred.

LORD SHAND and LORD ADAM were absent.

THE COURT pronounced an interlocutor in ordinary form remitting to the Lord Ordinary on the Bills, &c.

ALEXANDER MORISON, S.S.C.—ANDREW URQUHART, S.S.C.—Agents.

## No. 24.

BOYD, GILMOUR, & COMPANY AND OTHERS, Pursuers (Respondents).—

*Asher—Murray.*

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders  
(Appellants).—*Balfour—C. J. Guthrie.*

Nov. 16, 1888.  
Boyd, Gil-  
mour, & Co.  
v. Glasgow  
and South-  
Western Rail-  
way Co.

*Process—Appeal—Competency—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 71—A. S., 10th March 1870, sec. 3—Omission to lodge prints in time.*—In an appeal in vacation from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the Clerk of Court had received the process, and to box them on the first box-day thereafter, as required by sec. 3, subsec. 2, of A. S., March 10, 1870. An objection having been taken to the competency of the appeal, the Second Division, after consulting with the Judges of the First Division, held (1) that the Court have a discretion as to whether they will enforce the penal provisions of the Act of Sederunt; and (2) that as in the present case the omission was unintentional, and had caused no inconvenience or delay, the objection should be overruled.

2D DIVISION.  
Sheriff of  
Ayrshire.  
1.

In an action raised in the Sheriff Court of Ayrshire at Kilmarnock at the instance of Boyd, Gilmour, & Company and others against the Glasgow and South-Western Railway Company, the Sheriff-substitute (Hall), on 29th June 1887, decerned in favour of the pursuers.

On 25th July the defenders appealed to the First Division of the Court of Session.

On 15th March 1888 the Second Division, to which the case had been transferred, remitted the cause, with instructions to allow the parties a proof.

The Sheriff-substitute, after a proof, on the 18th July 1888 decerned against the defenders.

On 25th July 1888 the defenders appealed to the First Division, and the appeal was noted as received by the acting-depute-clerk of the First Division on 26th July.

The note of appeal, record, proof, and interlocutors ought, under the Act of Sederunt of 10th March 1870,\* to have been printed, and a print deposited with the Clerk of Court within fourteen days (9th August), and boxed on the first box-day in vacation, viz., on the 16th August.

The appellants failed to do this, or to move for reponing. They however borrowed the process, with the result that the Clerk of Court was unable to retransmit the process as abandoned to the Sheriff Court Clerk.† It was not till the 4th September that they deposited the print with the Clerk, and not till the 13th September, the second box-day, that the print was boxed to the Court.

When the appeal was called in the Single Bills in the First Division the respondents took objection to the competency of its proceeding in respect of the above facts. The case having been transferred to the Second Division, they renewed their objection.

Argued for the respondents;—As the prints were not lodged in time, the appellants must, in terms of the 2d subsection of section 3 of the Act of Sederunt, be held “to have abandoned” their appeal. They had also failed to move for reponing. They had no right to borrow the process, and had they not done this the Clerk of Court would, in terms of the 5th subsection of section 3, have retransmitted the process to the Sheriff Court Clerk. Indeed, the question must be considered as if this had actually been done by him. If it had been, the judgment would have been “final,” and the Court could not have directed the Sheriff Court Clerk to send it back.<sup>1</sup> The case of *Walker v. Reid* (4 R. 714) had no application to the present case. The informality there was due to a misapprehension on the agent's part owing to the fourteen days running partly in session and partly in vacation. In *Young v. Brown* (2 R. 456) there was only failure to lodge a part of the process.

\* A. of S., 10th March 1870, sec. 3,—“That the course of proceeding prescribed by the 71st section of the said statute [the Court of Session Act, 1868, 31 and 32 Vict. cap. 100] shall be altered to the following extent and effect:— . . .

(2) The appellant shall, during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said Clerk a print of the note of appeal, record, interlocutors, and proof, if any, . . . and the appellant shall, upon the box-day or sederunt-day next following the deposit of such print with the Clerk, box copies of the same to the Court, . . . and if the appellant shall fail, within the said period of fourteen days, to deposit with the Clerk of Court as aforesaid a print of the papers required, . . . or to box or furnish the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed as hereinafter provided.”

Subsec. 3,—“It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary officiating on the Bills during vacation, to repone him, to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shewn, and upon such conditions as to printing and payment of expenses to the respondent, or otherwise, as to the Court or the Lord Ordinary shall seem just.”

† A. of S., 10th March 1870, sec. 3, subsec. 5,—“On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same, and the Clerk of Court shall forthwith retransmit the process to the Clerk of the inferior Court.”

<sup>1</sup> *Park v. Weir*, Oct. 15, 1874, 12 S. L. R. 11.

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Argued for the appellants;—The failure to lodge the prints timeously was due to oversight or inadvertence. The appellants' agents heard nothing of it from the Clerks of the First Division. Had it been marked, as it should have been, to the Second Division, who had ordered the proof to which the appeal referred, the Clerks of that Division would have communicated with them, and the matter would have been attended to. No damage would be done to the respondents, as this appeal formed part of a test case which the parties had agreed should go to the House of Lords. In the circumstances the appellants were entitled to be reponed.<sup>1</sup>

The Court consulted with their Lordships of the First Division.

At advising,—

**LORD JUSTICE-CLERK.**—The respondents in this appeal, who hold a judgment in their favour by the Sheriff-substitute of Ayrshire, object to the competency of the Court taking up and disposing of the appeal on its merits, maintaining that under the clauses of the Act of Sederunt of 1870, regulating the preliminary procedure in such appeals, this appeal has fallen, and cannot be now considered by the Court of Session.

The facts are that the defenders on 25th July noted the appeal, and the process was transmitted on 26th July to the Clerk of Session. According to the Act of Sederunt the appellants should have lodged the print on 9th August, and boxed it on 16th August. This they did not do. They had it in their power within eight days to apply to the Lord Ordinary on the Bills, and to shew cause why they should still be allowed to box the papers. This also was not done. The papers were boxed on the 13th of September, being the second box-day, having been lodged with the clerk on 4th September. When the eight days had expired, the next step in ordinary course would have been for the Clerk of the Court of Session to mark the process with a note that the appeal had fallen, and to retransmit it to the Sheriff Court. This was not done either. Accordingly the appeal, which was to the First Division of the Court, came up there for hearing, when the respondents took objection to the competency of proceeding with it in respect of the facts I have stated. The First Division transferred the case to this Division, and the question on the competency is again raised.

As regards the cause of the omission, I think it must be taken to be the fact that the failure in this case to lodge and box the print within the time prescribed was due to inadvertence—and to inadvertence only,—although I cannot help saying that the circumstances suggested by the defenders as accounting for the mistake seem to me to be of the most shadowy description, the only suggestion being that the appeal was marked to the First Division, although the proof to which the appeal referred had been taken on remit from this Division. How that fact should have made any difference in the conduct of the detail business of lodging papers I have not been able to see. I presume it must have been from some practice of communication between the officials in the office and the clerks of agents, but this is by no means clear. The real question, however, is whether the penalty for the inadvertent omission must be the loss of the right to prosecute the appeal, with the result that the judgment of the Sheriff-substitute is stamped with finality.

<sup>1</sup> Walker v. Reid, May 12, 1877, 4 R. 714; Young v. Brown, Feb. 19, 1875, 2 R. 456; Lattimer v. Anderson and Wight, Dec. 20, 1881, 9 R. 370; Robertson v. Barclay, Nov. 27, 1877, 5 R. 257.

The pursuers maintain that this must be the result. I think Mr Asher pressed his contention so far as to argue that on the day after the expiry of the reponing days the power of the Court to take up and consider the appeal absolutely ceased, and that whether the process had been transmitted back to the Sheriff-clerk or not it was no longer before and could not be dealt with in any way by the Court of Session.

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I do not think that, in view of what has already been done by the Court in previous cases, any such contention can be given effect to. For in numerous cases the question has been considered on the merits, with the result that in some of them the appeal has been allowed to proceed, a result which could not have followed had the Court felt themselves compelled to hold that by the mere lapse of the time prescribed by the Act of Sederunt they had ceased to have any power over the process, and could not write upon it.

I cannot therefore give effect to the very broad and sweeping view which was pressed on us in debate that the lapse of the time fixed by the Act of Sederunt acts as a removal of the process out of the Court of Session, so that we are precluded from dealing with it whatever may be the circumstances of the case as regards the failure to box papers.

But then it is contended that the failure makes it imperative upon the Court to hold it incompetent to proceed to hear and dispose of the appeal upon the merits, and that the judgment of the Sheriff must be held to be final. At first sight there is great force in this objection when the words of the Act of Sederunt are considered, which are very distinct.

We have thought it advisable to consult the other Division of the Court, and the conclusion which I have to state is that at which we have arrived after consultation.

Had it been clear that the Court are bound to regard a provision of an Act of Sederunt as being equivalent to a statutory enactment, I should have been unable to hold otherwise than that the defenders' appeal had fallen, and that it was not in the power of the Court to replace them in the position of being able to prosecute that appeal now.

But this is not the view that has been taken in previous cases. The Court have invariably held that they were entitled to consider whether the circumstances of the case made it necessary to enforce the Act of Sederunt to the effect of precluding the party in default from proceeding with this appeal. They have thought themselves entitled to consider what was the intention in passing the Act of Sederunt, and having regard to that intention, whether there was in the particular case ground for enforcing its penal provisions. Thus the Lord President in *Taylor or Young v. Brown*, in which case there was a failure to box the note of appeal itself, says,—“According to the letter of the Act of Sederunt this is a good objection. But I confess to a reluctance to sustain so technical an objection if it is possible to get the better of it. Now, it is important to observe that the provision founded on occurs in the Act of Sederunt and not in the statute. The regulation is made in place of the 71st section of the statute, and it is important to observe that under section 71 this objection would not have been fatal. Therefore the objection stands on a regulation of a form of process made by the Court. When we are satisfied that under an Act of Sederunt only a formal and innocent omission has been made, we may allow the thing to be rectified.” And again in *Lattimer v. Anderson and Wight*, in which the agent had omitted to box the proof, his Lordship said,—“I think the case



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falls within the principle of the case of *Young v. Brown* rather than of *Robertson v. Barclay*. In the latter case there was an entire failure to print, the appellant had not even attempted to take any steps to print and box the appeal, and it was held that he had no excuse. The only excuse that was offered was that there had been verbal and obviously useless attempts to settle the case, which certainly did not justify the omission to prepare the prints. In the case of *Young v. Brown* there was a failure to print a part of what is required by the Act of Sederunt, a part no doubt which is of less importance to the case than that which has been omitted here, but I do not know that that fact will make any difference in the question whether the Act of Sederunt has been violated or not. The Act requires equally both the note of appeal and the proof to be printed, and if the omission is to be held fatal it must apply equally to any part which the Act requires to be printed. The circumstance that one part is of more importance to the ultimate discussion of the case makes no difference, for both the note of appeal and the proof must be here before the Court can consider the case." It also very clearly appears from the cases already decided that the Court have held the intention of the Act of Sederunt to be to prevent the delay in procedure, which the failure to box papers in due time tends to cause, to the detriment either of the interests of the opposing litigant, or of the despatch of the business of the Court; in short, that its penal action is directed against dilatory tactics; or, to use the words of the Lord President in *Robertson v. Barclay*, against "trifling away the time and violating the whole spirit of the regulation."

Now, this being the manner in which cases of failure to box prints have been dealt with hitherto, what is the case here? It is not suggested that the defenders did not box papers because they desired delay, or that in point of fact any delay was or could have been caused by the failure to box. It was admittedly an entirely unintentional mistake, which did not delay by one day the business of the Court, or cause any inconvenience or hardship to the pursuers. The box-day was in August, the prints were lodged early in September, and the Court did not meet for business till the 15th of October. The spirit and intention of the Act of Sederunt, of which the Lord President spoke in the case of *Robertson v. Barclay*, were thus in no way violated by what occurred. What was done was not done in pursuance of offputting tactics, and did not cause any delay or inconvenience whatever.

The case therefore falls to be considered in the light of those decisions under which appeals have been allowed to proceed notwithstanding the failure to box prints of parts of the process required by the Act of Sederunt to be boxed. Now, in the case of *Taylor or Young v. Brown* the note of appeal, which is one of the things specified, was by inadvertence not boxed. Notwithstanding this, it was held that the Court could proceed to hear and dispose of the appeal, and that they were not compelled by the terms of the Act of Sederunt to hold that the appeal had lapsed. The only difference between that case and the present is that there the appellant was in default as regarded only one of the many things required by the Act of Sederunt. Does it make any difference that here the omission is not of one of the prescribed things, but of all? It does not appear to me that it makes any difference in principle. Equally in both cases the omission was a substantial omission, but equally in both it was unintentional, harmless to the interests of the opposite party, and had and could have no injurious effect upon the progress of the business of the Court. I am

of opinion that in these circumstances the decisions already given by the Court are authorities for holding—(1) That it is not imperative on the Court to put in force the penal provisions of the Act of Sederunt; and (2) that the circumstances of this case do not call for an infliction of these penal provisions.

I am therefore in favour of repelling the objection to the competency of the appeal.

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LORD YOUNG.—The objection taken to the competency of proceeding with this appeal is admittedly one of a most technical kind. Your Lordship has stated the whole of the facts relating to the objection, and I agree with the accuracy of that statement as well as with the result at which you have arrived. The objection really comes to this, that whereas according to the provisions of the Act of Sederunt of 1870, the prints in the present appeal, which is but a small part of the whole case, ought to have been deposited with the Clerk of Court on the 9th of August, and boxed for the Judges on the 16th, they were not in reality lodged till the 4th of September, and were not boxed till the 13th of that month. The contention of the respondents is that under the imperative provisions of the Act of Sederunt we must hold in these circumstances the appeal as abandoned, and therefore that the judgment of the Sheriff upon the merits, which is for about £800, but which might have been for as many thousands, is final—that however just we may think it that relief should be given in the interests of parties, and however clear we may be in our opinion that no more than justice will be done without harm sustained, we are precluded by our own Act of Sederunt from doing it. I must repeat what I have said more than once already, that I doubt greatly whether the Court,—be it the whole Court, or any Division of the Court, or even a single Judge,—is precluded by any Act of Sederunt from doing what it thinks according to justice and equity in any individual case before it. I do not know whether it would be conceded or suggested that the remedy for oppression and injury in any individual case is another Act of Sederunt granting the relief sought. That would only be a roundabout way of doing what the Court thought consistent with equity in the particular case. Take the idea of the Court making rules of practice and procedure, and announcing these rules for the information of practitioners as the rules according to which it will generally proceed in the absence of reasons to the contrary—like the *Prætors* of old. Is that idea to preclude the Court from doing what it thinks just in individual cases? I do not think that we are called upon to decide such a point conclusively here, although I may say that it is one on which I have a very strong impression.

I do not know how the case of *Walker v. Reid* does not rule the present as an authority. It seems to me exactly in point, and indeed on all-fours with the present case. The rubric runs thus :—"In an appeal from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sec. 3, subsec. 1, of A. S., March 10, 1870, the agent having by mistake, as the day for lodging fell in vacation, lodged them on the box-day instead." The agent's mistake was that he did not think the fourteen days ran in vacation in the same way as during session, or that he ought to lodge the papers at the termination of the fourteen days, although they occurred in vacation. He was in fact labouring under a mistaken impression that he would be in time if he lodged them on the first box-day. This mistake led to a violation of the Act of Sederunt—the prints

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not being lodged within the time specified in the Act of Sederunt. Here the papers were not lodged with the clerk on the 9th August, but on the 4th September, and not boxed on the 16th August, but on the 13th September. In the former case there was a mistake, and in the present there has been a mere oversight. The Court, nevertheless, refused to hold it imperative that the appeal was abandoned,—indeed so to hold would have been manifestly contrary to the truth, for it had not been abandoned. Their Lordships were moved to hold that the strict terms of the Act of Sederunt must be departed from, and they therefore allowed the appeal to proceed. In that case, I was myself accidentally called in to make a quorum, and I read what I then said, because after a lapse of ten years I still remain of the same opinion:—"It must always be in the power of the Court to do justice in any case of this kind, and relieve a party of so severe a penalty, following on so critical a construction of what, after all, is only a rule of Court laid down by the Court for its own guidance, with notice to parties and practitioners. We may advantageously and wholesomely make stern regulations, in order to check appeals taken merely for delay or other improper purpose, but it is a strong thing to say, that, by any words of ours in an Act of Sederunt, we preclude ourselves from doing what we think justice in any particular case, and that the accidental and harmless delay, it may be of a day or an hour, will make a judgment final which is by the law of the land subject to review. The enactment that any delay, however considerable and unattended with harm or inconvenience, shall deprive a party of the review to which he is entitled by law, and without any power in the Court to grant him relief, is legislation as distinguished from a rule of Court to govern procedure."

Now, I should be myself prepared to read into every Act of Sederunt by implication, that, notwithstanding any of its provisions, it should be in the power of the whole Court, or any Division of the Court, or even of any single Judge in a case, to grant any relief in any individual case, which was thought to be according to justice and equity, and without prejudice to the opposite party. I am of that opinion here. Indeed it is indisputable that if we have the power to grant the relief asked, and to allow the appeal to proceed, it would be wise for us to exercise it. The only question therefore is whether we have the power. We certainly have, unless we have deprived ourselves of it, and I dispute the proposition that we have done so. This case again is taken as one of a set of test cases. The whole sum involved might have been here, and decree for it might have become final under this Act of Sederunt because of the delay in lodging the prints from a pure oversight, and from no design. Possibly a reduction might be brought, and justice done in that way, but I should more than doubt whether the party who had abandoned the appeal could bring a reduction of the judgment on the grounds on which he had appealed. But supposing it to be otherwise, what is the purpose of the Act of Sederunt? The Act was passed to prevent delay, and to expedite business and to promote economy in the carrying on of actions in the Court of Session; would it be in the interest of despatch, and I suppose of economy attending despatch, that we should be asked to try the case all over again? Even if this procedure were competent, it would only shew the necessity of the Court having the power of rendering it unnecessary. Suppose the respondent did not insist in this objection, are we to hold the Act of Sederunt so binding on us that we are in respect of the informalities to consider the appeal as abandoned?

I think too much weight has been given to Acts of Sederunt, and I am glad to have an opportunity of repeating my own opinion as to their proper character and function in regulating the course of our procedure.

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LORD RUTHERFURD CLARK.—We have thought this question of such importance that we have consulted the other Division of the Court. It is the prevailing opinion that notwithstanding the terms of the Act of Sederunt the present appeal is competent, the mistake in the procedure having been made inadvertently. In deference to this opinion, I concur in the result arrived at, although if I had been left to my own unaided judgment I do not think I could have reached such a conclusion.

LORD LEE.—I am of opinion that an Act of Sederunt passed as this was, under statutory authority, is binding on the Court, and that the Court has no power to dispense with its provisions or to avoid the results which must come from them. I confess to a dislike to dispensing powers. I think they are apt to give rise to great abuse and discontent, although they are always exercised in the name of justice. But here, as your Lordships have arrived at the conclusion that, notwithstanding the express terms of the Act of Sederunt, the circumstances are such as entitle us to entertain the appeal, I by no means dissent from that conclusion. I do however dissent from some of the general principles which have been announced.

THE case was sent to the roll.

GORDON, PRINGLE, DALLAS, & Co.—JOHN C. BRODIE & SON, W.S.—Agents.

SAMUEL WATSON, Pursuer (Appellant).—*M'Nair*.

No. 25.

CALLANDER COAL COMPANY, Defenders (Respondents).—*C. S. Dickson*.

Nov. 17, 1888.  
Watson v.  
Callander  
Coal Co.

*Poor's-roll*.—*Appeal from Sheriff Court and reporters divided in opinion*.—A pursuer in a Sheriff Court action for damages for personal injury appealed to the Court of Session against a judgment of a Sheriff, affirming the judgment of his Substitute, and assailing the defenders. The pursuer applied for the benefit of the poor's-roll, and the reporters on the *probabilis causa* were equally divided in opinion. The Court refused the application.

*Carr v. North British Railway Company*, Nov. 1, 1885, 13 R. 113, followed.

SAMUEL WATSON, surfaceman, Falkirk, raised an action in the Sheriff Court there against the Callander Coal Company for damages for personal injury.

2<sup>d</sup> DIVISION.  
Sheriff of  
Stirlingshire.  
I.

The Sheriff-substitute (Scott Moncrieff) assoilzied, and the Sheriff adhered.

The pursuer appealed, and applied for admission to the poor's-roll.

The Court remitted to the reporters on the *probabilis causa*, who reported that they were equally divided in opinion.

The pursuer moved the Court to admit.

The defenders, founding on *Carr v. North British Railway*,<sup>1</sup> decided by the First Division, opposed the motion, arguing that in that case the rule was laid down that where the reporters were equally divided in opinion, and both the Sheriffs were adverse to the applicant, the Court would not admit. It was different where the case was to originate in the Court of Session and no judicial opinion had been expressed on it.<sup>2</sup>

<sup>1</sup> Nov. 1, 1885, 13 R. 113.

<sup>2</sup> *Marshall v. North British Railway*, July 13, 1881, 8 R. 939.

## No. 25. At advising,—

Nov. 17, 1888. LORD JUSTICE-CLERK.—I think we must refuse this application.

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LORD RUTHERFURD CLARK.—I think we are bound to follow the judgment of the First Division in *Carr's* case, for the circumstances are precisely similar, unless we send the application to the whole Court, which I am not prepared to do.

LORD LEE concurred.

LORD YOUNG was present at the debate, but was absent at advising.

THE COURT refused the application.

J. D. TURNBULL, S.S.C.—J. & A. PEDDIE & IVORY, W.S.—Agents.

## No. 26.

THE SCOTTISH PROVIDENT INSTITUTION, Pursuers and Real Raisers.

W. H. COHEN & COMPANY, Claimants (Respondents).—*Salvesen*.

Nov. 20, 1888.  
Scottish Pro-  
vident Institu-  
tion v. Cohen  
& Co.

GEORGE LOGAN BROOMFIELD (Walker's Trustee), Claimant (Reclaimer).—*Readman*.

*Foreign—Right in security—Bankruptcy—Assignment—Loan—Life insurance.*—A domiciled Scotsman obtained a loan in England from a domiciled Englishman, and in security therefor delivered to the latter a policy of insurance on his life with a Scottish company. The borrower died soon afterwards, and after his death the lender gave notice by letter to the Insurance Company that the policy had been assigned to him, and was in his possession. Thereafter the estates of the deceased were sequestrated, and a trustee appointed.

In a competition regarding the right to the contents of the policy between the holder of it and the trustee, *held* (1) that the transaction having taken place in England the rights of the holder fell to be determined by the law of that country, and (2) upon an admission by the parties as to the law of England, that the deposit of the policy and the intimation to the Insurance Company were effectual to confer a preference upon the holder of the policy.

*Bankruptcy—Security—Prior debt—Act 1696, cap. 5—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 110.*—*Held* that the securities which are struck at by the Act 1696, cap. 5, and the 110th section of the Bankruptcy (Scotland) Act, 1856, are securities created by some act or deed of the bankrupt or deceased debtor, and that these provisions do not apply where it is the creditor who has rendered the securities effectual.

1st Division.  
Lord McLaren.  
M.

IN March 1886, Messrs W. H. Cohen & Company, money-lenders in Newcastle-on-Tyne, received an application from Andrew Allan Walker, a domiciled Scotsman, for a loan of money, and after sundry negotiations it was agreed between them that they should lend him a sum of £100 on receiving from him a promissory-note for the amount, and on his depositing with them a policy of insurance for £200 granted by the Scottish Provident Institution in his favour. The transaction was concluded at a meeting which took place between Walker and a partner of the firm in their office at Newcastle on 10th April 1886.

Walker died intestate on 16th June 1887. By that date he had repaid part of the loan, but there was owing to Cohen & Company a sum of £87.

On 1st August 1887 Cohen & Company intimated by letter to the Scottish Provident Institution that Walker had assigned the insurance policy to them in security for the advance, and on 3d August following they sent a second letter stating that they had been in possession of the policy since 10th April 1886.

It subsequently appeared that Walker had been insolvent at the date of his death, and on 5th November 1887 a petition for sequestration of

his estates was presented to the Lord Ordinary on the Bills by some of his creditors. Sequestration was awarded on 19th December 1887, and George Logan Broomfield, writer, Lauder, was appointed trustee.

The Scottish Provident Institution thereafter brought a multiple-poining in order that it might be determined who had right to the proceeds of the policy.

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Claims were lodged (1) for W. H. Cohen & Company, who pleaded;—  
1. The claimants having a right of retention of said policy until payment of the said sum of £87 and interest and costs, are entitled to be ranked and preferred in terms of their claim. 2. *Separatim*, The claimants' rights under the contract between them and the said Andrew Allan Walker fall to be determined by the law of England, and the claimants having by said law a valid lien over said policy for payment of the debt due to them, they are entitled to be ranked and preferred in terms of their claim.

(2) For the trustee on Walker's sequestrated estates, who pleaded;—  
The fund *in medio* being part of the sequestrated estates of the late Andrew Allan Walker, the claimant as trustee foressaid is entitled to be ranked and preferred in terms of his claim.

Another alleged assignee of the policy and the representatives of the deceased were also called as defenders in the action, but did not lodge claims.

On 1st March 1888 the Lord Ordinary (M'Laren) delivered the opinion which is quoted below,\* and on 3d March he pronounced an interlocutor

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\* "OPINION.—This multiplepoining was instituted by the Scottish Provident Institution to determine which party is in right of the sum payable under a life policy issued by the institution. At the time when the action was raised, it appears that the company were ignorant of the fact that the assured had died insolvent; but they had been made aware of claims at the instance of two persons who founded upon assignments of the policy, and the action was brought to determine the question of preference as between these claimants. One of the parties, Broomfield, has not appeared. The other assignee, Mr Cohen, has appeared, and in response to an intimation made to the representatives of the assured, the trustee for his creditors has also appeared. The question now raised is between the trustee for the assured's creditors and Mr Cohen, founding on his assignment to the policy.

"It appears that, some considerable time before his death, Walker, the assured, had obtained a small advance—£100—from Mr Cohen, for which he gave his promissory-note, and at the same time deposited the policy of assurance as a collateral security. The assignment of the policy supposed to be effected in this way was not intimated at the time. . . . The question that arises first in order is whether a good assignment can be made of the creditor's right under the policy of assurance by deposit of the deed. . . . The next question would be (as between the trustee for creditors and the assignee), whether the criterion of preference is the date of assignment or the date of the intimation of the assignment; and I rather think that these are the only two questions necessary to be considered. I do not conceive that it lies within my jurisdiction to determine the validity of a security created by the deposit of a document under the law of England. But it is within the scope of my jurisdiction to find out by what legal system the rights of parties are to be determined. It appears to me to be reasonably clear that the validity of the assignment must be determined by the law of the country within which the assignment was made. Here the policy is issued by a company having its domicile in Scotland, and by the company's obligation a right of credit is created capable of assignment. We have nothing to consider under the law of Scotland, so far as I can see, except to see that a valid right of credit is created by the policy in the form recognised by our law. But that right of credit follows the domicile of the creditor wherever he goes, and is capable of being assigned or dealt with by him in any manner which the law recognises. The assignment of the right of credit in the policy is a new con-

No. 26. appointing "the claimants W. H. Cohen and Company to state in a minute . . . whether they desire to found their case solely on the

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tract, distinct as regards its nature, mode of constitution, and the law that regulates it, from the contract constituted by the policy itself. And the validity of the assignment will, in general, be determined by the *lex loci contractus*—that is, according to the law of the country in which the transference is made or the security given.

"In this case the policy was made over to a creditor in England, and it appears to me that the contract falls to be determined by the law of England. We should certainly not recognise an assignment to an English policy by way of deposit made in Scotland. That would not be recognised by us, because the assignment was not made in the way required by our law. And I think, conversely, where the assignment is made between parties dealing with reference to the law of England, that we ought to recognise the assignment, provided it is in accordance with the requirements of that law. Subject to any inquiry that may be demanded as to what is the law of England on the point, these considerations will dispose of the first question.

"But the question that arises in bankruptcy depends upon different considerations. The authority of a trustee or creditors' representative in bankruptcy is in general recognised by foreign countries; but any question of competing right between the trustee and a creditor claiming upon a preferable security must apparently be determined by the law of the country in which the competition arises. Such at least was the opinion of Lord Deas in *Donaldson v. Findlay, Bannatyne, and Company*, 17 D. 1053. Now, if that criterion be applied to the present case, the facts are these:—The assignment—which in the present question I assume to be valid—was not intimated at the time, but was intimated after the death of Mr Walker, the assured party, and undoubtedly before his estate had been brought under the judicial administration of the sequestration. The question is, whether such intimation gave the creditor an effectual security. Reference was made to the Statute of 1696, and to the 110th section of the Bankruptcy Act of 1856, which extends the provisions of that statute to estates of deceased debtors. But it appears to me that neither of these statutes has any application to a case like the present, because they deal only with securities which are considered to be objectionable on the ground of being originally granted in satisfaction or security of a prior debt. And where such is the character of the security given, it is necessary in the case of real property that the security should be completed sixty days before the grantor's insolvency. So the Statute of 1696 says in express terms, and the analogue of that provision with reference to such a subject as a policy would be that it ought to be intimated sixty days before the sequestration, or sixty days before the death of a deceased debtor. But where a security is originally granted, not for a prior debt, but for an immediate advance, no statutory provision of this or any other country, I should imagine, would cut down such a transaction. There would be an end to all mercantile dealings if a security for money instantly advanced were liable to be cut down by the operation of a retrospective law. Such a rule would be in the highest degree unjust, because it would ignore the fact that, while the bankrupt has given security, his estate has at the same time received the benefit of the advance.

"Now, in the present case, according to Mr Cohen's claim—which I assume for the purpose of the present judgment to be correct in its statement of facts—the assignment of the policy was for an immediate advance of £100, and therefore it does not come within the scope of the statutes referred to at all. No doubt, if it had not been perfected by intimation to the company before the bankruptcy, it would have been objectionable on another ground,—that is to say, there would have been no constitution of a real right in the assignee until after bankruptcy, and the creditor would only be entitled to claim his dividend. But we are not in that class of cases, because the intimation was made in August, and sequestration was not applied for till November.

"The result of the consideration of the various questions argued is, that, pro

promissory-note mentioned in their claim, combined with the deposit of No. 26.  
the life policy as a collateral security for repayment of their advance;  
and meantime continues the cause in the Procedure Roll.”

On 27th June following, a minute that they did so found their case  
having in the meantime been lodged, his Lordship directed a case to be  
submitted to English counsel for his opinion on the effect of the deposit  
of the policy of insurance with Cohen & Company.

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The trustee, having obtained leave, reclaimed to the First Division.

On 18th July following, the Court of session continued the cause “in  
order that parties may have an opportunity of ascertaining and admitting  
the law of England applicable to the matter in dispute.”

A minute was subsequently lodged by the parties in which they  
admitted “that by the law of England—where the law of England  
applies—the deposit by the party insured of a policy of life insurance in  
security of a loan of money advanced on the faith of such deposit, operates  
as an equitable mortgage in favour of the lender, and if followed by notice  
to the insurance company prior to notice of the bankruptcy of the party  
insured to said company, confers upon the lender, while the policy remains  
in his hands, a preferable right to the contents of the policy to the extent  
of the unpaid portion of the loan in competition with the trustee in bank-  
ruptcy of the party insured.”

Argued for the trustee;—(1) The whole question here arose out of an ap-  
plication for a loan made in Scotland, and fell to be decided by the law of  
Scotland, where the transaction had its origin. Walker's domicile was in  
Scotland, and his estates were sequestrated in Scotland. The competition  
being between a creditor claiming on an alleged preferable security and  
the trustee upon the sequestrated estate of the debtor, the questions be-  
tween them fell to be settled by the law of the country in which the com-  
petition arose.<sup>1</sup> (2) Besides, the contents of the policy were payable in  
Scotland, and according to the law of that country there must be an in-  
timated and formal assignation to make the creditor's right effectual.<sup>2</sup> It  
did not matter that the parties to whom the policy had been delivered  
were resident in England. It had been held in a previous case, where  
the circumstances were very similar, that the rights of parties where that  
was the case fell to be determined by the law of Scotland.<sup>3</sup> (3) Further, this  
was a security which was granted in satisfaction of a prior debt. It was  
so because the security was not completed, as it was alleged it was by the  
intimation, until long after the date of the transaction, and subsequently  
to the death of the bankrupt. In order to make it effectual as against  
the trustee, it ought to have been intimated more than sixty days before  
the death of the bankrupt.<sup>4</sup>

Argued for W. H. Cohen & Company;—1. The minute which had been

vided it can be established either that the mere deposit of the policy is a good  
security by the law of England when followed by intimation, or provided the  
terms of the relative letter can be proved and shewn to be a good security by  
the law of England, then that security being followed by timely intimation,  
entitles Mr Cohen to a preference over the trustee in bankruptcy.

“I think that is the only deliverance that I can give at this stage of the  
case.”

<sup>1</sup> Donaldson v. Ord, July 5, 1855, 17 D. 1053, 27 Scot. Jur. 625.

<sup>2</sup> Act 25 and 26 Vict. cap. 85, sec. 1, and schedules A and B; Act 30 and  
31 Vict. cap. 144, sec. 5; United Kingdom Life Assurance Co. v. Dixon, July  
1, 1838, 16 S. 1277.

<sup>3</sup> Strachan v. McDougle, June 19, 1835, 13 S. 954.

<sup>4</sup> Act 1696, cap. 5; Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap.  
79), sec. 110.



No. 26. lodged shewed that in two respects the law of England upon this matter differed from that of Scotland. (1) The deposit of a policy of insurance in security of a debt operated as an equitable mortgage in favour of the lender, and (2) priority of notice gave a preferable claim. It had been decided in Scotland that by the law of England a mere letter, as here, was sufficient intimation of the assignation of a policy of insurance.<sup>1</sup> Here, therefore, there was an assignment which was valid by the law of England, and any question arising out of the debt which it secured must be settled by the law of the domicile of the person who was in right to demand its payment. It was therefore the *lex loci contractus* which must settle the validity of the transaction. The domicile neither of creditor nor of debtor affected the matter. 2. Assuming that the question of preferences fell to be decided by the law of Scotland, the security here was not reducible as being in satisfaction of a prior debt. The security fell to be looked at as at the date of the original transaction. "The completion of the security although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act."<sup>2</sup> Further, the completion of the security here was an act of the creditor, it was in no way the act or deed of the debtor.

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LORD PRESIDENT.—We have in this case no judgment of the Lord Ordinary under review, but we have his Lordship's views expressed in a note explaining his interlocutor of the 3d March last. It appears to me that these views are very sound. When the case was last before the Court upon the reclaiming note, we found that the Lord Ordinary had directed a case to be submitted to English counsel for the purpose of ascertaining the law of England applicable to the matter, if the law of England applied. Since then, upon the suggestion of the Court, the parties have ascertained what the law of England is, and have made it matter of admission, so that the Court is now in a position to dispose of the case upon its merits.

The claimants, Cohen & Company, who are money-lenders in Newcastle-on-Tyne, made an advance of £100 to Mr Walker, who is now deceased, and in return they received not only his promissory-note, but also a policy of insurance for £200 upon his life by the company who are the real raisers here. The transaction took place in England, and the constitution of the creditors' right must be determined according to the law of the country where the transaction took place,—that is, the law of England. By that law, as now admitted, "the deposit by the party insured of a policy of life insurance in security of a loan of money advanced on the faith of such deposit, operates as an equitable mortgage in favour of the lender, and if followed by notice to the insurance company prior to notice of the bankruptcy of the party insured to said company, confers upon the lender, while the policy remains in his hands, a preferable right to the contents of the policy to the extent of the unpaid portion of the loan in competition with the trustee in bankruptcy of the party insured."

Applying that law to the present case, it is to be observed that Cohen & Company, the holders of the policy, made intimation to the insurance company on 1st August 1887, after the death of Mr Walker, the party insured. That notice

<sup>1</sup> Wallace v. Davies, May 25, 1853, 15 D. 688.

<sup>2</sup> Bell's Comms. II. (7th edn.) 211; cf. Taylor v. Farrie, March 8, 1855, 17 D. 639, 27 Scot. Jur. 266; Miller's Trustee v. Shield, March 19, 1862, 24 D. 821, 34 Scot. Jur. 416; Ranton & Gray's Trustee v. Dickison, June 15, 1880, 7 R. 951.

was,—“We beg to give you notice that Mr Andrew Allan Walker of Westruther has assigned his policy (No. 47,293 in the Scottish Provident Association) over to us as security for an advance of £100. We understand that he has since died. Please note and oblige.—Yours truly, W. H. Cohen & Co.” On 3d August following they wrote again to the insurance company,—“In reply to your favour, we beg to say that we have this policy in our possession, and have had since the date of its assignment, viz., the 10th day of April 1886.—We are, yours truly, W. H. Cohen & Co.” The sequestration of Walker’s estate as a deceased debtor was awarded on 19th December following that notice.

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The question comes to be, applying the law of England as now ascertained, whether that intimation of the right of the depositary of the policy is sufficient to operate a preference in his favour in competition with the trustee in the sequestration. I am of opinion that it must be so. The intimation put the holders of the contents of the policy, viz., the insurance company, in the same position as if a Scottish deed of assignation had been intimated on the same date. Seeing that the deposit of the policy by the transaction in England was fully equivalent to a deed of assignment executed in Scotland, the intimation completed the right and put the receiver of the intimation in the position of holding no longer for the original creditor, but for his assignees.

It has been maintained that the 110th section of the Bankruptcy Act, 1856, applies to the case, and that this policy must be taken to be a security for a prior debt. But it is plain that the security contemplated by the 110th section is a security created by some act or deed of the bankrupt or deceased debtor. Here, the intimation was the act of the creditor, who thereby rendered effectual a security which was validly constituted before the death of the original holder of the policy.

I am of opinion that the Messrs Cohen are entitled to be ranked and preferred in terms of their claim.

LORD MURK and LORD TRAYNER concurred.

LORD SHAND and LORD ADAM were absent.

THE COURT accordingly recalled the Lord Ordinary’s interlocutor, and ranked and preferred W. H. Cohen & Company preferably in respect of their claim.

ROMANES & SIMSON, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

WILLIAM MITCHELL AND OTHERS, Petitioners.—*Murray—Shaw.*  
RAWYARDS COAL COMPANY AND LIQUIDATOR, Respondents.—  
*D.-F. Mackintosh—C. S. Dickson.*

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*Company—Winding-up—Supervision order—Companies Act, 1862 (25 and 26 Vict. c. 89), secs. 147, 149, and 150.*—On 1st November 1888 a coal company (limited) went into voluntary liquidation, and on the same day the liquidator issued a circular to the shareholders intimating that it was proposed to form a new company, and to advertise the colliery for sale at the upset price of £3000, and requesting answers before 12th November.

On 3d November one of the shareholders presented a petition to have the liquidation put under the supervision of the Court, and to have an additional liquidator appointed, stating, *inter alia*, that coal was rising in value, and that the present was an unfavourable time to sell the colliery. On 12th November, no answers to the circular having been returned, the liquidator advertised the

No. 27. colliery for sale on 21st November at the upset price of £3000. The case was put out for hearing in the Summar Roll on 20th November. On 19th November a minute was lodged for the petitioner and certain concurring shareholders stating that the upset price was too low, that the notice of sale was too short, and that the liquidator was a relative of certain directors who had formed the design of starting a new company, and were anxious to acquire the colliery for an inadequate consideration.

The Court *refused* the supervision order.

2D DIVISION.  
I.

THE RAWYARDS COAL COMPANY, LIMITED, was incorporated under the Companies Acts on 19th August 1872, and thereafter continued to carry on the business of coalmasters. The capital was by the memorandum of association declared to be £30,000, divided into 3000 shares of £10 each. Of these 2644 were allotted and were fully paid up, making the shareholders' capital £26,440.

At an extraordinary general meeting of the company, held on 1st November 1888, it was resolved by a majority that the company could not, by reason of its liabilities, continue its business; that it was advisable to wind it up voluntarily; and that Gavin Black Motherwell, solicitor, be appointed liquidator.

On 3d November William Mitchell, Airdrie, a contributory holding ninety shares, presented a petition craving the Court to direct that the liquidation should be continued subject to the supervision of the Court, and further, that an additional liquidator be appointed.

The petitioner stated that he and certain other shareholders had opposed the resolutions to wind up and appoint a liquidator; that coal had risen and was rising in value, and the present was not a favourable time to sell the works; that various questions as to the management of the company and the disposal and realisation of its assets were expected to arise; that, as there might be difficulties as to the separate action of creditors, he was desirous of obtaining the benefit of a supervision order; and that an additional liquidator ought to be appointed.

On 15th November answers were lodged for the company and the liquidator stating that the whole assets of the company were worth from £10,000 to £12,000; that its indebtedness amounted to £21,693, of which £10,643, 9s. 9d. was due to the British Linen Company Bank; that in the spring and summer of 1888 repeated unsuccessful attempts had been made to sell the colliery, plant, &c., and that they had been more than once exposed for sale at an upset price, which, if obtained, would not nearly pay the company's debts; that they were, at the date of lodging the answers, advertised for sale at a further reduced upset price; that none of the creditors objected to voluntary liquidation or to the appointment of Mr Motherwell as liquidator.

On 16th November a minute was lodged for certain shareholders (to the amount of £3440) stating that they concurred in the petition.

The case was put out for hearing on 20th November.

On 19th November a minute (boxed 20th November) was lodged for the petitioner and for a Mr Laurie, one of the minuters under the previous minute. The material averments in this minute were as follows, viz.—The minuters stated that they, as directors of the company, were liable along with John Motherwell, William Motherwell, and Andrew Aitken, the other directors, to the British Linen Company Bank for £10,643, 9s. 9d.; that they were also liable, or alleged to be liable, for a sum of £4300 in a bond granted by them and by the company in favour of William Motherwell; that William Motherwell had charged each of them to pay five-sixths of the sum in that bond, and thereafter, the charge having expired without payment, had presented a petition for sequestration of their estates, which

had been granted, but recalled by the Lord Ordinary on the Bills (Lord Lee), against whose judgment a reclaiming note was then pending;\* that the minuter Laurie was a creditor of the company for £150 (with interest) lent to the company in May 1884; that the claims of ordinary trade creditors of the company did not exceed £200 in value. "The liquidator, Mr Gavin Black Motherwell, is a son of William Motherwell, the chairman of the company, and a nephew of John Motherwell, one of the directors. Prior to the passing of the resolution to wind up, a company had been in course of formation by these gentlemen for the purpose of purchasing the business and plant of the present concern. It was objected by, *inter alios*, these minuters that such a sale could not be carried out without the consent of the shareholders. Thereafter the meeting of 1st November was held, at which the resolution to wind up was passed. The design of the Messrs Motherwell throughout has been to acquire for their own benefit, and for an altogether inadequate consideration, the business, plant, &c. of the Rawyards Coal Company, and in carrying out this design they have been greatly aided by the fact that Mr John Motherwell, one of the directors, is also proprietor of the coalfields leased by the company. The interests of the creditors and of the other shareholders will thus be sacrificed.

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"In pursuance of this design Mr Gavin Black Motherwell, the liquidator, issued on 1st November, the date of the resolution to wind up, a circular, a copy whereof is produced and referred to. In this circular it is stated that it is proposed to form a new company, and to advertise, *inter alia*, the colliery for sale at the upset price of £3000. A request is made for an answer on or before the 12th November. It is not known what reply was received, but it is believed that the Messrs Motherwell have agreed to the scheme, and have obtained the assistance of the names of several friends. On 12th November, being the last date stated for receiving replies, an advertisement appeared in the *Glasgow Herald* of the sale of the whole colliery at the upset price of £3000, the sale to take place on the 21st instant. Said advertisement and proposed sale are not *bona fide*, and, if allowed to be carried out, will be disastrous to the interests of the company and its creditors. The minuters have, and can have, no confidence in the administration of the said Gavin Black Motherwell, and the circumstances are such that, in the view of the minuters, it is absolutely necessary for their protection that the liquidation should proceed under the supervision of the Court, and that an additional liquidator should be appointed.

"The time thus given to intending purchasers to inspect the subjects is only nine days—a period of at least four or five weeks being necessary for the due examination of the pits, workings, books, and plant. The sum of £3000 named as the upset is ridiculously low, the items making up the lot thus exposed standing in the company's books, as is stated in said circular, at £46,218, 17s. 9d.

"Further, the affairs of the company ought to be investigated by a neutral man, and this object has been defeated by the appointment of Mr Gavin Black Motherwell to the office as liquidator. The company has, in fact, been under the control of the Messrs Motherwell for several years past, and it is necessary that an independent investigation should be made in the interests of the minuters and other creditors."

Argued for the minuters;—The application was one which they were *in titulo* to make. They were creditors of the company, and also contributors. There was no instance of the refusal by the Court of an application to place a liquidation under supervision, when presented by a quali-

\* The proceedings in this case are reported *infra*, p. 122.

No. 27. **Nov. 20, 1888.** *Mitchell v. Rawyards Coal Co. and Liquidator.* **Nov. 20, 1888.** *Mitchell v. Rawyards Coal Co. and Liquidator.* fied person. The circumstances stated in the minute made the case a strong one for granting the order. There was no legitimate interest to oppose it. Even in a case in which the Court had declined to appoint an additional liquidator, the Court had, all parties concurring, placed the liquidation under supervision.<sup>1</sup>

Argued for the respondents;—The company had already resolved on a particular mode of liquidation. There was a discretion in the Court to refuse the order, and the best reason for so exercising the discretion was that the majority of the contributors and creditors desired the voluntary liquidation to be proceeded with, and did not desire that it be placed under the supervision of the Court.<sup>2</sup> Heavy loss was being caused by delay in carrying through the sale. The only relevant allegations of the petitioners had not been made till too late. The sale was to take place on 21st November, and the Court could not be asked to stop it by an order pronounced the previous day at the instance of persons who had kept back their grounds of action till the very last. The sale would not suffer from the low upset price, for the colliery had been months in the market, and previous attempts to sell it had failed.

**LORD JUSTICE-CLERK.**—The history of this mining company seems to have been much like that of a good many other companies during the last few years. It began with a paid-up capital of about £26,400, and there was money borrowed from different banks to a large amount, the total assets of the company being, I think, £40,500. A dividend of five per cent was paid in one year, but no dividend has been paid since 1878, and there is no doubt that the case of this company has been very lamentable for some considerable time. We are told, and it was not disputed, that it is being carried on with a practical loss of about £300 per month, and a sum of more than £10,000 has been borrowed from the British Linen Company, and the directors of the company in question, including the gentlemen who have brought this petition, granted a bond for £4300, for which sum they all became jointly and severally liable. Some of the directors were solvent and able to pay, and those who were so have charged those who failed to pay. The charge has now expired, and no suspension has been raised, and these gentlemen have therefore become notour bankrupt. Now, the company was informed before the beginning of this month, that a majority of the directors were in favour of the advisability of appointing a liquidator; and on the 1st of November a meeting was held. The vote for the appointment of a liquidator, and for the appointment of Mr Motherwell as liquidator, was carried by a majority of 573 against 53. As regards value, I think I am right in saying that the proportion was at least six to one in favour of the resolution. But a question here arises in consequence of a notice issued by the liquidator requiring any of the shareholders to communicate with him before the 12th of November, and stating a proposal to float a new company, and to advertise the colliery at an upset price of £3000. The petition was presented on 3d November. On the 12th of November none of the shareholders had made any reply to the intimation of the liquidator, and it was then resolved to advertise the colliery for sale, and the sale has been advertised for the 21st,—that is, to-morrow. In these circumstances the petitioners ask us for a supervision order, and that an additional liquidator be appointed. Their case is that the notice of the sale has been far too short, that the property is being thrown

<sup>1</sup> *Brightwen v. City of Glasgow Bank*, Nov. 27, 1878, 6 R. 244.

<sup>2</sup> *Buckley on the Companies Acts*, 5th ed., p. 316-317.

away, that there has been a rise in the market in coal, and they desire to prevent this sale from proceeding. On the other hand, the liquidator, and those who agree with him, say that this is by no means the first proposal or intimation of sale, that it was well known throughout what I may call the "colliery market," that this property was for sale; that it has been put up on several occasions at prices varying from £5000 to the present upset price of £3000, and that there have been various private offers, which, however, were not accepted, one of which was over £3000, and one of, I think, £2700.

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In these circumstances, the question is whether we are to pronounce an order which will have the effect of stopping the sale to-morrow. That is really the practical question before us. For myself I may say that if the question had come before us purely as it ought to have done, I should have been inclined to hold that the notice of the sale was rather too short. But then, I am sorry to say that the position, this being the very day before the proposed sale, is much aggravated by the fact that these petitioners have succeeded in putting both us and the opposite party in this position, that up to last night no real statement of their case had been tabled. Now, in this new minute there seems to be a sort of suggestion of something like a "plot" in regard to the sale. I can hardly understand this, for I think there are no facts stated in the minute which, if facts they be, were not well known to the proponers of this minute long before it was prepared; and indeed in their petition they have indicated that something of the kind, which they have now much more fully stated, was in their minds. The petitioners come therefore before us, as I think, in a most unfavourable position. There is no doubt they have a very substantial interest, because, according to the price realised for this property their own obligation and risk will be lowered or increased, but I think their present proceeding is entitled to no favourable consideration.

On the whole matter I am for refusing the prayer of the petition. I think the petitioners should have presented to us a full statement of their case at a much earlier date than they have chosen to do.

**LORD RUTHERFURD CLARK.**—This is a petition applying for a supervision order, and the appointment of an additional liquidator. I understand that it is necessary that we should to-day make an order. If we make no order to-day, then the evil complained of by the petitioners will be necessarily caused. The motion, therefore, and the only motion, before us is whether we should now and immediately make the order craved. I do not doubt the great interest which the petitioners have here, because on the amount of the price to be realised may depend the extent of their liability under the bond to the bank, but at the same time, they are opposed to a very large body of the shareholders, and also to the greater part of the guarantors under the bond.

The first point that is pressed on us is that the proposed sale is made without due notice. It certainly is rather rapid, but I cannot hold that *per se* as sufficient to enable me to pronounce an order which will suspend the present administration of the company. The colliery has been for a certain time in the market; those most interested in it desire that it should be sold now, and ask us not to pronounce the order craved on the very intelligible ground that the expense of keeping it up in a saleable condition is very heavy. I cannot see any way to pronouncing any order on this first ground. The next point is that the minutes charge the liquidator with acting in concert with certain of his

**No. 27.** friends and relations with the view of their acquiring the subjects at an unduly cheap price. I must say I do not think these allegations form a sufficient ground to warrant the desired order, when I consider that it was only last night that they were presented to the Court. I think we cannot proceed to make an immediate order, and I must say I think the petitioners are themselves to blame for not putting forward their allegations sooner.

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I therefore concur entirely with your Lordships in refusing to make any order to-day for the supervision of this company. If the parties want any further investigation into these allegations, I suppose the petition might stand over, but if, as I apprehend, the petitioners' whole interest was to secure an immediate order to-day, we may probably be able at once to dismiss the petition.

**LORD LEE.**—I also am for refusing this petition. The question is whether cause has been shewn why the Court should interpose under the sections of the Companies Acts to which we were referred. The burden of shewing cause is on the petitioners; and I am clear that on the petition, as originally brought, no sufficient cause was shewn. As to this new minute, I think the allegations in it are not so stated that we should deal with them as relevant for inquiry. I think we must consider them in the light of the circumstances under which they have been brought forward. I do not think the petition should be allowed to stand over in any view, but that it should now be refused.

**LORD YOUNG** was absent.

THE COURT refused the petition.

THOMAS CARMICHAEL, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

**No. 28.** **WILLIAM MITCHELL**, Petitioner (Respondent).—*Murray—Shaw.*  
Nov. 22, 1888. **WILLIAM MOTHERWELL**, Respondent (Reclaimer).—*Sir Charles Pearson—Low.*  
Mitchell v. Motherwell. **JOHN LAURIE**, Petitioner (Respondent).—*Murray—Shaw.*  
**WILLIAM MOTHERWELL**, Respondent (Reclaimer).—*Sir Charles Pearson—Low.*

*Bankruptcy—Sequestration—Recall—Affidavit—Specification of securities—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 22.*—A advanced a sum of £4300, for the purpose of carrying on a limited company, and by bond he took the company and its six directors, of whom he was one, bound to repay the loan. Thereafter A charged B, one of the six co-obligants, to refund the £4300, under deduction of one-sixth part for which he (A) was liable, and the charge having expired without payment, A thereupon obtained sequestration of B's estates. A's affidavit, produced along with the petition for sequestration, set forth the amount (£3583, 6s. 8d.) of the debt and the names of the company and of the other five directors as co-obligants. It did not mention an inhibition which A had used against B, but which was admittedly valueless, and had attached nothing. A petition by B for recall of the sequestration was thereupon presented, founding upon the 22d section of the Bankruptcy (Scotland) Act, 1856,\* on the grounds (1) that

\* The Bankruptcy (Scotland) Act, 1856, sec. 22, provided—" . . . Such oath in the case of a creditor residing within the kingdom of Great Britain and Ireland, shall be taken by him before a Judge Ordinary, Magistrate, or Justice of the Peace, to the verity of the debt claimed by him, and he shall in such oath state what other persons, if any, are, besides the bankrupt, liable for the debt, or any part thereof, and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect."

the affidavit did not state that he himself was liable as a co-obligant for the whole debt; and (2) that it failed to specify a security held by A over the bankrupt estate. The Court repelled the first objection, and, as regarded the second, *held* that as the objection was one which did not appear *ex facie* of the proceedings, they had a discretion as to recalling the sequestration, and that in the present case there was no ground for recalling it.

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*Observations on Ballantyne v. Barr*, 5 Macph. 330.

By bond, dated 15th April and recorded 4th June 1884, the Rawyards Coal Company, Limited, and William Mitchell, William Motherwell, Andrew Aitken, John Motherwell, John Laurie, and George Walkinshaw, the directors of the company, bound and obliged the company, and themselves as individuals, and their respective heirs, executors, and successors, all jointly and severally, without the necessity of discussing them in their order, to repay to William Motherwell the principal sum of £4300 which they had borrowed from him, with interest and penalties thereon. The sum of £4300 contained in that bond bore to be the *cumulo* amount contained in three prior bonds for £2000, £1800, and £500 respectively, granted in favour of the same person by the company and its directors.

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1st Division.  
Lord Lee.  
M.

On 18th July 1888 William Mitchell was charged at the instance of William Motherwell, under the bond above narrated, and warrant thereon, to pay the principal sum of £4300 therein contained, under deduction of the sum of £716, 13s. 4d., being the charger's one-sixth proportion thereof as co-obligant.

The charge having expired without payment, and Mitchell having been thereby rendered notour bankrupt, Motherwell presented a petition to the Lord Ordinary on the Bills praying for sequestration of Mitchell's estate. He produced at same time an extract of the bond and an affidavit,\* as provided for in the Bankruptcy Act, 1856. Sequestration was awarded on 9th August 1888 by the Lord Ordinary on the Bills (Shand).

Mitchell thereafter presented a petition in the Bill-Chamber for recall of the sequestration, in which he stated that he was not insolvent, and had no creditors unless Motherwell was one. The petition further set forth;—"The petitioner avers that the oath made by the said William Motherwell in support of his application for the petitioner's sequestration does not comply with the statutory requisites prescribed in the 22d section of the Bankruptcy (Scotland) Act, 1856, quoted above. In particular, it does not specify the securities which the said William Motherwell held over the estates of the petitioner and his co-obligants, and it does not specify all the co-obligants. The said William Motherwell at the date of the

\* The affidavit bore that Mitchell was justly due and resting owing to the deponent the sum of £3583, 6s. 8d., being the balance, after deducting £716, 13s. 4d. (being the sixth part for which the deponent was liable), of the sum of £4300 contained in the bond above mentioned granted by the company and its directors.

The affidavit further bore;—"Depones, That no part of the said debt has been paid or compensated, and that the deponent, besides the said William Mitchell, holds the said Rawyards Coal Company, Limited, the said Andrew Aitken, John Motherwell, John Lawrie, and George Walkinshaw, liable for the said debt. Depones, That the deponent also holds as security to the extent of the said sum of £500, and interest and penalties corresponding thereto, the security created by the said bond and disposition in security over (first) All and Whole that piece of ground" [the subjects were described]. "Depones, That the deponent holds no other obligants or securities for the said debt than those above specified.—All which is truth, as the deponent shall answer to God."



No. 28. said oath held, and still holds, the security of an inhibition, duly executed on 4th June 1888, over the estates of the petitioner, and he also holds the security of an inhibition, duly executed on or about the same date, over the estates of the said John Laurie, a co-obligant, and he does not in the said application for sequestration specify either of the said securities. The creditor is the said William Motherwell, and he is also debtor in the said bond of 15th April 1884 for the whole debt—the parties being liable *singuli in solidum*. The said William Motherwell, therefore, was not entitled to charge the petitioner for payment of the whole debt, under deduction only of the said William Motherwell's *pro rata* share. A *pro rata* share may not be the ultimate liability of the petitioner or the said William Motherwell.

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“Further, the said Rawyards Coal Company, Limited, is perfectly solvent, and thus quite able to pay its debts, and the said William Motherwell's remedy was to take payment from the real debtor.

“So far as regards the said William Motherwell's claim to recover the debt, it is extinguished *confusione*.”

Motherwell lodged answers to the petition, in which he, *inter alia*, admitted that he had served letters of inhibition against both Laurie and Mitchell, but he explained that no further security was thereby created, and no advantage was obtained therefrom. He admitted that Mitchell's other debts were of small amount, but stated that the company was insolvent. He stated the following plea in law;—The petition for sequestration, and the procedure therein, having been regular and proper, and in accordance with the provisions of the Bankruptcy Acts, and the warrants for the decree of sequestration having been those required by the said Acts, the petition should be refused.

Motherwell had also applied for and obtained under similar circumstances sequestration of the estates of John Laurie, another of the above-mentioned co-obligants in the £4300 bond, and a petition for recall of this sequestration was presented by Laurie, and heard at the same time as that at the instance of Mitchell. The averments and pleadings of the parties were in identical terms, with this exception, that it appeared that in May 1888 Laurie had executed a general trust-conveyance, and made over his whole effects to trustees for certain purposes, and that Motherwell averred that that conveyance had been granted in fraud of his rights and of those of Laurie's other creditors.

On 6th September 1888 the Lord Ordinary on the Bills (Lee) pronounced this interlocutor:—“ . . . In respect that the affidavit of the petitioning creditor is not conform to the requirements of the Bankruptcy (Scotland) Act, 1856, recalls the sequestration of the estates of the petitioner William Mitchell, awarded by the Lord Ordinary on 9th August 1888: Prohibits any further proceedings therein: Appoints the judgment of recall to be entered in the Register of Sequestrations, and marked on the margin of the Record of Inhibitions, and decerns; and, in the circumstances, finds no expenses due.”\*

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\* “OPINION.—Although the sequestration was competently awarded, seeing that notour bankruptcy was proved, and that the affidavit produced with the petition was *prima facie* sufficient, the objections urged in the petition for recall must be considered in the light of the documents now produced, and of the undisputed averments.

“So considered, it appears (1) that the respondent, besides being creditor in the bond, was one of the joint obligants for the debt of the Rawyards Coal Company along with the petitioner and four others; and (2) that the answers contain no denial of the allegation that the respondent (the petitioning creditor)

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The interlocutor in Laurie's case was in similar terms.

The respondent Motherwell reclaimed in both cases.

Argued for him;—The objections taken to the oath by the petitioner were three in number—(1) It was said that it did not set forth that the petitioning creditor was himself "liable for the debt," and therefore that it did not state in terms of the 22d section of the Bankruptcy Act, 1856, "what other persons are besides the bankrupt liable for the debt." (2) It was said that the oath did not specify an inhibition which had been used on the petitioner's estate, and that there had been a failure in this respect also to comply with the provisions of the 22d section of the Act. (3) It was further said that there was no debt.

The case of *Gardner v. Woodside*<sup>1</sup> was inapplicable to the facts of this case. Two rules had been established in regard to such objections as were here raised. In the first place, if some statutory requirement had been omitted *ex facie* of the oath, the sequestration fell to be recalled. In the second, if the proceedings were *ex facie* valid, but something had not been specified or produced which ought to have been, then the discretion of the Court came in, and the question was what was right in the interest of all parties concerned.<sup>2</sup> In regard to the first and third objections, which were *ex facie* of the oath, both

held an inhibition which he had used on 4th June against the present petitioner and another of the joint obligants.

"It was incumbent on the respondent, under section 22 of the statute, to state in his oath 'what other persons, if any, are liable for the debt, or any part thereof,' and also to specify 'any security which he holds over the estate of the bankrupt, or of other obligants.' It appears to be settled that an inhibition is a security which ought to be specified.

"My opinion is that the affidavit in this case did not comply with the requirements of the statute. It is framed on the assumption, which I think erroneous, that the respondent's liability as one of the joint debtors was limited to one-sixth. It states that, for the amount which the bankrupt was charged to pay, the respondent held no other obligants than the Rawyards Coal Company and the four other obligants named. But he himself was an obligant exactly in the same position as all the others.

"I think that it was a mistake on the part of the respondent to assume that because he was the creditor in the bond, he was entitled to deal with himself as one of the joint and several obligants in any other way than he deals with the rest. He himself was an obligant for every part of the debt, just as much as the others. Yet this is not stated. In fact the oath by its terms leaves it to be understood that he was under no liability after deducting one-sixth.

"Further, the affidavit is defective in not specifying the inhibition, the use of which is not denied.

"These omissions in the affidavit are not mere technicalities. They give rise to a substantial objection. For, whether the Rawyards Coal Company is insolvent or not, it puts the petitioner in a very disadvantageous position to be forced to work out his rights of relief as a sequestrated bankrupt. It is admitted in the answers that his other debts are of small amount. The respondent may have been within his legal rights in giving the petitioner a charge to pay under the bond. But he has not satisfactorily explained either why he did not mention himself as liable for the whole debt, or why he did not proceed against the proper debtor, viz., the Rawyards Coal Company. To use the process of sequestration for the purpose of gaining an undue advantage over a co-obligant, is to abuse it; and there is sufficient authority to shew that the Court even where the proceedings are *ex facie* regular, can prevent this—(*Gardner v. Woodside*, 24 D. 1133)."

<sup>1</sup> *Gardner v. Woodside*, June 24, 1862, 24 D. 1133, 34 Scot. Jur. 564.

<sup>2</sup> *Ballantyne v. Barr*, Jan. 29, 1867, 5 Macph. 330.

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No. 28. Mitchell and Lawrie were co-obligants along with the petitioning creditor, and the whole history of the transaction was given in the oath. Nov. 22, 1888. Mitchell v. Motherwell. It was unnecessary for the petitioning creditor to say that he was liable to himself for the debt. He was entitled to demand the whole minus his own one-sixth part, and to leave the other co-obligants to work out their relief. The respondents said that the debt was extinguished *confusione*. That was admitted so far as his one-sixth share was concerned, and if it had not been so, he might have charged any one of the co-obligants for the whole debt. In regard to the second objection, although it was true that the inhibition had been used, and had not been specified in the oath, it had attached nothing. The respondents did not state that there was any heritable estate which it could have attached, and in point of fact there was none. Further, since the Titles to Land Act, 1868, sec. 157, inhibition did not cover *acquirenda*. That was enough to dispose of the objection.<sup>1</sup> The case of *Hay*<sup>2</sup> was different, because there the inhibition was worth something. *Campbell's*<sup>3</sup> case had no application, because there the sequestration was recalled, on the ground that the statements in the affidavit were negatived by the statements in the document of debt. In *M'Ewan's* case<sup>4</sup> there were securities of considerable value which had not been specified in the affidavit, and on that ground the sequestration was recalled. It was therefore different from the present case. Further, the objections now urged, in so far at least as they were *ex facie* of the oath, were such as ought to have been stated and disposed of when the sequestration was granted, and as matter of fact the reasons now adduced for recall had been urged, and repelled by the Lord Ordinary (Shand), when he pronounced the interlocutor awarding sequestration on 9th August 1888.

Argued for the two petitioners ;—There had been a failure to comply with the provisions of the 22d section of the Bankruptcy Act, 1856, in two respects, both of which were grounds for recalling the sequestration. 1. Upon the face of the oath there was a misstatement as to the "other persons besides the bankrupt liable for the debt." The deponent ought to have stated that the persons liable were the co-obligants, and that he was himself liable along with them. 2. The inhibitions used by the deponent over the estates of both petitioners had not been specified. In the question of awarding and recalling sequestration, the Court were not called upon to exercise any discretion, as the reclaimer suggested, and all considerations of equity or expediency must be laid aside.<sup>5</sup> But if the question were one of discretion for the Court, one co-obligant in a debt of the kind in question ought not to be allowed to oppress another, which was the effect of the present proceedings. The view contended for by the reclaimer proceeded upon a misapprehension of *Barr's* case,<sup>6</sup> founded upon a dictum at the close of Lord Benholme's opinion in that case, which was not sound. In *Barr's* case the sequestration was recalled, because the claim of the petitioning creditor was not vouched, which was

<sup>1</sup> *M'Kay v. M'Kay's Creditors*, Nov. 19, 1864, 3 Macph. 74, 37 Scot. Jur. 38; *Learmonth v. Patton*, July 18, 1845, 7 D. 1094, 17 Scot. Jur. 564.

<sup>2</sup> *Hay v. Durham*, Feb. 5, 1850, 12 D. 676, at p. 683, 21 Scot. Jur. 583.

<sup>3</sup> *Campbell v. Myles*, May 27, 1853, 15 D. 685, 25 Scot. Jur. 413.

<sup>4</sup> *M'Ewan v. Cleugh*, Dec. 7, 1842, 5 D. 273, 15 Scot. Jur. 106.

<sup>5</sup> *Joel v. Gill*, June 10, 1859, 21 D. 929, L. J.-C. Inglis, p. 937; *Campbell v. Myles*, May 27, 1853, 15 D. 685, 25 Scot. Jur. 413; *Kinnes v. Adam & Son*, March 8, 1882, 9 R. 698; *M'Ewan v. Cleugh*, Dec. 7, 1842, 5 D. 273, 15 Scot. Jur. 106.

<sup>6</sup> *Ballantyne v. Barr*, 5 Macph. 330.

not a matter for the discretion of the Court. The distinction which ought to be drawn was between proceedings (1) where the statutory requisites had not been complied with; and (2) where there having been no failure of the statutory requirements the sequestration fell to be recalled upon other grounds, *e.g.*, where there were competing sequestrations. The authorities upon questions which had arisen regarding the voting for trusteeships were equally good in a question relating to the construction of the oath of the petitioning creditor.<sup>1</sup> The objections in both cases were no doubt purely technical, but the statute said that they must be enforced, and the Lord Ordinary was therefore right in recalling this sequestration.

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At advising,—

**LORD PRESIDENT.**—The Lord Ordinary has recalled this sequestration upon two grounds, which require to be considered separately, for this among other reasons, that one of them is said to appear *ex facie* of the proceedings themselves, and the other depends upon a matter of fact which is not disclosed upon the proceedings.

As regards the first of these two grounds, the complaint is that the petitioning creditor has failed to comply with the provisions of the 22d section of the Bankruptcy Act, 1856, which requires that the oath of the petitioning creditor shall “state what other persons, if any, are besides the bankrupt liable” for the debt which the petitioning creditor claims as due to him; and accordingly the inquiry is whether, on the face of the affidavit, it appears that persons beyond those specified in the affidavit are liable to pay the debt claimed. The bond out of which the claim arises is a peculiar document, and requires careful consideration. The object of it was to raise money for the Rawyards Coal Company. The company had no credit, and its directors interposed their personal security to carry it on. The way in which this was done was that William Motherwell, one of the directors, advanced the money required, the amount being £4300, and the bond bears that the money was advanced by him, and the obligation is to repay it to him. William Motherwell became one of six co-obligants, who were directors of the company, and in a question with his co-obligants he is only liable in payment of one-sixth part of the debt, being £716, 13s. 4d., and accordingly the debt to which he makes affidavit is £3583, 6s. 8d. That is the debt which the petitioning creditor is bound to specify in his oath, as provided by the 22d section of the statute, and he is further required to state in the affidavit “what other persons, if any, are besides the bankrupt liable for the debt.”

I think that upon a true construction of the effect of the bond Motherwell is not liable for any part of the £3583, 6s. 8d. He cannot be held to be liable to himself for any part of it, and in a question with his co-obligants he is only liable for the £716, 13s. 4d., which forms no part of the sum claimed in the affidavit. Upon these grounds it is clear that there is no one liable for the debt which is claimed whose name is not mentioned in the affidavit. That disposes of the first objection, which, if it had been well founded in point of fact, would have been quite a relevant objection, and could not have been resisted, because a failure to comply with the provision of the statute that the names of the debtors shall be set forth in the affidavit,—a failure which would appear *ex facie* of the document,—would, I think, be fatal to it.

<sup>1</sup> Wright v. Corrie, Nov. 19, 1842, 5 D. 164; M'Ewan v. Cleugh, 5 D. 273.

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The second objection is of a different kind. It is that the petitioner fails to specify in his oath "a security which he holds over the estate of the bankrupt or of other obligants." In point of fact, it is said that he held a security which might be more or less valuable, but which it is admitted he used over the estate of the bankrupt, viz., an inhibition, of which there is no mention in the affidavit. In regard to this objection, it is not one which appears *ex facie* of the document. It requires to be averred as matter of separate and extrinsic allegation, and if necessary to be proved, and it therefore stands in a totally different position from the other, which I have already considered.

I should like to say at once that I hold the case of *Barr v. Ballantyne* to decide (and this does not depend upon an *obiter dictum*, but is of the essence of the judgment) that there are two classes of objections which may be taken to the validity of the affidavit which must accompany a petition for sequestration, and which if substantiated afford good reasons for recalling the sequestration. The first class appears *ex facie* of the proceedings, but the second requires to be established otherwise. In the first the decision in the case of *Barr* establishes that the Court is bound to recall the sequestration if the objection is verified, and there is shewn to have been a failure to comply with the statutory requisites, having regard only to the proceedings themselves. In the second the Court is called upon to exercise its discretion as to recall. The reason for this distinction is very obvious. In the latter case, although for example there has been a failure to specify in the oath some security which the petitioning creditor may hold over the estate of the bankrupt, or of some other obligant, it may turn out that that failure is of the very slightest importance, and that no one has been prejudiced thereby. In the former case, when the petition for sequestration has been presented, with the affidavit and vouchers of the petitioning or concurring creditor, which are *ex facie* perfectly good and sufficient, the other creditors are entitled to rely upon the sequestration being available to them. But if the proceedings are liable to be recalled because of some latent objection, there is no security for these other creditors who are standing by and going to avail themselves of the sequestration that it will go on. These other creditors are entitled to rely upon the sequestration being good, provided the proceedings are *ex facie* regular. I do not mean to say that it is not open to the bankrupt to object on the ground that the debt of the petitioning creditor is bad; but if such is the fact, the Court would recall the sequestration in the exercise of its discretion, and not because of a failure to comply with the statutory provisions. Here there has been no failure to comply with the statutory provisions. The oath bears to be quite in conformity with the requisites of the statute, and accordingly the case belongs to that class where the Court in the exercise of its discretion is entitled to look to the circumstances of the case, and to the merits of the objection, and where if they are satisfied that the objection is worthless, and that the bankrupt will not suffer prejudice, they are entitled to disregard it altogether.

The inhibition which has admittedly been used in the present case by the reclaimer is worth nothing, and has secured nothing; and it is not alleged that the bankrupt is in possession of anything which it could cover. Even if it had secured something that would not have led to a dismissal of the petition for sequestration, nor would the proceedings have necessarily been thereby invalidated. The matter would have been rectified in the course of the sequestration.

On these grounds, I do not think that in the exercise of the discretion which is vested in us, we can give effect to the second objection which has been urged.

LORD MURK.—I am of the same opinion. Two objections have been urged in favour of the recall of this sequestration. The first has regard to the amount of the debt as deponed to by the respondent, who was the petitioning creditor, and is said to arise *ex facie* of the affidavit. But I am of opinion with your Lordship that this objection is not well founded, as there is, I think, a substantially correct disclosure in the affidavit, as your Lordship has explained, of the position in which the respondent stands under the bond towards the other parties who were obligants along with him.

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The second objection is that there was a failure to specify a security held by the respondent over the bankrupt estate, as required by the 22d section of the Bankruptcy Act, 1856, and it is said that this failure consisted in an omission to specify an inhibition which was held over the estate. It is admitted that this inhibition was used, but it is said that it was not worth much, if anything, as a security. According to the strict interpretation of the words of the statute however, I am disposed to hold that it ought to have been mentioned in the oath. The decisions, I think, go that length, for an inhibition is a security in the sense of the statute, and I do not think the circumstance that it was of little value is sufficient to justify the omission. In one of the cases which have been mentioned,<sup>1</sup> the security, which was an inhibition, was valued at only £3, 16s. 1d., and yet the Court held it should have been specified in the affidavit. But while I agree with the Lord Ordinary that it ought not to have been omitted from the affidavit, I think it is a matter for the discretion of the Court, having regard to the decision in the case of *Barr v. Ballantyne*, whether the sequestration should on that account be recalled; and I agree with your Lordship that this omission is not of a description which makes it necessary for us to adopt that course.

LORD SHAND.—I concur with your Lordships.

It appears to me that the passage which occurs in the case of *Barr v. Ballantyne* at the close of Lord Benholme's opinion, 5 Macph. 334, supplies the rule to be applied in questions of this kind. His Lordship there says,—“I am anxious to state my view on this matter, that where there is no nullity *ex facie* of the proceedings, though nullity may be made out on investigation, the Court may exercise its discretion as to recalling or not recalling the sequestration; but where an objection founded on the statute appears *ex facie* of the proceedings the Court cannot exercise any discretion, but is bound to recall.” The provisions of the 29th and 30th sections of the Bankruptcy Act, which direct the Lord Ordinary or the Sheriff to give sequestration, plainly indicate that the procedure is to be of a summary nature. If the petition is presented by the debtor himself, or with his consent, the Judge is “forthwith” to grant sequestration. If the petition is not presented with his consent, the bankrupt must on citation shew that sequestration cannot competently be granted, and if he fail to do so and does not pay the debt, the Judge is to grant sequestration, and by section 31 it is provided that the deliverance awarding sequestration shall not be subject to review. The statute does not contemplate or warrant the making up of records, or other detailed procedure as between persons seeking and opposing sequestration. In cases which raise such a question as whether the bankrupt is subject to the jurisdiction of the Court, or whether notour bankruptcy has been constituted—there must be some sort of investigation. Beyond that, if

<sup>1</sup> Hay v. Durham, 12 D. 683.

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Here it is not disputed that the affidavit was in all respects *ex facie* regular, subject only to this observation, that it is said the petitioner was a creditor of himself as well as of the other obligants, and that therefore he ought to have mentioned himself as one of the obligants whom he held liable to himself for the debt. The debt deponed to in the affidavit amounts to £3583, 6s. 8d. The affidavit bears that certain other persons named besides the bankrupt are obligants for the debt, and that the deponent holds no other obligants, and no securities for the debt beyond one heritable security, which is specified. Everything is *ex facie* regular, and sequestration was properly granted. Applying the dictum of Lord Benholme, we should refuse, I think, to recall the sequestration, unless indeed it can be shewn that in justice to the bankrupt or the other creditors it ought to be recalled.

The Lord Ordinary has thought that in justice to the bankrupt it ought to be recalled. That view, I think, has been shewn to be erroneous. The bankrupt, Laurie, has attempted to put away his means and effects, and for that reason it is proper that a trustee for creditors should have a title under the sequestration to reduce the deeds granted. But even apart from this specialty, I think there is nothing in the position of the bankrupt which would entitle him to say that the sequestration should be recalled. A creditor is entitled to use the diligence of sequestration against a debtor who cannot meet his debt.

It is said that the debt is overstated in the affidavit. But assuming that it may turn out to be overstated, or subject to deduction, or repetition of a part, because it may be eventually found that certain of the obligants cannot pay their shares, and that the creditor himself must bear a share of the deficiency, yet if it appears that in any view there is a debt of £50, that is sufficient to warrant sequestration, and I should regret if the practice to give effect to this rule were altered. In any possible view a large sum is due by the debtor, even supposing the other obligants could pay nothing. The two points pleaded are technical. First, it is said the creditor should have stated that he held himself liable for part of the debt. Apparently he held he was not so liable, and your Lordship has indicated an opinion favourable to that view. That is not, I think, clear. But really the affidavit discloses the whole facts on which the question turns, and the affidavit does not preclude the question being raised and properly determined in the sequestration, it may be in accordance with the bankrupt's contention.

It is further said that there has been an omission to make mention of a certain security held by the creditor, that an inhibition has been used, and that it ought to have been stated and valued in the affidavit. I am not prepared to say that a creditor is bound to mention a security of that kind where the debtor has no heritable property. It must be borne in mind that inhibition is no longer available against future acquisitions of estate. It is not ever now said that the debtor had any heritable property. If a creditor uses an arrestment and it attaches no funds, is he bound to specify the arrestment as a security? I think not. He has attempted to get a security but failed, and an inhibition which affects no heritage is not in my view a security. Supposing however, that the debtor has heritable property, the question comes to be whether the neglect to mention the use of an inhibition is a sufficient reason

for recalling the sequestration. No prejudice to anyone has been done by the absence of notice of the inhibition, and none by the failure of the creditor to refer to his own obligation to share in a deficiency caused by any obligant failing ultimately to pay his share of the debt. No. 28.  
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In the matter of recalling a sequestration, the Statute of 1856 has no provisions relative to the ground on which a sequestration should be recalled. I think the views expressed by the Judges in the case of *Barr v. Ballantyne* are sound, and I am for giving effect to them. If the debtor meant to contest his liability for the debt he should have brought a suspension of the charge, which he did not do. A sequestration once granted is very important in its effects from the date of the first deliverance under section 42 of the statute, and the provisions of section 107, and the following sections relating to diligence and prescription. Creditors may very reasonably rely on a sequestration duly obtained on an affidavit and claim in all respects *ex facie* regular and duly vouched, and indeed are in such circumstances, I think, precluded from having a second sequestration where one has been already granted. It would be an injustice to them to recall the sequestration on any technical grounds, or on any grounds which do not go to the root or substance of the petitioning creditor's claim, or which at least go the length of shewing that an injustice has been done to the bankrupt in awarding sequestration. That is certainly not the case. I think the Lord Ordinary's interlocutor should be recalled, and the petition refused.

LORD ADAM was absent.

THE COURT recalled the Lord Ordinary's interlocutors in both cases, and refused the petitions.

THOMAS CARMICHAEL, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

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REV. JAMES C. JACK, Petitioner (Respondent).—*Sir Charles Pearson—Law.*

MISS MAGGIE SIMPSON, Compearer (Appellant).—*W. G. Miller.*

*Poiniding—Cessio—Appeal—Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), sec. 26.*—A Sheriff having refused to a poiniding creditor a warrant to sell under sec. 26 of the Personal Diligence Act, 1838, on the ground that the debtor had applied for the benefit of cessio, the creditor appealed under sec. 65 of the Court of Session Act, 1868. *Held* that the creditor was entitled to a warrant of sale.

*Process—Extract—Sheriff Court Act, 1876 (39 and 40 Vict. cap. 70), sec. 32.*—Sec. 32 of the Sheriff Court Act, 1876, provides that no extract of any interlocutor in the Sheriff Court "shall be issued before the expiration of fourteen days from the date thereof, unless the Sheriff or Sheriff-substitute who pronounced the same shall allow the extract to be sooner issued."

An interlocutor in a Sheriff Court allowed "extract of this decree to go out upon caution being found," and extract was taken on the day after the interlocutor was issued. An objection having been taken to the competency of an appeal against the Sheriff's interlocutor, *held* that the words quoted above could not have the effect of restricting the time for appealing, and could not mean more than that extract was not to go out until after the fourteen days, and then only upon caution being found.

*Cessio—Minister's stipend—Assignment to creditors.*—The emoluments of an assistant and successor to a parish minister amounted to £100 a-year. He applied for cessio, his debts being £1100. *Held* that he was entitled to the benefit of cessio on his assigning £20 a-year to his creditors.

*Scott v. Macdonald*, March 5, 1823, 1 Shaw's App. 363, *followed*.



No. 29. ON 31st May 1888 the Sheriff-substitute of Forfarshire at Forfar (Robertson) granted decree in absence for £1000 in an action of damages for breach of promise of marriage at the instance of Miss Maggie Simpson against the Rev. James C. Jack, minister of Kingoldrum, near Kirriemuir.

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The defender having been charged upon 13th June following on the warrant contained in the decree, the pursuer thereafter on 23d June executed a poiding of the defender's goods (which was reported to the Sheriff on 27th June following), and applied for warrant to sell the poided effects.

On 6th July following Jack presented a petition for cessio in the Sheriff Court at Forfar, stating that owing to the expired charge on the above decree he was notour bankrupt, and the Sheriff-substitute on the same day pronounced an interlocutor granting a warrant to cite creditors.

Jack thereupon lodged a caveat in the poiding, and on 16th July the Sheriff-substitute (Robertson) pronounced an interlocutor refusing *in hoc statu* the crave for a warrant to sell.\*

On 31st July 1888 he pronounced this interlocutor in the cessio process:—"Having taken the deposition of the pursuer,† James Craig Jack . . . Finds him entitled to the benefit of the process of *cessio bonorum*, and he having taken the statutory deposition, grants the benefit of the process of *cessio bonorum*, and decerns, assigns, and adjudges the pursuer's moveable property to and in favour of James Forrest junior, solicitor, Kirriemuir, as trustee for behoof of the pursuer's whole creditors, without prejudice to the pursuer granting a disposition *omnium bonorum* if required," &c., "and allows extract of this decree to go out upon caution being found."‡

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\* "NOTE.—This poiding of the Rev. Mr Jack's effects was reported on the 27th June. A warrant to sell would have been granted thereafter as a matter of course, but since that date Mr Jack has been declared to be notour bankrupt, and has applied for cessio. This makes his estate litigious, and equalises all diligences within sixty days prior to the bankruptcy, and within four months thereafter. The trustee in the cessio will use diligence for behoof of all the creditors, so that the poiding creditor will gain nothing by selling the effects now. The trustee will sell to greater advantage, and with less expense to all concerned. I decided the same point a few years ago, and Lord Trayner, who was then Sheriff-principal, affirmed the judgment."

† From the state of affairs lodged by Jack it appeared that his assets in July 1888 were £73, 16s. 6d., and his liabilities, including his debt of £1009, 12s. to Simpson, were £1114, 12s. His salary as assistant and successor to the minister of Kingoldrum was £91 per annum. He lived in the manse, and the glebe and cottages were worth £14 a-year.

At Jack's examination no other creditor but Simpson appeared. Jack stated in his deposition that he expected to receive the whole emoluments of the parish whenever the present incumbent ceased to have anything to do with it. The stipend of the parish was £172, 12s. 5d.

‡ "NOTE.—I was asked to make it a condition of cessio being granted that the reverend petitioner should hand over a certain proportion of his stipend to his creditors. I can see no authority for this in the Cessio Acts. Mr Goudy, in his book on Bankruptcy, page 451, seems to think that there is no way of recovering such estate for the benefit of creditors in cessios under the Debtors Act, and I certainly was not referred to any case where this had been done.

"Under the older bankruptcy law there is a case where a clergyman's stipend was conveyed to his creditors after leaving him £95, 6s. 1d. as *beneficium competentie*, 3 Shaw, 195, *A B v. Sloan*; and possibly, if I were to convert this cessio into a sequestration under the 11th section of 44 and 45 Vict. c. 22, the trustee might attach part of the reverend petitioner's salary.

Caution was found on 1st August, the day following, and the decree No. 29. was immediately extracted.

Simpson appealed in both cases—in the latter upon 3d August—and the Sheriff (Comrie Thomson), on 4th October, dismissed the appeals.\*

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She then appealed in both cases to the Court of Session.

Argued for her;—1. *In the poinding*—The appeal was competent.<sup>1</sup> Under the Personal Diligence Act, 1838, section 26, the Sheriff was bound to have given a warrant to sell the poinded goods, unless “lawful cause” was shewn to the contrary. “Lawful cause” referred to such questions as the regularity of the proceedings, and the applicant’s right to a warrant.<sup>2</sup> If warrant of sale were not granted here, there would be a dead-lock. The appellant was the only poinding creditor, and the only person interested in the diligence. As matter of fact the respondent had become notour bankrupt on the expiry of the charge on the extracted decree on 20th June 1888, and not as the Sheriff seemed to hold when he presented the petition for cessio. 2. *In the cessio*—(1) The appeal was not incompetent. The words “allows extract to go out upon caution being found” were mere surplusage, and were not intended to override the statutory provision contained in the 32d section of the Sheriff Court Act, 1876. They did not mean that extract was to be allowed before the expiration of fourteen days; if that had been so, the Sheriff would have specified the number of days within which extract was to be permitted. Great injustice would result from the construction put upon the words by the respondent, and the effect would be that appeal would be altogether barred, which could never have been contemplated by the Legislature.<sup>3</sup> (2) Upon the merits, the recent

This step would entail considerable expense to the creditors, and might not avail them after all, for in the case *Barron v. Mitchell*, 8 R. 933, it is evident, from a perusal of the Lord Ordinary’s interlocutor, that they would be met with a difficulty, and, looking to the small sum, if any, that would be left after leaving the petitioner a competent livelihood, I am unwilling to take this step. For if the Court in 1824 thought a clergyman could not live decently under £95, 6s. 1d. a-year, probably now that the expense of living has increased, a larger sum would be allowed. If so, there would be little or nothing over for the creditors. The petitioner is only an assistant and successor in the parish, and his whole present means are required to keep him decently in his clerical position. Should he apply for his discharge hereafter, it will be open for his creditors to object.”

\* The note to the interlocutor in the poinding case was,—“NOTE.—I express no opinion as to the effects of a decree of cessio in equalising diligences. The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act. The only interest opposed to the course which has been followed is that of the poinder, who has a completed diligence. But his rights, including his claim for expenses, are sufficiently secured by the provisions of the statutes.”

The note to the interlocutor in the cessio case was,—“NOTE.—I am of opinion that it is not competent at this stage of process of cessio to entertain the proposal that as a condition of granting the benefit of that process, the petitioner should hand over a certain proportion of his stipend to his creditors. I do not say whether his refusal to do so may be a good ground for refusing or delaying his discharge.”

<sup>1</sup> *Clark, &c., v. Hinde, Milne, & Co.*, Dec. 18, 1884, 12 R. 347 (Lord Shand, 354).

<sup>2</sup> *Mackay’s Practice*, ii. 211; *Bell’s Comms.* ii., 596 (7th edn. 485); *Bankruptcy and Cessio (Scotland) Act*, 1881 (44 and 45 Vict. cap. 22), sec. 11.

<sup>3</sup> *Act of Sederunt*, Dec. 22, 1882, sec. 3.

No. 29. Cessio Acts had not affected the conveyance of the property of the debtor. A cessio imported a *dispositio omnium bonorum* just as much now as under the old law.<sup>1</sup> Ministers' stipends had been held to be subject to arrestment, and in the case of *Macdonald* a minister had been found bound to assign half of his salary as a condition of his receiving the benefit of cessio.<sup>2</sup> So, too, a half-pay officer had had to give up the half of his pension as a condition of his obtaining cessio.<sup>3</sup> Here the respondent had a stipend of £106 a-year and a manse, and in these circumstances the cessio ought either to be refused or to be granted only conditionally on the respondent assigning a portion of his stipend to his creditors.

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Argued for the respondent;—1. *In the poiding*—The duty of the Sheriff-substitute in carrying through the poiding was merely ministerial<sup>4</sup> and his interlocutor of 16th July refusing the warrant to sell was not subject to review. There was really no process, but if there was, the judgment was not a final one, and was not appealable. Before the application for cessio, the debtor was notour bankrupt, and all his creditors were then entitled to come in and share in the benefit of the existing diligence.<sup>5</sup> The object of a cessio was to give a debtor immunity from diligence. 2. *In the cessio*—(1) The appeal was incompetent, because as matter of fact caution was found and the decree extracted before the appeal was taken. The appellant ought to have availed herself of her opportunity to appeal sooner.<sup>6</sup> (2) On the merits, the Court ought to take into account the fact that the respondent was only assistant and successor to the parish minister, and that the expenses of living were much increased since the date of the authorities which had been cited on the other side.

At advising,—

LORD PRESIDENT.—Taking the appeal in the poiding first, the diligence proceeded upon an extract decree for the sum of £1000. The charge following thereon was given upon 13th June, and it expired on the 20th of the same month, and Mr Jack, the defender, accordingly on that day became notour bankrupt. His creditor then proceeded to execute a poiding, and a certificate of execution was returned to the Sheriff in common form, and was reported, by the Sheriff-officer who executed it, on 27th June. Thereafter the Sheriff-substitute appointed parties' procurators to be heard on a motion for a warrant to sell, which was the next step which would follow as a matter of course, unless any reason was adduced for suspending that warrant. After hearing the creditor and the debtor, the Sheriff-substitute *in hoc statu* refused a warrant to sell, and the reason he assigned for doing so is put by him thus,—“A warrant to sell would have been granted thereafter as a matter of course, but since that date Mr Jack has been declared to be notour bankrupt, and has applied for cessio. This makes his estate litigious, and equalises all diligences within sixty days prior to the bankruptcy, and within four months thereafter. The trustee in

<sup>1</sup> Debtors Act, 1880 (43 and 44 Vict. cap. 34), sec. 7; Bankruptcy and Cessio Act, 1881 (44 and 45 Vict. cap. 22); Bell's Comms. ii. 5th edn. 594.

<sup>2</sup> Connell on Tithes, ii. 99; Dove Wilson's Sheriff Court Practice, 673; Scott v. Macdonald, Jan. 1715, 1 Shaw's Appa. 362; Learmonth v. Paterson, Jan. 21, 1858, 20 D. 418.

<sup>3</sup> Davidson, March 11, 1818, F. C.; cf. also Shand's Practice, 820.

<sup>4</sup> Personal Diligence Act, 1838, sec. 26.

<sup>5</sup> Debtors Act, 1880 (43 and 44 Vict. cap. 34), sec. 9, subsec. 5.

<sup>6</sup> Sheriff Court Act, 1876, secs. 26 (subsec. 4), 32, and 33; Adam v. Kinnes, Feb. 27, 1883, 10 R. 670; Tennant v. Romanes, June 22, 1881, 8 R. 824.

the *cessio* will use diligence for behoof of all the creditors, so that the pouncing creditor will gain nothing by selling the effects now." No. 29.

I think that that judgment proceeded upon a mistake as to the effect of a decree of *cessio*, and of the transfer of a bankrupt's estate by a *dispositio omnium bonorum*. It is very true that a debtor who applies for *cessio* must have been previously made notour bankrupt, and that this has the effect, which the Sheriff-substitute very properly states, of equalising diligence done within sixty days prior to the bankruptcy, and within four months thereafter. But I do not understand what the Sheriff-substitute means when he says, "the trustee in the *cessio* will use diligence for behoof of all the creditors." All that the trustee in a *cessio* has to do is to realise the estate and to distribute it. His position is not the same as that of a trustee in a sequestration. The latter is a pouncing and arresting creditor, and his diligence of pouncing and arrestment is universal, and extends to everything in the bankrupt's possession, and to the whole of what may be due to him, in the same way as if he had used pouncing and arrestment. A *cessio* has not the effect of a universal diligence in favour of the trustee in the *cessio*, and there is nothing in that appointment which to my mind can in any way prevent a pouncing creditor from going on with his diligence. It is possible that the effect of notour bankruptcy may be that other creditors will come in and share in the sale of the pointed effects. But that takes place apart from the process of *cessio*, and the trustee has nothing to do with the sale, although, of course, it is always subject to the effect of section 12 of the Bankruptcy Act, 1856, which equalises diligences in the way which I have explained. I am therefore of opinion that the Sheriff-substitute had no ground whatever for refusing this warrant to sell.

It is seen now, by the expiry of the four months, that apparently no other creditor is going to claim to share with the pouncing creditor in the proceeds of the sale, and in that case the effect, of course, must be that the pouncing creditor will obtain payment of her debt so far as the proceeds of the sale will go in extinction of it. I think therefore that the interlocutor refusing *in hoc statu* a warrant of sale is not justified by anything which has occurred.

I am just as little disposed to agree in the view of the Sheriff, who says,— "The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act." I do not think he is, and if any good cause could have been shewn for stopping the issue of this warrant of sale, of course it was in the discretion and in the power either of the Sheriff-substitute or of the Sheriff so to act. But there is no reason of this kind suggested; there is nothing, in short, to debar this pouncing creditor from going on in the exercise of her undoubted right, and from bringing the pointed goods to a sale.

As to the process of *cessio* there are two questions for consideration. The first is, whether any appeal was competent from the Sheriff-substitute's interlocutor of 31st July 1888? The respondent says that the appeal to the Sheriff was incompetent, because the Sheriff-substitute's decree had been extracted prior to the taking of the appeal to the Sheriff.

The question therefore comes to be, was this extract justified by the terms of the interlocutor, and particularly by the part of it which deals with the extracting of the decree? The Sheriff-substitute appended these words to the end of his

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interlocutor—"And allows extract of this decree to go out upon caution being found." Now, the respondent construes these words as meaning that the moment caution is found extract may be obtained, whereas, if the cause had been allowed to take its ordinary course, there could have been no extract for fourteen days. And the respondent rested this contention upon sec. 32 of the Sheriff Court Act of 1876 which provides that extract (and extracts in cessios are regulated by the same rule) shall not issue for fourteen days unless the Sheriff-substitute "shall allow the extract to be sooner issued." Now it appears to me that what that section contemplated was that if for any special cause the Sheriff shall think it right to shorten the period, and allow extract to go out at any time within fourteen days, he shall specify what that time is to be in his interlocutor. What is left to the Sheriff is to say how short the time is to be, and what are to be the number of days before which extract shall not go out. Sir Charles Pearson contended that this was not a novelty in this statute, and it is quite well known that there might be very important reasons for shortening the period before extract, and accordingly power has always been given to the Sheriff in certain cases so to shorten it.

But has the Sheriff in this case exercised the power given to him by the 32d section? In considering whether he has one cannot help looking at the effect of adopting the construction contended for by the respondent. It means, "If you find caution to-day you may extract to-day, therefore an appeal shall not be competent to-morrow." That is a somewhat startling suggestion, and it is a construction which is unknown in practice, where in the ordinary case fourteen days are allowed for appeal. The bond of caution might be ready to be lodged when the interlocutor was issued, and to adopt such a reading would undoubtedly result in injustice. But I do not think that this was the Sheriff-substitute's intention, and I have mentioned the effect of it in order to shew that it was not very likely that this was his intention. Nor do I think that the words of this interlocutor, fairly construed, bear the meaning that extract is to go out within any less time than an extract usually does; but only that the Sheriff intended to affirm emphatically that there was to be no extract until caution was found. I do not construe these words as meaning that extract is to be allowed to go out the moment caution is found. In the present case extract was taken on the 1st August, the day after the interlocutor bears to be signed, and it appears to me that that extract was in the circumstances altogether unjustifiable.

That being so, there is nothing now left in this cessio except to determine how much, if any, of the pursuer's stipend as assistant and successor in the parish of Kingoldrum ought to be assigned to his creditors as the condition of his obtaining cessio. Now, his emoluments are very small. I do not think that they can be taken as being more than £100, and certainly that sum does not leave him much room for assigning anything to his creditors consistently with his living at all in the manner becoming a parish minister.

Looking to what has been done in previous cases, both in cessios and in sequestrations, I do not think that we can call upon him to assign more than £20 out of the £100, leaving £80 at his own disposal. I think therefore that we should remit to the Sheriff in order that he may give effect to this, and find the petitioner entitled to the benefit of cessio on his assigning to his creditors £20 of his salary. Nor do I see any reason for saying that this is a proceeding in any way incompetent in a process of cessio. There is direct and clear authority

in the judgment of the House of Lords in the case of *Scott v. Macdonald*, 1 Sh. App. 362, and there are other authorities of an analogous kind which have been cited, all of which go to shew that though a person's means are derived from the emoluments of an office, or from an annuity, he is not thereby exempt from the claims of his creditors, but that some reasonable proportion of his means must be assigned to them as the condition of his obtaining the benefit of cessio. No. 29.  
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That was what the Court did in the case of *Scott*, and we shall in the present case adopt the course which was there followed. The Sheriff and Sheriff-substitute seem to think that the recent Cessio Acts have displaced the rule of law laid down in *Scott's* case, but I can only say that I have not heard anything cited from these Acts which can in any way bear out the suggestion. They are perfectly silent in regard to this matter, and therefore the common law is left to regulate the matter as it did before.

LORD MURE.—I agree with your Lordship. With regard to the pointing, I think that the pointing creditor was entitled to have a warrant to sell. Even if other creditors had appeared, I do not see that that would have made any difference, as creditors comparing are entitled to be conjoined with the first pointer.

Upon the competency of the appeal in the cessio case, I also adopt your Lordship's view. The interlocutor of the Sheriff-substitute is no doubt rather vague as to the matter of the extract; but I do not think we are forced to put a construction upon its terms which would put it in the power of a Sheriff-substitute to stop the ends of justice by preventing appeals.

Upon the merits of the case, I am of opinion, having regard to the authority of the case of *Scott v. Macdonald*, that £20 is a fair sum for the respondent to be called upon to assign to his creditors as the condition of his obtaining the benefit of cessio.

LORD SHAND.—My opinion is the same in both cases.

Upon the 16th July when the Sheriff-substitute sisted the pointing, the present appellant had presented a report of the execution of the pointing which had followed upon a decree of the Court containing a warrant to point. She then craved a warrant of sale, and this the Sheriff-substitute refused, on the ground that since the date of the pointing the respondent had been "declared to be notour bankrupt," and had "applied for cessio." But in such cases the debtor is always notour bankrupt, because the fact of the expired charge, and of the pointing following upon it, makes a debtor notour bankrupt under the 7th section of the Bankruptcy Act, and even expiry of the days of charge without payment has this effect under the Act of 1880. It is out of the question to say that because the debtor is notour bankrupt, the pointing is to be stopped in order that it may be seen whether any other creditor will come forward. The pointing creditor is entitled to proceed with his diligence unless it can be shewn by the debtor, or by someone interested in the property about to be sold, that there is some good reason against it, unless for instance there is some inherent defect or impropriety in the proceedings, or it may be that the sale is being unduly hurried, so that the effects will be sacrificed. Nothing of that kind is alleged here. The fact of notour bankruptcy gives certain rights to the creditors under section 12 of the Bankruptcy Act, but these rights remain whether the

No. 29. sale goes on or not. The proceeds of the pointing must be divided amongst the different creditors having and claiming their rights in terms of the statute.

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The fact of notour bankruptcy does not affect the matter, and if the additional fact that the debtor has applied for cessio be added, it will make no difference. When the Sheriff-substitute refused the appellant's application for a warrant to sell, and stopped the diligence, there was only an application for cessio. Decree had not been granted. But assuming that it had been granted, it did not put the other creditors in possession of a completed diligence. If it had done that, the case might have been different, but I doubt whether even in that case there would have been ground for stopping the pointing. By the decree of cessio, the bankrupt merely conveyed the estate as it existed in himself, and subject to any preferential rights acquired by creditors, to a trustee for behoof of his creditors. The statute contains no such provisions vesting the bankrupt estate in the trustee as are contained in the Bankrupt Act of 1856. So that there appears to me to be no reason for stopping the present appellant in the pursuit of her diligence. I cannot agree with the Sheriff-substitute that the fact of the application for cessio makes "the estate litigious, and equalises all diligences within sixty days prior to the bankruptcy, and within four months thereafter," to the effect of preventing a creditor having existing diligence from carrying it out.

Nor do I agree with the Sheriff, who says, in the note to his interlocutor of the 4th October,—“The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act.” The 26th section of that Act provides that “on the execution of the pointing being reported, the Sheriff shall, if necessary, give orders for the security of the moveables, and if they be of a perishable nature, for the immediate disposal thereof, under such precautions as to him shall seem fit; and if not so disposed of, and if no lawful cause be shewn to the contrary, he shall, if required, grant warrant to sell them by public roup,” &c. The question therefore is,—“Is there good and lawful cause shewn for not granting the warrant of sale?” I do not think so. There is no competing diligence, nor are there other creditors in the field opposing the granting of the warrant, and having valid grounds of opposition.

In regard to the process of cessio we have first to construe the clause at the end of the Sheriff-substitute's interlocutor of 31st July, which “allows extract of the decree to go out upon caution being found.” The question is whether an appeal may be precluded in this way in the circumstances of this case. If a case should occur where for some special reason the days have been shortened, we shall have to deal with it. But I agree with what your Lordship has said, that an interlocutor allowing extract of the decree before the usual period must be rigidly construed, and I also agree with the interpretation which your Lordship has put upon this clause. I think that what the Sheriff-substitute really meant by these words was merely that caution was to be found before this decree was extracted. The interlocutor may fairly be read as implying the addition of the words “on the lapse of the usual time, caution always being found before extract.” What was meant was, that it should be a condition of extract that fourteen days should expire and caution be found.

I also agree with your Lordship in the next place as to the competency of dealing in a process of cessio with a salary or stipend or similar permanent in-

come, and I think that £20 is a reasonable sum, such as we should ordain the respondent to assign to his creditors as a condition of his obtaining the benefit of cessio. I do not think that a gentleman in the position of the respondent should be left with an income utterly unsuitable for the office he holds, and I therefore think that at present, and looking to the amount of his emoluments, a larger sum should not be demanded from him. If, however, the respondent proceeds to ask for a discharge, another and a different question may arise, because he has prospects, and it may fairly be urged then, in view of his income being certainly increased in the event of his surviving the present incumbent, that on that event occurring a larger sum should be provided.

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LORD ADAM was absent.

In the pointing, the Court recalled the interlocutors appealed against, and remitted to the Sheriff forthwith to grant warrant of sale of the pointed effects, and to proceed further as should be just.

In the action of cessio, the Court repelled the objections to the competency of the appeal, and found that, in addition to the *dispositio omnium bonorum* granted by the pursuer, he was bound, as a condition of his obtaining the benefit of cessio, to assign to the trustee his stipend to the extent of £20.

ROBERT D. KER, W.S.—REID & GUILD, W.S.—Agents.

THE DUKE OF ARGYLL, Pursuer (Respondent).—*Mackay—H. Johnston.*

No. 30.

ARCHIBALD CAMERON AND OTHERS, Defenders (Appellants).—*Watt.*

Nov. 24, 1888.

*Process—Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), secs. 25, 27, 28—Decree conform.*—When an order of the Crofters Commission is presented to a Sheriff, with a request for decree conform, the Sheriff, if satisfied that the order is in conformity with the statute, and has been duly recorded, should, without further procedure, grant decree conform.

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Argyll v.  
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THE DUKE OF ARGYLL brought a petition in the Sheriff Court of Argyllshire at Oban against Archibald Cameron and others, crofters in Tiree, in which he set forth an order of the Crofters Commission, of date 6th October 1886, fixing the fair rent, &c. to be paid by the defenders, and concluded that the Sheriff should interpose his authority thereto, and pronounce decree conform. The petition was served upon the defenders, and the Sheriff-substitute (MacLachlan), on 27th July 1888, allowed them to lodge defences.

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The pursuer having appealed the Sheriff (Irvine) recalled his Substitute's interlocutor:—"Further, having considered the order of date 6th October 1887, pronounced by the Commissioners appointed for the administration of the Crofters Holdings (Scotland) Act, 1886, and being satisfied with the conformity of that order with the provisions of that Act, and that the order has been duly recorded, interpones authority to said order: Grants decree in terms thereof, and decerns."

The defenders appealed to the Court of Session.

The pursuer argued that the appeal was incompetent. The decision of the Crofters Commission was by the 25th section of the Crofters Act, 1886, declared to be final; and the Sheriff had pronounced decree conform in terms of the 28th section. The proceedings were summary, and there was nothing to appeal from.<sup>1</sup>

<sup>1</sup> Bone v. School Board of Sorn, March 16, 1888, 13 R. 768.



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The appellants argued that they were entitled to lodge defences. The Act nowhere said that the proceedings were to be summary.

LORD PRESIDENT.—I think the appeal is incompetent, and that the subject-matter of it is such that we cannot entertain it, or look at it at all. The 25th section of the Crofters Act provides that “the decision of the Crofters Commission, in regard to any of the matters committed to their determination by this Act, shall be final.” That section of itself, it must be observed, creates a finality at a very early stage of the proceedings. The determination of the Crofters Commission is to be final. There is no appeal of any kind against it, but there is to be a registering of the determination in the Sheriff Court Books as provided by the 27th section of the Act. The 28th section provides that “any order of the Crofters Commission, or two of their number acting as herein-before provided, may be presented to the Sheriff, and the Sheriff, if satisfied that the order has been made in conformity with the provisions of this Act, and has been duly recorded, may pronounce decree in conformity with such order, on which execution and diligence shall proceed.” The object of the statute is plainly that the order of the Commission may be enforced by the ordinary diligence of the law where necessary. It is not imperative that the order shall be presented to the Sheriff; the words are “may be presented to the Sheriff”; and, as I understand it, the object of the 28th section is, by presenting the order to the Sheriff, to make it the foundation of diligence. The Sheriff is to pronounce decree conform, but he is to satisfy himself beforehand that the order has been made in conformity with the provisions of the Act. I do not understand these words to import that the Sheriff is to have a process before him or to hear parties; but he is to read the order for himself, and to see that it is in conformity with the statute, and then pronounce decree.

The notion that there is an appeal to this Court against a decree conform is quite out of the question. Such a thing was never heard of. The sole object of a decree conform is to make the order a basis for diligence, and if anything has gone wrong in the course of the proceedings, either before the Commissioners or in the deliverance of the Sheriff in pronouncing the decree as conform to the Act, that may be brought up either by way of suspension or reduction, but certainly it was not intended by the statute that there should be a process in the Sheriff Court. And there being no process in the Sheriff Court, there can be no judgment of the Sheriff which can form the subject of an appeal.

LORD MURE.—The deliverance of the Commissioners in a case of this description is final upon the merits under the 25th section of the Act; and, when duly recorded under the 27th section in the Sheriff-clerk’s office, it may be enforced under the provisions of the 28th section. That is to be done simply by presenting the order to the Sheriff, or, in other words, laying it before him for consideration, and he may pronounce decree conform in order to execution, if satisfied that the order has been made in conformity with the provisions of the Act. Now, the Sheriff appears to have been so satisfied, and has pronounced decree conform; and I am very clear, upon the ground stated by your Lordship, that this appeal is incompetent. The mistake, I think, was that the proceedings were taken under the Sheriff Court Act by formal process, which has no application to such matters as the present.

LORD SHAND.—I am of the same opinion. I think this appeal is incompetent

because there is no process. The statute provides that the Sheriff may pronounce decree in conformity with the order of the Commissioners, and that having been done, there is an end of the matter. If there is anything wrong in the proceedings which can be made the subject of complaint, the remedy must be by way of suspension or reduction of proceedings which, though *ex facie* regular in terms of the statutes, have nevertheless been unwarranted or in violation of the statutory provisions.

No. 30.

Nov. 24, 1888.  
Duke of  
Argyll v.  
Cameron.

I agree that there was an error in the Court below in attempting to make a process. But the Sheriff when the case was presented to him put that right. All that is required is that the applicant shall present the order of the Commissioners and evidence of its having been duly recorded to the Sheriff, with a request, which may be by a written minute indorsed on the order and signed by the applicant or his agent, or, I should say, even made verbally, for a decree of Court in conformity with the order. If the Sheriff is satisfied that the order has been made in conformity with the provisions of the Act and has been duly recorded, he will, without further procedure, grant decree conform.

LORD ADAM concurred.

THE COURT dismissed the appeal as incompetent.

LINDSAY, HOWE, & Co., W.S.—CLARK & MACDONALD, S.S.C.—Agents.

JANE HELEN TROTTER, Pursuer (Reclaimer).—*C. N. Johnston*.  
GEORGE HOPPER OR HAPPER, Defender (Respondent).—*Gunn*.

No. 31.

Nov. 24, 1888.  
Trotter v.  
Happer.

*Process—Jury Trial—Special Cause—Action of damages for seduction and for payment of aliment—Evidence Act, 1866 (29 and 30 Vict. cap. 112), sec. 2.*

—In an action of damages for breach of promise of marriage and seduction, in which there was also a conclusion for payment of the aliment of an illegitimate child, held (*rev. judgment of Lord Fraser, diss. Lord Shand*) that no special cause had been shewn, in terms of the 2d section of the Evidence Act, 1866, why the case should not be tried by a jury.

JANE HELEN TROTTER, who was designed as a daughter of William Trotter, farmer, at Greenlaw, in the county of Berwick, brought an action of damages for breach of promise and seduction against George Hopper or Happer, a tailor and clothier in Greenlaw. There was also a conclusion for the aliment of an illegitimate child of the pursuer's, of which the defender was alleged to be the father.

The Lord Ordinary (Fraser), on 18th October 1888, allowed the parties a proof of their averments.

The pursuer reclaimed, and argued that no special cause had been shewn why the case should not be sent to a jury, as provided in the Evidence Act, 1866.<sup>1</sup>

The defender argued that he should be saved the expense of a jury trial in a case of this kind.

LORD PRESIDENT.—I am afraid that we have no choice but to follow the provisions of the statute. The Judicature Act of 1825 (6 Geo. IV. cap. 120), sec. 28, specially appropriates this class of cases for jury trial, and under that statute it was incompetent to try such cases in any other way. By the 49th sec.

<sup>1</sup> Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 28; Court of Session Act, 1850 (13 and 14 Vict. cap. 36), sec. 49; Evidence Act, 1866 (29 and 30 Vict. cap. 112), sec. 2.

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tion of the Court of Session Act of 1850 (13 and 14 Vict. cap. 36), that rule was relaxed as regarded certain of the enumerated causes in the Judicature Act, but actions of damages were specially excluded. The 2d section of the Evidence Act of 1866 granted a further relaxation, and provided that, "if both parties consent thereto, or if special cause be shewn, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section 1st hereof in any cause which may be in dependence before him, notwithstanding of the provisions contained in" the above-mentioned statutes.

The cause shewn in the present case is that cases of this description are not suitable for jury trial. But that is not "special" cause; it is "general" cause, and constitutes an objection to the condition of the law as things stand. A "special" cause must be special to the case under consideration, and therefore I consider myself bound hand and foot by the statutes, and I am for recalling the Lord Ordinary's interlocutor, and remitting the case to him to adjust issues for trial by jury.

LORD MURE concurred.

LORD SHAND.—I have great difficulty in interfering with the judgment of the Lord Ordinary. I quite agree that in the general case, an action of damages for seduction ought to be tried by a jury, and that it is not a good reason for taking a course different from that prescribed by the statute that a jury is too liable to act from feeling in place of judgment in favour of a pursuer suing an action of seduction. That is not "special cause" shewn.

But there are specialties in this case which, I think, warrant what the Lord Ordinary has done in determining as a matter of procedure the mode of inquiry. Besides being an action for damages for seduction, this is also an action of affiliation. There is a conclusion for payment of the aliment of an illegitimate child. The result of our sending this case to be tried by a jury will, I am afraid, be that, in the numerous actions of affiliation that are brought now in the Sheriff Court, we shall in future have a conclusion for damages for seduction in order that the pursuer may have her case tried in that way.

Here the pursuer is the daughter of a person in humble circumstances, "who rents eight or nine acres of land, and does carting work" in the district; and the defender is a tailor and clothier in the village of Greenlaw, which has a population of about 800. Had the case been one between farm servants, which ought to be tried in the Sheriff Court, though it might competently be raised in the Supreme Court, I should say it ought certainly not to be sent to a jury. This case seems to me also to be a proper one for the Sheriff Court, and for the Sheriff Court only, looking to the expense of litigation in the Court of Session, and the rank in life of the parties; and that being so, I think the Lord Ordinary was right in his view that it ought to be tried before himself without a jury, at the least expense. Therefore, upon the whole, I agree with his Lordship.

LORD ADAM.—If the question were open whether this was a case for a jury trial or not, I think perhaps it would be more appropriate for trial by a proof before the Lord Ordinary. But, as matter of right, the pursuer is entitled to have it tried before a jury, unless the defender is able to shew special cause why it should not be so tried. Two causes are alleged here. The first is that there may be a miscarriage of justice, owing to the jury being carried away by

the eloquence and rhetoric of the pursuer's counsel. But that is a cause which applies to all cases. It is not a special cause, and is no reason for not sending the case to a jury. The second special cause is, that looking to the rank in life of the parties to the present action, it is undesirable and inexpedient on the ground of expense that the case should be sent to a jury. The pursuer is a daughter of a farmer at Greenlaw, and it is averred by her that "the defender is in good circumstances, and carries on a good business as a tailor and clothier, and has a number of men in his employment." Such is the description of the parties to the action; and holding, as I do, that the pursuer has a right to go before a jury, unless the defender can shew special cause why it should not, I agree with your Lordship in the chair that no such cause has been shewn here.

No. 31.

Nov. 24, 1888.  
Trotter v.  
Happer.

The COURT recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to adjust issues for the trial of the cause.

ANDREW WALLACE, Solicitor—WHIGHAM & COWAN, S.S.C.—Agents.

WILLIAM KIRK DICKSON, Claimant (Appellant).—*Crole.*

No. 32.

JAMES MACDONALD, W.S., Objector (Respondent).—*A. J. Young.*

Nov. 26, 1888.  
Macdonald v.  
Dickson.

*Election Law—Lodger.*—Held that a son who was allowed by his father, without contract or payment of rent, the sole use of two rooms in the father's house of the requisite yearly value, was not entitled to be enrolled as a lodger.

WILLIAM KIRK DICKSON claimed to be entered on the roll of voters for the burgh of Edinburgh (West Division), as a lodger.

James Macdonald, W.S., a voter on the roll, objected on the ground that the claimant did not pay rent for his lodgings.

The Sheriff (Crichton) rejected the claim, and the claimant took a case.

Registration  
Appeal Court.  
Lord Mure.  
Lord Lee.  
Lord Kinnear.  
Sheriff of the  
Lothians.

The Sheriff stated the facts thus:—"That the claimant has occupied for some years past two rooms at No. 38 York Place, of a clear yearly value, if let unfurnished, of upwards of £10; that he has had the sole use of these rooms; that he has paid no rent for them, but has enjoyed them as a gift, and as part of his allowance from his father."

The question of law was:—"Whether, in order to constitute a lodger qualification, it is essential that the claimant should have paid rent for the rooms occupied by him, or whether enjoying the use of them as part of an allowance as a gift is sufficient?"

Counsel for the respondent was not called upon.\*

LORD MURE—I do not think it necessary to call upon the respondent here. It seems to me that the Sheriff has taken a sound view. The possession of two rooms in a father's house as a gift is no contract in any sense of the word. It was, as I understand it in this case, defeasible at any moment. In the case of *Brown v. Martin*, and the other cases reported with it, the sons actually paid a rent in money or money's worth, and were living continuously, and by contract, in the rooms occupied by them for the period of time required by the statute, but I know of no authority under the statute to give to a son occupying a room in his father's house, by permission of his father, a right to be enrolled in respect of that permission, which may be withdrawn at any time.

\* *Authorities cited by the claimant.*—*Brown v. Martins, &c.*, Nov. 6, 1885, 13 R. 159; *Ferguson v. Kerr*, Nov. 6, 1879, 7 R. 7; *Parker v. Campion*, Nov. 29, 1870, 1 Reg. and Land Act Irish App. 75.

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Dickson.

LORD LEE.—I come to the same conclusion. I have no doubt whatever that a father may agree with his son to give him rooms on such terms, with or without payment, as to give him a right to claim as a lodger, but the question is whether there is anything of that kind set out in this case. I think there is not. There is no adverse claim to be regarded as sole tenant stateable by the son here as against his father.

LORD KINNEAR.—I am of the same opinion. The qualification is that the claimant shall have as a lodger, and as sole tenant, occupied lodgings of a certain yearly value. A person who occupies lodgings as sole tenant must occupy them under a contract of lease, and the admission in this case is that the claimant has not occupied under any contract whatever, but by the gift or tolerance of the owner or occupier of the house. Upon the admitted state of the facts it seems perfectly clear that the occupancy of the claimant might have been determined by the will of his father at any moment during the twelve months. I think that is not a right qualifying under the statute.

THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff.

WILLIAM BLACK, S.S.C.—JAMES MACDONALD, W.S.—Agents.

No. 33.

Nov. 27, 1888.  
Cheape v.  
Kinmont.

GEORGE C. CHEAPE AND OTHERS, Appellants.—*Chisholm*.  
WILLIAM G. KINMONT, Respondent.—*A. J. Young*.

*Revenue—Inhabited house duties—Hunt-kennels—House Tax Act, 1808 (48 Geo. III. cap. 55), schedule B, rule 2—Inhabited House Duty Act, 1851 (14 and 15 Vict. cap. 36), schedule.*—The master and committee of subscribers to a pack of fox-hounds were tenants of premises used for the purposes of the hunt—viz., dwelling-houses for the huntsman and whips, stables for twenty horses, kennels for about fifty couples of hounds, and two or three acres of land for exercising, &c. The premises were all in one enclosure, and the *cumulo* rent was £40, but none of the houses was by itself of the annual value of £20. *Held* that the premises were liable for inhabited house duty at 9d. per £ under schedule B, rule 2, of the House Tax Act of 1808, and the schedule appended to the Inhabited House Duty Act, 1851.

Exchequer  
Cause.  
1st Division.  
M.

AT a meeting of the Commissioners of Inland Revenue for the county of Edinburgh held on 2d April 1888, Captain Cheape, Master of the Linlithgow and Stirlingshire Foxhounds, on behalf of himself and the other members of the committee of subscribers to the hounds, appealed against an assessment of £1, 10s. made upon them for inhabited house duty for the year ending on 24th May 1888, at the rate of 9d. per pound on £40, the rent of premises occupied by the Committee at Golfhall, parish of Corstorphine, and belonging to Sir James R. Gibson Maitland, Bart.

The Commissioners refused the appeal, and a case was stated at the request of the appellants for the opinion of the Court of Exchequer.

The assessment appealed against was levied in terms of the Inhabited House Duty Act, 1851 (14 and 15 Vict. cap. 36), and the House Tax Act, 1808 (48 Geo. III. cap. 55).\*

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\* The schedule annexed to the Act 14 and 15 Vict. cap. 36, provides,—“On every inhabited dwelling-house which, together with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year . . . And where any such dwelling-

The following facts were set forth in the case :—"The premises consist of,—(1) A two-storey dwelling-house of six apartments, occupied by James Beaven, the huntsman, of the probable annual value of £9. (2) A cottage of two apartments and a bed-closet, occupied by the first whip, worth probably £4 per annum. (3) A groom's house of three rooms, worth £4 per annum. (4) Stables, with harness room, and other accommodation for 20 horses. (5) A kennel capable of holding about 50 dog hounds, with exercising yard attached. (6) A kennel capable of holding 50 bitches, with exercising yard attached. (7) A small kennel with yard attached. (8) Two boiling-houses, and several other outhouses. (9) About three and a-quarter acres of land on the east side of the kennels, which is used chiefly as a training and exercising yard. These subjects are let at a *cumulo* rent of £40, with £9, 15s. 8d. as for interest on expenditure on the kennels some years ago. The interest is regarded by all parties as equal to the rent of the land, and it is assumed that the balance of £40 represents the annual value of the whole buildings."

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Argued for the appellants ;—None of the houses mentioned in the case were of the annual value of £20, and therefore the case did not fall within the schedule of the Act of 1851. They had no internal communication with each other, and could not therefore be charged on the *cumulo* rent. The offices, &c., mentioned in schedule B of the Act of 1808, were offices attached to a gentleman's residence, and not houses such as these, which were totally unconnected with the residences of any of the committee. They more nearly resembled the houses occupied by miners and belonging to a mining company, which, though forming possibly a large village, were not assessable.<sup>1</sup>

Argued for the respondent ;—The hunt committee occupied the huntsman's dwelling-house and the other houses by their servants, and the whole premises formed part of an enclosed subject entirely used for the purposes of the hunt. The subject must therefore be looked on as a whole, and assessed on the *cumulo* annual value.

LORD PRESIDENT.—The Act which imposes the duty which is now laid on the appellant is that of 14 and 15 Vict. c. 36, and the schedule, which is the important part of that Act, authorises duties to be levied upon inhabited dwelling-houses according to the annual value thereof—that is to say, on "every inhabited dwelling-house which, together with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of £20" a-year. There must be an inhabited dwelling-house in order to bring the subject of the assessment within the scope of the schedule, but that inhabited dwelling-house need not of itself be of the value of £20 if the household and other offices, yards, and gardens therewith occupied and charged make it up to

house shall not be occupied and used for any such purpose, and in manner fore-said, [as a shop, licensed house, &c.] there shall be charged for every twenty shillings of such annual value thereof the sum of ninepence."

By section 2 of that Act certain of the powers and provisions of former Acts were continued, *inter alia*, those set forth in schedule B of 48 Geo. III. cap. 55.

Schedule B of the Act 48 Geo. III. cap. 55, provides (rule 2),—"Every coach-house, stable . . . and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds belonging to and occupied with any dwelling-house, shall in charging the said duties be valued together with such dwelling-house, provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued."

<sup>1</sup> Douglas v. Young, Nov. 14, 1879, 7 R. 229, see Lord President, pp. 230-231, and Lord Deas, p. 232.

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that amount. And with regard to the different modes of occupation we have it provided in the schedule that where the dwelling-house is occupied by any person in trade who shall expose for sale and sell any goods in any shop or warehouse, being part of a dwelling-house, and also where a dwelling-house shall be occupied by any person who shall be duly licensed to sell beer, ale, wine, or other liquors, and also where any dwelling-house shall be a farm-house occupied by the tenant or farm-servants, and *bona fide* used for the purposes of husbandry only, the assessment is to be at the rate of 6d. per £. In all other cases, except these three, the assessment is to be at the rate of 9d. per £. But it is obvious that what is contemplated in all these cases is that the dwelling-house may be occupied by a person other than the person assessed, for there is given as one example a dwelling-house, being a farm-house, occupied by a farm servant, upon which nevertheless the owner or tenant may be assessed. Now, the schedule of the old Act of 48 Geo. III., to which this later statute refers us back, has this rule—"Every coach-house, stable, brew-house," and so forth "belonging to and occupied with any dwelling-house shall, in charging the said duties, be valued together with such dwelling-house," provided that no more than one acre of garden ground shall in any case be so valued. Then the question comes to be, have we in this case a dwelling-house to begin with? Undoubtedly we have; there is a dwelling-house of some importance. It is said not to be quite of the value of £20 in itself, but nevertheless it is a two-storeyed house with six rooms, and is occupied by the huntsman, who, of course, is the chief man in the premises. The other houses consist of stables and kennels, which are occupied along with the dwelling-house in this sense, that they are all occupied for the purposes of the hunt; they are all occupied for one and the same general purpose, and therefore they seem to me to fall within the description both of the schedule in the old Act and of the schedule in the new Act. Now, it is not pretended that these premises are under the value of £20; on the contrary, they are very much above it, and therefore it appears to me that the Acts of Parliament are directly applicable. Some reference was made to the fact of the different buildings constituting these premises having separate entrances and no internal communication, but that has no relevancy in regard to a subject of this kind. The second rule in the schedule of the Act of 48 Geo. III. makes no reference to internal communication or anything of the kind as being necessary; on the contrary, it is quite obvious that the sort of premises there in view are premises occupied in connection with the dwelling-house, but not by any means necessarily communicating with the dwelling-house in any way. And just as little is there any such idea to be found in the schedule of the more recent statute. I therefore think this duty is well laid on.

LORD MURE concurred.

LORD SHAND.—It appears to me upon the statement of the case that we have here a dwelling-house and pertinents, such as are described in rule second of the Act of 48 Geo. III., in the occupation of the committee of the hunt, upon whom the assessment has been laid, and as these are to be regarded, as I think, as one subject, and are above the value which renders the subjects liable to assessment, I have no doubt the assessment has been well laid on.

LORD ADAM concurred.

THE COURT affirmed the determination of the Commissioners.

WALLACE & BEGG, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

WILLIAM HENDERSON, Pursuer (Reclaimer).—*R. V. Campbell—Baxter.* No. 34.  
THE LORD ADVOCATE, Defender (Respondent).—*A. J. Young.*

*Public-house—Certificate—Early-closing licence—Remission of one-seventh of duty—Inland Revenue Act, 1880 (43 and 44 Vict. cap. 20), sec. 44—Public-Houses Hours of Closing Act, 1887 (50 and 51 Vict. cap. 38), sec. 4 (b).—The Public-Houses Acts Amendment Act, 1862, enacted, by schedule A, No. 2, a form for publicans' certificates in Scotland which fixed eleven P.M. as the hour for the closing of public-houses. By section 7 of the Licensing Act, 1874, extended to Scotland by section 44 of the Inland Revenue Act, 1880, it was enacted that where the applicant for a licence should apply to the Justices to insert in the licence a condition that he should close his premises "one hour earlier at night than that at which such premises would otherwise have to be closed," such condition should be inserted, and that the holder of such an early-closing licence should be entitled to obtain such licence on payment of six-sevenths of the duty which would have been payable by him had such condition not been inserted. Sec. 4 of the Public-Houses Early Closing Act, 1887 (which did not apply to towns and other populous places containing 50,000 inhabitants), enacted a new form of certificate under which publicans were debarred from keeping open their premises "after such hour at night of any day not earlier than ten and not later than eleven as the licensing authority may direct."*

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The licensing authority of Midlothian resolved that from and after Whitsunday 1888, and until the licensing authority shall otherwise determine, all licensed houses within the county "shall be closed at ten o'clock at night."

The holder of a certificate which, in terms of that resolution, fixed the hour for closing at ten P.M., raised an action against the Commissioners of Inland Revenue, concluding for repayment of one-seventh of the duty paid by him under protest for his certificate, in respect that the ordinary hour of closing being eleven o'clock he held an "early-closing certificate" within the meaning of section 7 of the Licensing Act, 1874, as extended to Scotland. *Held (aff. judgment of Lord Fraser)* that under the Licensing Act of 1887 there was no ordinary hour for closing within the district other than that fixed by the magistrates, and that ten o'clock being the hour so fixed, the pursuer was not entitled to the remission claimed.

WILLIAM HENDERSON, wine and spirit merchant, Straiton, Midlothian, on 20th June 1888, raised an action against the Lord Advocate, as representing the Commissioners of Inland Revenue, concluding for payment of £4, 5s. 9d., being one-seventh of the licence duty paid by him under protest for the year May 1888 to May 1889.

1st DIVISION.  
Exchequer  
Cause.  
M.

The pursuer averred;—"The pursuer applied for his present certificate in the statutory form of application prescribed by 25 and 26 Vict. cap. 35, sec. 8 (1862). Upon this application he has obtained and taken out as his licence for the present year a licence containing conditions rendering such licences a six-day licence as well as an early-closing licence, inasmuch as he is forbidden to sell on Sunday, and is specially directed not to keep open house after ten P.M., being one hour earlier at night than that at which his premises would otherwise have to be closed. The pursuer has therefore, in terms of sections 7 and 8 of 37 and 38 Vict. cap. 49, as extended to Scotland by sec. 44 of the Inland Revenue Act of 1880,\* claimed deduction of two-sevenths from the total licence duty as

\* The Inland Revenue Act, 1880 (43 and 44 Vict. c. 20), sec. 44, enacts,—  
"The provisions regarding six-days' licences and early-closing licences contained in section 49 of the Licensing Act, 1872, and sections 7 and 8 of the Licensing Act, 1874, shall be deemed to apply throughout the United Kingdom."

The Licensing Act, 1872 (35 and 36 Vict. c. 94), sec. 49, is quoted in the Lord Ordinary's note.

The Licensing Act, 1874 (37 and 38 Vict. cap. 49), section 7, enacts that when an application is made for a licence, and the applicant applies to the



**No. 34.** calculated upon his rental. The Commissioners of Inland Revenue, while granting the former established deduction of one-seventh as for a six-day licence, have refused or delayed to grant to the pursuer deduction of one-seventh as for an early-closing licence, leaving it to the pursuer by agreement to try the question of his right to this further deduction in the present form. . . .” (Cond. 5) “The ordinary hour for closing licensed premises in Scotland had been, from the passing of the Act 25 and 26 Vict. cap. 35, in 1862,\* eleven o’clock P.M. This hour for closing remained and remains the statutory and ordinary hour for closing where no special regulation to the contrary is made under such special powers as have from time to time been conferred on the licensing authorities. Power to change the statutory certificates in certain localities so as to cause early closing was contained in section 2 of 25 and 26 Vict. cap. 35. Further power in the same direction was conferred by 50 and 51 Vict. cap. 38, entitled ‘An Act to provide for the earlier closing of premises licensed for the Sale of Exciseable Liquors in Scotland.’† This last-

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cate.

Justices to insert in the licence a condition “that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the Justices shall insert the said condition in such licence. The holder of a licence in which such condition is inserted (in this Act referred to as an early-closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed, under the provisions of this Act. . . . The holder of an early-closing licence may obtain from the Commissioners of Inland Revenue any licence granted by such Commissioners, which he is entitled to obtain in pursuance of such early-closing licence upon payment of a sum representing six-sevenths of the duty which would otherwise be payable by him for a similar licence not limited to such early closing as aforesaid.”

Sec. 8 enacts that “a person who takes out a licence containing conditions rendering such licence a six-days’ licence, as well as an early-closing licence, shall be entitled to a remission of two-sevenths of the duty.”

\* The Act of 1862 (25 and 26 Vict. c. 35), sec. 2, enacts that the forms of certificate in schedule A shall be used. In schedule A the form of certificate for public-houses contains this condition,—“And do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquor before eight of the clock in the morning or after eleven of the clock at night of any day; . . . and do not open his house for the sale of any exciseable liquors, or permit or suffer any drinking therein, or on the premises belonging thereto, or sell or give out the same or any other goods or commodities on Sunday.”

Sec. 2 contains this provision:—“Provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing . . . public-houses than those specified in the forms of certificates, . . . it shall be lawful for such Justices or Magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit.”

† The Act of 1887 (50 and 51 Vict. c. 38), sec. 4, enacts,—“(b) The form of certificate for public-houses set forth in schedule A of the Public-Houses (Scotland) Acts Amendment Act, 1862, shall be amended as follows:—The words ‘and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven o’clock at night of any day,’ shall be omitted from the said certificate, and there shall be inserted in the said certificate in place thereof these words,—‘And do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or

mentioned Act, which applies only to the country districts in Scotland, exclusive of the larger towns, does not by any general or imperative enactment introduce any new statutory hour for closing different from eleven P.M., but it gives power to Quarter Sessions in counties to direct the closing of licensed premises at any hour not earlier than ten P.M., nor later than eleven P.M. According to the form of certificate therein provided, the pursuer, or any other licence-holder in his position, would still be entitled to keep open until eleven P.M. in the absence of any special direction to the contrary by the licensing authority. The pursuer has, however, been under, as is assumed, the special powers of this new statute, directed to close at ten o'clock P.M. for the current year by the following special endorsement upon his current certificate, viz.—'The licensing authority, at a meeting held on 14th March 1888, resolved that from and after Whitsunday next, and until the licensing authority shall otherwise determine, all licensed houses within the county of Midlothian shall be closed at ten o'clock at night.' It is not the case that all licensed houses within the county of Midlothian are closed at ten P.M. In particular, and as one instance, the licensed premises at Granton, within the said county, known as the Granton Hotel, are open under the certificate granted by the licensing authority of the county until the ordinary statutory hour of eleven P.M. All licensed houses in Edinburgh, and also in Leith (including Newhaven), are within the county of Midlothian, and are also open till eleven P.M."

The defender answered,—“Admitted that the pursuer made application for his certificate in statutory form. Denied that he has obtained an early-closing licence. His licence does not oblige him to close at an hour earlier at night than that which applies generally to other licensed houses within the district, nor did he apply to the Licensing Justices to insert in his licence a condition that he should close one hour earlier than the general hour of closing fixed for the other licensed houses.” And with reference to cond. 5 he answered,—(Ans. 5) “The licensing authority has directed that all licensed houses within the county of Midlothian shall be closed at ten o'clock at night, and that is now the statutory hour for closing within that district. In the case of the Granton Hotel, the hotelkeeper on the 11th of July last presented a petition for leave to keep his premises open till eleven P.M., instead of closing at ten P.M., in terms of the general resolution of the licensing authority, and of that date the Licensing Justices authorised the petitioner to keep his hotel open till eleven P.M., and the petitioner's certificate was endorsed accordingly. Admitted that Edinburgh and also Leith (including Newhaven) are locally within the county of Midlothian, and explained that they are not within the Midlothian licensing district, and that Edinburgh is a county in itself. *Quoad ultra* denied.”

The pursuer pleaded;—(1) The pursuer is, in law and within the meaning of the Inland Revenue Act, 1880, the holder of an early-closing licence for the current year, and he is therefore entitled to a deduction of one-seventh from the licence duty imposed by the said statute.

The defender pleaded;—(1) On a sound construction of the statutes applicable to the case, an early-closing licence means a licence for premises closed an hour earlier at night than other licensed premises in the same district. (2) The pursuer not being the holder of an early-closing

sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten and not later than eleven, as the licensing authority may direct.”

The Act does not apply to towns and other populous places containing 50,000 inhabitants.

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licence, is not entitled to the deduction which he claims, and the defender ought to be assoilzied, with expenses.

The Lord Ordinary (Fraser), on 27th October 1888, pronounced an interlocutor assoilzieing the defender from the conclusions of the summons.\*

\* \* "OPINION.—The sum sued for in this action is only £4, 5s. 9d., but it is stated on the record that the action is brought by agreement, in order to settle an important point on the construction of the Revenue Laws as to publicans' licences. It is necessary, in disposing of the question raised, to consider not merely the statutes relative to public-houses applicable exclusively to Scotland, but also certain Inland Revenue Acts which are applicable to the United Kingdom.

"The first Statute (1872) requiring attention is the Act 35 and 36 Vict. cap. 94, which by the second section is declared not to extend to Scotland, but which in part, by a subsequent enactment, was so extended. The 49th section of this Act, dealing with Sunday trading, enacts as follows:—'Where on the occasion of an application for a new licence or transfer, or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant at the time of his application applies to the Licensing Justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the Justices shall insert the said condition in such licence. The holder of a licence in which such condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this Act with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only. The holder of a six-day licence may obtain from the Commissioners of Inland Revenue any licence granted by such Commissioners which he is entitled to obtain in pursuance of such six-day licence, upon payment of six-seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday, he shall be deemed to be selling intoxicating liquor without a licence.'

"The next Statute (1874) is 37 and 38 Vict. cap. 49, which the defender says is not exclusively applicable to England, and there is no express declaration in the statute, as there is in the Act of 1872, that it is not to extend to Scotland. It is of no consequence to determine the point, because by a subsequent enactment the two sections bearing upon the present question have been made applicable to the United Kingdom. The 7th section of this statute enacts that when an application is made for a licence, and the applicant applies to the Justices to insert in the licence a condition 'that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the Justices shall insert the said condition in such licence.' And then it is enacted that 'the holder of an early-closing licence in which such condition is inserted (in this Act referred to as an early-closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act.' It is next enacted that the holder of such early-closing licence may obtain from the Commissioners of Inland Revenue the licence granted by such Commissioners upon payment of six-sevenths of the duty which would otherwise be payable by him for a licence not limited to such early closing. And the 8th section enacts that 'a person who takes out a licence containing conditions rendering such licence a six-day licence, as well as an early-closing licence, shall be entitled to a remission of two-sevenths of the duty,' that is to say, an English publican who takes a licence with the condition that he shall not open his house on Sunday, and who agrees to shut it an hour earlier on other days of the week, gets a deduction of two-sevenths of the duty.

"These two statutes apparently were held to be applicable only to England,

The pursuer reclaimed.

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because by the Inland Revenue Act of 1880 (43 and 44 Vict. cap. 20), sec. 44, it is enacted 'that the provisions regarding six-day licences and early-closing licences, contained in section 49 of the Licensing Act, 1872, and sections 7 and 8 of the Licensing Act, 1874, shall be deemed to apply throughout the United Kingdom.'

"The Commissioners of Inland Revenue have recognised the right of the Scottish publican to a remission of duty by reason that he is by the Scots law restricted to a six-day licence in respect that he cannot open his premises on Sunday, but they have refused to recognise his right to demand remission of duty on account of his being restrained by the regulation of the Justices acting under the recent Public-Houses Hours of Closing (Scotland) Act, 1887, from carrying on his trade beyond ten o'clock at night. The pursuer contends that he is thus forced to an early closing, and is entitled in consequence to remission of another one-seventh of the duty.

"It is therefore necessary now to see what is the course of legislation in reference to this matter of early closing in Scotland. The English practice of the applicant applying to the Justices to insert in his licence from them (in Scotland called a certificate) a condition that he will close his premises one hour earlier than the ordinary hour for closing, is not in accordance with the Scottish practice. It is not necessary to have such an application in order to limit the publican's business hours. The certificate which he received from the Justices peremptorily stated, until the passing of the Act of 1887, hereafter mentioned, what is the hour of closing without the intervention of the applicant at all. It is unnecessary to refer to the earlier statutes, because this subject, until last year, was regulated by the Act of 1862 (25 and 26 Vict. cap. 35). The 2d section of this Act enacts, that 'the forms of certificates contained in schedule A to this Act annexed shall come in place of the forms of certificates provided by the recited Acts, or either of them.' Now, schedule A contains a form of certificate for public-houses in which there is this enactment,—'And do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven of the clock at night of any day; . . . and do not open his house for the sale of any exciseable liquors, or permit or suffer any drinking therein, or on the premises belonging thereto, or sell or give out the same or any other goods or commodities on Sunday.' There is in the body of the statute itself no provision enacting any rule as to the hour of closing. It rests simply on this certificate. This clause in the certificate was a repetition of the form contained in the Act of 1853 (16 and 17 Vict. cap. 67), called the Forbes Mackenzie Act, where it appears for the first time. In the Home Drummond Act (9 Geo. IV. cap. 58) the condition in the certificate is merely that the publican shall not suffer drinking in the premises 'during the hours of divine service on Sundays, or other days set aside for public worship by lawful authority, nor keep the same open at unseasonable hours.'

"A further step in the way of restriction, or in the power of restraining the publican, was taken in the Act of 1887 (50 and 51 Vict. cap. 38), which does not apply to any town, burgh, or other populous place containing 50,000 inhabitants. It is not disputed that it applies to the premises held by the pursuer. Now, the 4th section of this Act materially alters the terms of the certificate, for it enacts—'(b) The form of certificate for public-houses set forth in schedule A of the Public-Houses (Scotland) Acts Amendment Act, 1862, shall be amended as follows:—The words "and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven o'clock at night of any day," shall be omitted from the said certificate, and there shall be inserted in the said certificate in place thereof these words "and do not keep open house, or permit or suffer any drinking in any part of the premises belong-

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"The provisions regarding six-day licences and early-closing licences, contained in section 49 of the Licensing Act, 1872, and sections 7 and 8 of the Licensing Act, 1874, shall be deemed to apply throughout the United Kingdom." Now, of course that means only that if there are cases in Scotland or Ireland of the same nature as those provided for in these previous statutes with regard to England, then the previous Acts shall apply to these cases. It becomes necessary therefore to consider what is the case of a six-day licence and what is the case of an early-closing licence, which entitles a party holding such licence to a deduction from the full amount of his licence duty.

ing thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten and not later than eleven, as the licensing authority may direct." Acting under the powers thus conferred upon them, the Justices of Midlothian, at a meeting held on the 14th of March 1888, resolved,—'That from and after Whitsunday next, and until the licensing authority shall otherwise determine, all licensed houses within the county of Midlothian shall be closed at ten o'clock at night.' The pursuer does not state that in defiance of this resolution of the Justices he has kept his premises open, and the remedy he seeks is a return of duty in consequence of the loss he sustains by the restriction of the hours of business. It was suggested that the Justices had no power to pass a general resolution applicable to the whole county of Midlothian, but that they must deal with each man's certificate by itself if they choose to restrict the business hours. The Lord Ordinary is not called upon in this process to deal with any such question. All that he has to determine is, whether there is a good claim in law here for the return of one-seventh of the duty in addition to the one-seventh at present allowed for the Sunday closing.

"The case of the pursuer is simply this, that the ordinary hour of closing was eleven o'clock, and if he must now close at ten, then his licence is an 'early-closing licence,' and he is entitled to a return of the duty. Now, the assumption here made is quite unfounded. Eleven o'clock no doubt was the hour mentioned in the form of certificate in the Act of 1853 and the Act of 1862, but it can be carried no further back, and it rests upon the condition inserted in the certificates granted under these statutes. Now, when the Act of 1887 expressly declares that the condition fixing the hour of closing at eleven o'clock shall be deleted from the certificate and another form of condition inserted, viz., an hour to be fixed by the Justices, the hour so fixed by them becomes the ordinary hour of closing for the district to which the resolution applies. Eleven o'clock is entirely blotted out of the regulations as to business hours, and a substitute put in its place. There is now no 'ordinary' hour for closing except the hour so fixed; and there is no early closing at an hour other than the ordinary one. The result consequently must be that this action fails.

"The pursuer complains that the Justices have extended the time to the Granton Hotel for closing. This they did in virtue of powers specially reserved to them by the Act of 1887, the 7th section of which enacts that 'nothing contained in this Act shall affect the provisions of the 6th section of the Act 25 and 26 Victoria, chapter 35, respecting the granting of special permissions.' Now, this 6th section of the Act of 1862 gives power to the Chief Magistrate and to the Justices of any county respectively to grant permission to extend the time for supplying liquors in regard to any public or special entertainment, or in any other place or premises during any particular time beyond the time prescribed by the certificate for closing. It was under this power that privilege was granted to the Granton Hotel. And it is further enacted by the Act of 1862 that it shall be lawful for the Justices or for the Magistrates 'to make such general regulations touching such permissions as they shall think fit, and such special permissions shall be subject to such general regulations.' The power, therefore, to pass general regulations by the Justices, as was done by the Justices of Midlothian in 1888, seems to be thus recognised."

Now, in the case of a six-day licence, the statute makes it very clear that the case contemplated is that of the party applying for a licence desiring to have inserted in his licence a condition that he shall close on Sunday, and that the Justices shall comply with that application, and insert the condition in the licence. In regard to the early-closing licence, the 7th section of the Licensing Act of 1874 provides that "Where, on the occasion of any application for a new licence, or the removal or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant applies to the Licensing Justices to insert in his licence a condition that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the Justices shall insert the said condition in such licence. The holder of an early-closing licence in which such condition is inserted (in this Act referred to as an early-closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act." Now, these Licensing Statutes are clear in their provisions. I do not think they admit of any ambiguity. They both contemplate—both the Statute of 1872, regarding a six-day licence, and the Statute of 1874, regarding an early-closing licence—that the applicant for a licence shall desire to be put under a restriction, and if he does, then the restriction shall be quoted in the licence by the Justices, and he shall be obliged to keep it. In the case of the early-closing licence it is made very clear what is meant by early closing. It is closing at an hour earlier than the ordinary hour at which such premises would be closed. Now, if after the passing of the Inland Revenue Act, 1880, this question had arisen, the condition of the law relating to the licensing of public-houses was such that a very nice and important question would have arisen as to whether the English Licensing Statutes were applicable, or could be made applicable, to the then existing state of the law. By the Act 16 and 17 Vict. cap. 67, and also by the Act 25 and 26 Vict. cap. 35, the condition which the holder of a licence came under was, that he "do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom, any liquors before eight of the clock in the morning or after eleven of the clock at night of any day." Now, if in that state of the law the applicant for a certificate had inserted in his petition a prayer that he should be put under obligation by his certificate that he should close his premises at ten o'clock at night instead of eleven—eleven o'clock being then the ordinary hour of closing—it would have been difficult to say that the effect of the Act of 1880 would not have been to have given him the benefit of the 7th section of the Act of 1874. But I put this case also—Supposing the applicant for a certificate did not himself desire or apply to be put under that restriction, but that the Justices, in the exercise of the power committed to them by the existing Public-Houses Acts, had put his premises under the condition of closing at ten o'clock instead of eleven, would or would not the provisions of the English Licensing Acts, made applicable to Scotland by the Revenue Act of 1880, have applied? That might admit of a good deal of argument.

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But this case turns upon the more recent Act of 1887 (50 and 51 Vict. cap. 38), and the question which naturally arises under that statute is whether there is now any ordinary hour of closing at all. If there be none, I do not very well see how the 7th section of the Act of 1874

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can be applied, because there could only be a right to the deduction of one-seventh from the licence duty in the event of the licence-holder being put under the condition that he shall close an hour earlier than the ordinary hour of closing, or, in other words, that he shall close earlier than his neighbours generally; but the Act of 1887, while it professes in the preamble to meet a desire that an earlier hour than eleven o'clock at night should be fixed for the closing of premises licensed for the sale of exciseable liquors, does not by its enactments really carry out that object, because it does not by these enactments fix any hour at all; on the contrary, it leaves it to the Justices in Quarter Sessions—the licensing authority as they are called—to dispose of that question at their discretion. The form of certificate is to be altered from that contained in schedule A of the Public-Houses (Scotland) Acts Amendment Act 1862, and in place of the existing form this is to be inserted,—“And do not keep open house, or permit or suffer any drinking or selling of any liquors before eight of the clock in the morning or after such hour at night of any day not earlier than ten and not later than eleven, as the licensing authority may direct.” Now, the statute does not thereby fix an hour; on the contrary, it leaves it to the licensing authority to fix the hour, and they may fix any hour between ten and eleven. I do not suppose it will be contended that under this provision it would not be competent for the Justices to fix half-past ten, or to fix a quarter-past ten, or a quarter to eleven; all that is within their discretion, and what they have done in this particular case is to come to a general resolution that ten o'clock in the county of Midlothian shall be the hour for closing—that is to say, the ordinary hour of closing. Now, that being so, how can it be said that the applicant here is under a condition or obligation to close his premises, in terms of the 7th section of the Act of 1874, “one hour earlier at night than that at which such premises would otherwise have to be closed,” or, as it is put in another part of the clause, “shall close his premises one hour earlier at night than the ordinary hour at which such premises would be closed.” Instead of being an hour earlier, the hour at which he closes his premises is the ordinary hour at which all other premises are closed, unless there is some special dispensation with regard to the particular locality. Therefore I come to the same conclusion as the Lord Ordinary, that the passing of the Act of 1887 made the clauses of the Act of 1874 inapplicable to any case within the county of Midlothian, or to any case to which the Act of 1887 applies, and therefore it is impossible to grant this relief to the applicant.

LORD MURE.—I agree with your Lordship. As I understand, this early-closing licence is given to a party who applies, under the English Acts, to the Magistrates or Justices to have his premises closed at an hour earlier than that fixed in the statute as the ordinary hour of closing, and if the Magistrates or Justices make an arrangement of this sort, and his licence is so fixed that he shall close his premises at ten o'clock instead of eleven, then that is an early-closing licence, and he is entitled to a reduction of licence duty. Now, that is the way in which the thing is done, as I understand, in the English cases. Before the passing of the later Acts the Magistrates or Justices in Scotland had no such power, but a six-day licence in Scotland was granted since the passing of the Inland Revenue Act, 1880, by which less duty was charged for the six-day licence than for the seven-day licence. Then in the English Act of 1874 the general hour for closing in certain districts, which had been eleven o'clock

before, was fixed to be ten o'clock, but that did not make the parties who closed at ten entitled to an early-closing licence. If a person wished to have an early-closing licence under the general provision of the Act of 1880, he still required to go to the Justices and put himself under a further restriction in the matter of time than the Act itself did. He then put himself in the position of closing earlier than the ordinary hour fixed by the statute. He could still do that, and get his early-closing licence. So standing the matter, we come to the Act of 1887, which gives a discretionary power to the Licensing Justices as to the hour of closing. Now, under that Act of 1887, instead of eleven o'clock being taken as the general hour of closing, there are certain provisions by way of alteration of the certificate by which the general hour of closing is made different if the Magistrates choose to make it different. There is a power given them, and under that power the Licensing Justices in each district can fix a general hour instead of that being done by the Act of Parliament itself; and the Magistrates of Midlothian have, as I understand, fixed ten o'clock under the powers so given, and the certificate which was handed up to us bears that that is the hour. Now, the applicant's certificate binds him to close at ten o'clock, but he is not closing earlier than any other person in Midlothian holding such licences; they all close at ten o'clock. Therefore I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to.

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LORD SHAND.—Notwithstanding the full and able argument which has been addressed to us on the part of the reclainer here, I am of opinion that the judgment of the Lord Ordinary is well founded. It appears to me that after the passing of the Inland Revenue Act of 1880, which was intended to give to publicans the benefit of the provisions regarding six-day licences and early-closing licences, which had been conceded to persons carrying on businesses of that kind in England and Ireland only, those who had obtained certificates or licences in this country would have had the benefit of these provisions. It is conceded that they did get the benefit of the provisions so far as the Sunday licence was concerned. They got a seventh off the licence duty, because practically they were holding six-day licences, and got the benefit in that way. But I further think that although there may have been some difficulty as to the form in which it was to be done, there can be no doubt that some form could have been arrived at by which they could also have got the benefit of the early-closing licence. Your Lordship has put one case. Supposing a person making an application in making it conforms literally with the provision of the statute by applying to have his licence limited so that he should close his premises an hour earlier than that at which his premises would otherwise have to be closed, then I cannot doubt that the Magistrates must have dealt with that application and acceded to his request; they would have marked it on his certificate, and he would have got the benefit of the provision. But we must further bear in mind that at that time, when the Statute of 1880 was passed, in virtue of section 2 of the Act of 1862 (25 and 26 Vict. cap. 35), while the certificate did contain the usual hour as at that time, viz, eleven o'clock, being the hour of closing, there was this provision—"Provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing . . . public-houses than those specified in the forms of certificates, . . . it shall be lawful for such Justices or Magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later



**No. 34.** than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit." And if Magistrates, in the exercise of that power in any particular district, said that certain persons holding certificates must now close at ten instead of eleven, which was the hour to which the statute authorised them to be open, speaking generally, then I take it there would be room for holding clearly that in that case also the publican would have had the benefit of the early-closing licence, which would give him a seventh off—at least I say there is a great deal to be said on the point. Matters remained in that position from 1880 to 1887.

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I concur in holding that all that has been changed by the Statute of 1887. What is the feature of the English Act which is sought to be applied to the Act of 1887? It is this, that the reduction of the sum paid upon the licence is to be given where the person holding the licence shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act. We must read these words as meaning that he is to close his premises one hour earlier than the ordinary hour at which such premises would be closed under the statute we are now reading, viz, the Statute of 1887. Now, can it be shewn that the reclamer has to close his premises an hour earlier than the ordinary hour at which under this Act he would be entitled to keep his premises open? The answer to that is just what the Lord Ordinary has given,—there is no longer any fixed hour up to which he is entitled to keep open, so that he must be restricted in order to take away the right. The question here is, what is the ordinary hour of closing? The ordinary hour is not eleven o'clock, but such hour not earlier than ten and not later than eleven as the Magistrates may think fit to fix, and as the Magistrates have fixed ten, I do not think it can be said that the reclamer is a person who has to close his premises earlier than the hour which the statute sets forth as the ordinary hour of closing. Upon that ground I agree with all that your Lordships have said. I am of opinion that the Lord Ordinary's judgment should be adhered to.

**LORD ADAM.**—It appears to me that the provisions as to early closing, as they have been explained to us, are clear and intelligible in their native soil, and as applicable to the English system, but I confess that since they have been transplanted here, I see or would have seen great difficulties in reconciling them with our Scottish system, which was entirely different, and if this question had occurred prior to the passing of the Act of 1887, I should have participated in your Lordship's difficulties upon the case, and would have wished further time for consideration. But now, after the passing of the Act of 1887, I do not think this case is attended with difficulty. Every certificate, as has been pointed out, must now bear that the publican does not keep open house after such an hour at night of any day not earlier than ten and not later than eleven as the licensing authorities may direct. Therefore, now, as I read that the licensing authority must direct what the hour of closing is to be. The hour of ten is not fixed, and the hour of eleven is not fixed, and there is no hour between these two fixed by statute; there is no hour fixed, but the licensing authority shall say what the hour shall be. That is the position of matter under the Act of 1887. Now, that being so, the question comes to be, whether this publican, whose certificate ordains that he shall close at ten o'clock, has

what is called an early-closing licence? Early closing implies that it must be earlier than something. Earlier than what? Now, that takes us back to the English statute, because it is the English statute which introduces this. It is said that the premises shall be closed at an hour earlier than that at which such premises would otherwise have to be closed. Otherwise than what? If we go a little further down the clause we find what it is; it is earlier than the ordinary hour at which such premises shall be closed under the provisions of the Act—that is to say, under the provisions of the Act we are now considering. But, as has been pointed out, there is no ordinary hour fixed by the Act of 1887 at all; that is to be fixed by the licensing authority. In this case the licensing authority have fixed ten o'clock as the hour of closing for the whole of Midlothian, and that is the ordinary hour, if there is any ordinary hour. Well, then, the question comes to be, as this gentleman's certificate declares that he shall close at ten o'clock, is that earlier than the ordinary hour fixed by the statute or by the Justices under the statute? I am totally unable to see that it is. Therefore, I am unable to see that this is an early-closing licence or certificate in the sense of the English Acts, and therefore I agree with your Lordship and the Lord Ordinary.

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THE COURT adhered.

WYLIE & ROBERTSON, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

MARTIN MACKAY AND OTHERS (Hubert Rossborough's Trustees), First Parties.—*Ure*. No. 35.

MRS ELIZABETH GIFFORD OR ROSSBOROUGH, Second Party.—*J. G. Smith*.  
MRS SARAH J. SHERIDAN AND OTHERS, Third Parties.—*R. V. Campbell*.  
Nov. 28, 1888.  
Rossborough's  
Trustees v.  
Rossborough.

*Husband and Wife—Terce and jus relictæ—Conversion*.—A bondholder infert sold the security subjects under his bond, but died before granting a disposition. His widow maintained that the bond formed part of her husband's moveable estate at the date of his death, subject to *jus relictæ*.

*Held* that the bond had not been rendered moveable in a question between the executor and the widow.

*Heritable and Moveable—Incidence of debts—Lease*.—A testator in his trust settlement directed his trustees to pay the income of the residue of his estate to his sister and her children, and after her death, and when the youngest attained the age of twenty-five years, to divide the capital of the residue among them. He was tenant under lease of a music-hall, and when he died some years of the lease were still to run. His trustee failed to dispose of the lease or to sublet the premises. His widow claimed her legal rights.

*Held* that the loss occasioned by the lease of the music-hall fell to be charged (1) against the moveable estate in a question with the widow, and (2) against the fee of the residue of the estate in a question between the liferentrix and him under the settlement.

HUBERT THOMAS ROSSBOROUGH of "The Cottage," Mount Vernon, near 1st Division. Glasgow, died on 28th March 1887 leaving a widow but no children. B.

By his trust-disposition and settlement, dated 8th June 1886, he conveyed to Martin Mackay, writer in Glasgow, and others, his trustees, his whole means and estate. After a provision to his widow, by the third purpose he directed that his property at Mount Vernon, called "The Cottage," should be kept up and occupied after his death by his sister, Mrs Sarah Jane Rossborough or Sheridan, of New York. By the fifth purpose

**No. 35.** he directed the trustees, after payment of certain legacies, to hold and invest the residue of his estate and to pay one-half of the free annual income arising therefrom to his sister Mrs Sheridan if she survived him, and the other half to her children. By the sixth purpose the trustees were directed after her death to divide and pay the income of the whole residue among her children, till the youngest reached the age of twenty-five years, when they were to realise the residue and divide it among the children.

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At the date of the truster's death Mrs Sheridan had two children.

The estate of the deceased consisted, *inter alia*, (1) of sums due in certain bonds and dispositions in security, amounting in all to the sum of £29,870, 5s.; (2) of moveables in the Britannia Music Hall amounting, per valuation, to the sum of £659, 7s. 6d.; (3) of the dwelling-house and grounds at Mount Vernon, the saleable value of which was estimated at about £3000.

Previous to his death the deceased had taken certain steps towards realising some of the bonds and dispositions in security, amounting in all to £7250. (1) With regard to a bond and disposition in security for £1800, he had served an intimation and requisition for payment. The period specified in the intimation had expired without payment, and no further steps had been taken for realising the security. (2) With regard to a bond for £1300, a requisition for payment had been served on the debtor. After the expiry of the period for payment the security subjects had been advertised but not exposed for sale, the truster having died without signing the articles of roup. (3) Under a bond for £1150, after the usual steps, the subjects had been twice exposed for sale but had not been sold. (4) Under a bond for £3000, the subjects, which were situated in College Street and High Street, Glasgow, after the usual steps, had been exposed for sale by public roup and sold; but the purchaser, not having implemented his bargain by paying the price, had not received a disposition to the subjects.

The truster at the date of his death was tenant of the Britannia Music Hall, Trongate, Glasgow, under a lease for twelve years, at a rent of £600 per annum for each of the last ten years of the lease. His business, which was that of a music-hall proprietor or manager, was profitably carried on in the music-hall under his personal management. After his death the trustees were unable to effect a sale of the lease for the period still to run or to sublet the subjects. They had wound up the affairs of the deceased and the subjects were now unoccupied and yielded no return to the estate.

The widow, Mrs Rossborough, claimed *terce* and *jus relictæ*.

Questions arose (1) as to the nature and amount of these rights in consequence of the steps taken by the deceased to realise the bonds and dispositions in security being uncompleted; (2) as to what part of the estate fell to be charged with the rent, taxes, and other expenses connected with the music-hall.

This special case was accordingly presented to the Court.

The trustees, as representing the interests of Mrs Sheridan's two children, the fiars, were the parties of the first part.

The widow, Mrs Rossborough, was the party of the second part.

Mrs Sheridan, with consent of her husband, was the party of the third part.

The second party maintained that, *qua* relict, she was entitled to one half of the moveable estate, including therein, as being moveable, (first half of the sum of £3000 contained in the bond and disposition in security over the subjects in College Street and High Street, Glasgow; and (second one-half of sums contained in the bonds and dispositions in security, o

which formal intimations calling for payment had been given, and the notices had expired prior to Mr Rossborough's death without payment being made. She also claimed (third) to be relieved of and from all claims for rent, taxes, and other charges for and connected with the Britannia Hall as from and after Whitsunday 1887.

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The first parties admitted the right of the second party to terce and *jus relictæ*, but they maintained that she was not entitled to one-half of the sums of £3000, £1800, £1150, and £1300 or to relief from whatever loss might be incurred in connection with the Britannia Music Hall, from Whitsunday 1887 till the end of the lease.

The third party, the liferentrix, maintained the same pleas as the first parties, and further maintained "that in the event of the lease of the Britannia Music Hall not being realised profitably for the estate, the rent, taxes, and other charges under the said lease, and all loss or deficiency thence arising to the estate, should be charged against and deducted from the capital or residue of the estate liferented by her and her children."

The questions of law were as follows:—"(1) Were the bonds above mentioned, or any of them, rendered moveable as to the relict by the steps taken to realise the securities, and is the second party entitled to one-half of the sums contained in said bonds, or any of them, as *jus relictæ*? (2) Can the rent of the Britannia Music Hall, and the tenant's obligations under the lease thereof, till the expiry of the lease, be so charged by the first parties as to affect the estate falling to the widow as terce or *jus relictæ*? (3) Are the obligations in the tenant's part of the lease of the Britannia Music Hall, including therein rent, taxes, and all other charges falling upon the tenant, to be charged against and deducted from the capital or residue of the estate? Or do the said obligations fall to be charged against the revenue thereof?"

Argued for the first parties, the trustees;—The first question was whether, by the steps which the deceased took before his death to realise the bonds and dispositions in security, he had converted them into moveable estate, so as to make them subject to the second party's *jus relictæ*, notwithstanding the provisions of the Titles to Land Consolidation (Scotland) Act, 1868,\* which expressly enacted that they should not be subject to a widow's *jus relictæ*. It was no doubt her interest that the question should be answered affirmatively, for as she had claimed her legal rights she was entitled as *jus relictæ* to one-half of the moveable estate as against one-third of the revenue of the heritage as terce, and therefore it was to her advantage that the moveable estate should be increased at the expense of the heritable. The question, however, fell to be answered in the negative. In the first place, even in a question between heir and executor, apart from the Act, it could not be held that conversion had taken place. The true test of conversion was whether the deceased had gone so far that it was impossible for him to draw back and retain his security, so that all that remained to him at his death was a mere claim for a sum of money.<sup>1</sup> Even in the case of the bond for £3000, where the steps had

\* By 31 and 32 Vict. cap. 101, sec. 117, it is enacted that from and after the commencement of the Act such securities shall be moveable as regards the succession of the creditors therein, " . . . . Provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti*, where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ*, where the same is or shall be conceived in favour of the husband," &c.

<sup>1</sup> Ersk. Inst. ii. 2, 16, and ii. 8, 23 and 25; More's Notes to Stair, 143; Bell's

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gone furthest towards realisation, the deceased had power to resale, owing to the failure of the purchaser to implement his bargain. Viewed by this criterion, then, no conversion had taken place, and the bonds still remained heritable at the time of his death *quoad* the second party's *jus relictæ*. But, in the second place, this was not a question between heir and executor, but between the executor and widow, and it was plain that she would be entitled to terce out of these bonds, inasmuch as at the date of the husband's death his infestment in all of them remained undischarged. The law was quite settled that the husband's infestment was the measure of and security for the widow's right of terce.<sup>1</sup> At the date of the death of the deceased it did not matter how far he had gone in realising the securities, if the disponee were not infest.

The second question related to the music-hall. The business carried on was really a mercantile speculation, in which the testator's moveable estate was invested, and from which his whole moveable means, out of which the second party's *jus relictæ* was payable, was derived. It was only just that before her *jus relictæ* was paid the loss effeiring to the bad asset should be deducted.<sup>2</sup> The third question was one between the liferentrix and the fiars, her children. The lease being part of the residue, any profits by increasing the residue would have increased the income arising therefrom, and therefore the loss should lie on the revenue.

Argued for the second party;—(1) It was quite clear from the steps which the testator took to realise his bonds prior to his death, that he intended to convert them into money. As regarded the bond for £3000, he had actually sold the subjects.<sup>3</sup> He might have a right of retention for the price, but that was quite a different thing from his position as security-holder. The contention of the trustees involved the absurdity that the insolvency of the debtor in the contract of sale was to regulate the succession to the creditor's estate. Conversion must then be held to have taken place, and that being so, the second party was entitled to her *jus relictæ* out of them. (2) No part of the loss on the music-hall ought to fall upon her. She never could be entitled to *jus relictæ* out of the lease, and therefore any loss in connection with it must primarily fall upon the heir.<sup>4</sup> If there had been no heritable estate out of which to pay the debt, of course the moveable estate would be liable. But here, confessedly, there was heritable estate in the house at Mount Vernon, more than sufficient in value to pay the whole debt incurred in connection with the music-hall.

The third party concurred in the arguments stated for the first parties, except that she argued that in a question between the liferentrix and the fiars the loss arising from the lease of the music-hall ought to fall on capital and not on the revenue of the estate.<sup>5</sup>

Com. ii. 6; Montier v. Baillie, June 29, 1773, Hailes' Decns. 530, and M. 15,859; Heron v. Espie, June 3, 1856, 18 D. 917, per Lord Justice-Clerk (Hope), 928 and 931, and per Lord Murray, pp. 928, 937, and 938, 28 Scot. Jur. 420; Wilson v. Wilson, Nov. 29, 1808, F. C.; Johnstone and Others v. Greig, &c., June 28, 1831, 9 S. 806, 3 Scot. Jur. 537; Paul v. Home, July 5, 1872, 10 Macph. 937.

<sup>1</sup> Ersk. ii. 9, 46; Bell's Prins. 1600; MacCulloch v. Maitland, July 10, 1788, M. 15,866; Campbell v. Campbell, Feb. 17, 1776, 5 Brown's Supp. 627; Fraser on Husband and Wife, ii. 1095.

<sup>2</sup> Ferguson v. Ferguson's Trustees, Feb. 23, 1877, 4 R. 532.

<sup>3</sup> Stair's Inst. ii. 4; Sir Geo. Mackenzie's Inst. ii. 2, 6; Bell's Comm. (5th and 7th edns.) ii. 6; Fraser's Husband and Wife, ii. 985.

<sup>4</sup> Police Commissioners of Dundee v. Straton, &c., Feb. 22, 1884, 11 R. 586.

<sup>5</sup> Ferguson v. Ferguson's Trustees, Feb. 23, 1877, 4 R. 532.

At advising.—

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LORD PRESIDENT.—The late Mr Hubert Rossborough died on 28th March 1887, leaving a settlement, dated 8th June 1886, disposing of his whole estate. He was married to Miss Elizabeth Gifford, the second party in this special case, but there is no issue of the marriage.

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The widow rejects the provisions made for her in the settlement, and claims her legal rights, and it is not disputed that she is entitled so to do.

Her rights extend to one-third of the income of her husband's heritable estate and one-half of the moveable estate. Her interest therefore is to augment the amount of the moveable estate as much as possible, or, in other words, to enlarge the amount affected by her *jus relictæ* at the expense of the estate subject to the terce.

The greater part of Mr Rossborough's heritable estate consisted of bonds and dispositions in security on which he was infeft. The Act 31 and 32 Vict. c. 101, sec. 117, makes such securities moveable as regards the succession of the creditors therein, but with the express proviso, that they shall continue heritable *quoad faciem*, "and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband."

Where a widow claims her legal rights in opposition to her husband's settlement, all questions between her and the parties interested in her husband's succession must be settled as in a case of intestacy, for while the latter cannot found on the settlement to the prejudice of the former's rights, neither can the latter take any benefit from the settlement which she has repudiated. The question therefore comes to be, what portion of the deceased's estate is to be considered heritable and what moveable in a question between the widow on the one hand, and the heir and executor respectively on the other. Now, the statute settles that question so far, when it enacts that heritable securities shall remain subject to the terce as heritage, and shall not to any extent pertain to the widow *jure relictæ*.

But as regards certain of the heritable securities in the present case, the widow contends that both the common law, and the statute which declares and confirms the common law, should receive no effect because of the steps which were taken by her husband before his death for the purpose of converting the heritable securities into moveable estate. These steps are fully detailed in the seventh, eighth, ninth, and tenth heads of the special case, and amount in substance to this—Of the entire amount of heritable bonds belonging to the deceased (£29,870) he had previous to his death demanded payment in the usual form of four bonds, amounting in all to £7250. In one case he had served the usual intimation and requisition for payment, but no further steps were taken. In another, after the expiry of the period for payment under the requisition, the subjects were advertised for sale, but had not been sold or exposed for sale. In a third, the subjects had been brought to sale, but had not found a purchaser. In the fourth, the subjects had been exposed for sale, and were actually sold. But the purchaser being unable to pay the price the contract of sale remained unfulfilled, and the purchaser obtained no title to the subjects.

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In all these cases it is clear that the infertment of the deceased as creditor stood undischarged and undisturbed, and afforded him at the time of his death precisely the same security over the same subjects as he acquired when he originally took infertment on the bonds, excepting only any change in the value of the security subjects.

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It is well-settled law that the husband's infertment at the time of his death is the measure as well as the security of the tercer's right, and that though the husband has actually sold his heritable estate, and the purchaser be ready to fulfil his contract and pay the price, yet if the purchaser be not infert during the husband's lifetime, the right of terce will not be excluded. It seems needless to add (though the statute above cited has done so) that estate which is subject to the terce cannot be affected in any way by the *jus relictæ*.

The first question therefore falls to be answered in the negative.

As regards the second and third questions, Mr Rossborough was at the time of his death tenant of the Britannia Music Hall under a lease for twelve years from Whitsunday 1878 at a rent of £600. He carried on business there as a manager and purveyor of public entertainments, and realised profits from that business. But when his estate came into the hands of his trustees they were unable either to carry on the business or to find a purchaser for the unexpired term of the lease. They have accordingly wound up that business, and the hall is unoccupied, and instead of yielding revenue is an annual burden on the estate to the extent of the rent and taxes till the expiry of the lease at Whitsunday 1890.

It appears to me that this is a loss occasioned to the estate by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties to the case, and does not form any proper charge against the third party as liferenter.

LORD MURE.—I agree in the opinion read by your Lordship, and having had the opportunity of previously seeing it, have nothing to add.

LORD ADAM.—The main question here is whether the widow of the testator has a claim of *jus relictæ* out of the sums due under the six bonds, amounting in all to £29,870, 5s. ? It is not disputed that they are all heritable bonds, and that the husband died infert in the subjects over which they were granted. Neither do the trustees dispute that the widow has a right of terce out of the bonds. On the contrary, they assert that she has such a right, and that is their principal reason for holding that she is not entitled to *jus relictæ*. *Prima facie* the widow's right is one of terce and terce only, but it is said—and it is the first question which we have to decide—that certain steps taken by the husband during his life with a view to realise the securities over which the bonds were granted had the effect of rendering the bonds moveable *quoad* the widow, as as to give her a claim to half the amount due under the bonds as *jus relictæ* instead of terce.

I think it is only necessary to consider the particular steps taken by the testator to realise the security under the bond for £3000, because the steps in that case went a great deal farther towards realisation than the steps taken under any of the other bonds. If the widow cannot succeed on the facts in the case of that bond, she cannot succeed as to the others.

With reference to that bond, it is set forth in the case that the security subjects were exposed for sale by public roup at the upset price of £5250. A purchaser appeared and offered the upset price, and was preferred to the purchase. The purchaser was unable to fulfil his bargain, and a charge for payment was served upon him in the usual way, and it was allowed to expire three days before the testator's death without payment being made. It is not relevant to consider what the trustees did after his death, and therefore the proceedings are just these,—The testator during his life endeavoured to realise the security subjects, and they were knocked down to an intending purchaser for a certain sum. The purchaser was unable to fulfil his contract, and the testator died without having got payment of the price, and remained still infert in the subjects.

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Now, in my opinion, the widow is not entitled to *jus relictæ* out of that bond, but is clearly entitled to terce. There is no doubt on all the authorities, that the husband's sasine is the measure of the widow's right, and no proceedings which have not the effect of evacuating the husband's sasine can preclude her right. There are two authorities on the point, and one is a very strong authority. The first is the case of *MacCulloch v. Maitland*, M. 15,866, where certain lands were actually disposed by the husband, and the disponee took possession, but did not get infertment in the lands. The husband died, and after his death his widow claimed terce out of the lands. It was held that the husband's sasine had not been evacuated, and the widow was therefore held entitled to terce out of the lands. The other case is the case of *Campbell v. Campbell*, 5 Brown's Supp. 627, and it is there said:—"The husband's sasine, says Mr Erskine, is the measure of the wife's terce; thus neither an heritable bond nor a disposition of lands granted by the husband, if death has prevented him from giving sasine to the creditor or disponee, can hurt the terce," and so the Lords found,—“In respect that the deceased John Campbell was not at the time of his death denuded of the subject within mentioned by infertment, but only by a title which remained personal: Therefore find that Katherine Waddell, his relict, is entitled to a terce of said subjects, and not to a third part of the price thereof.”

Now, it appears to me that both of these cases are—one of them much—a *fortiori* of the present case. There was not only an intention to sell, but an actual disposition granted, but it was not followed by infertment of the disponee. The husband's sasine still subsisted, and with it the widow's terce. I cannot find circumstances so strong in the present case, and therefore I think the authorities are conclusive of the present case, and it must be held that the widow has a right to terce. That being so, the necessary consequence is that the bonds are not subject to a claim of *jus relictæ*. I therefore agree with your Lordships that the only answer we can give with reference to the bond for £3000 is that the widow is not entitled to *jus relictæ*. If that is true of the first bond, it is also true of the rest. We must therefore answer the first question in the negative.

I also agree as to the answer to be given to the second and third questions.

LORD SHAND was absent.

THE COURT pronounced the following interlocutor:—"In answer to the first question, find and declare that the bonds mentioned in the case were not rendered moveable as to the relict by the steps taken to realise the securities, and that the second party is not entitled to any part of the sums contained in the said bonds *jure relictæ*: In answer to the second and third questions, find and declare that the loss occasioned to the estate of the deceased by



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the subsistence till 1890 of the lease of the Britannia Music Hall is occasioned by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties in the case, and does not form any proper charge against the third party as liferenter, and decern: Find the first and third parties entitled to expenses against the second party."

CAMPBELL & SMITH, S.S.C.—ADAM SHIELL, S.S.C.—Agents.

No. 36. ROBERT LIDDLE WALES, Complainer (Reclaimer).—*Strachan*—*M'Lennan*.

MARY WALES, Respondent.—*Ure*—*A. S. D. Thomson*.

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Wales.

*Jurisdiction—Burgh Court—Heritable Right.*—Under a mutual disposition and settlement a husband assigned to his wife, "in liferent for her liferent alimentary use allenary," certain house property. After the husband's death, his heir-at-law by onerous deed disposed the fee to the widow, "as liferenter of the said subjects." This disposition was placed on record. The widow thereafter married again, and after residing some time with her second husband, she separated from him, and brought an action of ejectment from the house property above mentioned against him in the Court of the royal burgh in which it was situated. The husband defended the action, on the ground that the liferent had been extinguished by the conveyance of the fee, and that the *jus mariti* was not excluded. The Magistrates granted warrant of ejectment, on the ground that the alimentary liferent still subsisted, and that the *jus mariti* of the husband was excluded. In a note of suspension at the instance of the husband, *held* (rev. judgment of Lord Fraser) that the question was one of heritable right, and that the Burgh Court had no jurisdiction to entertain it.

1st Division.  
Lord Fraser.  
M.

IN April 1888, Mary M'Lauchlan or Wales, wife of Robert Liddle Wales, innkeeper, Stranraer, raised an action against her husband in the Burgh Court, Stranraer, concluding for an order on the defender to remove from Nos. 1 and 2 Agnew Crescent there, or alternatively for warrant to eject him therefrom.

The pursuer averred that prior to her marriage with Wales, which took place in 1877, she was widow of Robert M'Lauchlan, and had resided with him at 1 and 2 Agnew Crescent; that M'Lauchlan died in 1868; that by a mutual disposition and settlement, between him and the pursuer, he disposed to her, in case she should survive him, "in liferent for her liferent alimentary use allenary, whom failing and at her death to my own heirs, executors, and assignees whomsoever, in fee, his whole heritable estate," including the property in question. She further averred that she had been compelled to leave her present husband in 1885, and had lived apart from him ever since.

The defender averred;—"The pursuer acquired absolute right to the properties in question by disposition granted by William M'Lauchlan [who was heir-at-law to the deceased Robert M'Lauchlan], land-steward, Billown, near Castletown, Isle of Man, in her favour, dated the 16th, and recorded in the division of the General Register of Sasines applicable to the county of Wigtown the 20th, both days of August 1873. The defender's rights of *jus mariti* and right of administration are in no way excluded by the terms of said disposition, and no other deed has entered the record in any way affecting or restricting them. Said disposition is in the possession of pursuer, and she is called upon to produce it, failing which a diligence is craved for its recovery."\*

\* The disposition referred to bore,—“I, William M'Laughlin, land-steward,

The pursuer pleaded, *inter alia* ;—(1) The pursuer being proprietor for her liferent alimentary use allanarly of the subjects before mentioned, is entitled to exercise all the rights of property over the same, without being subject to the control or administration of her husband. No. 36.  
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The defender pleaded, *inter alia* ;—(1) It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband, and all such averments should be deleted from the proceedings. (3) The defender, in entering into the contract of marriage with the pursuer, was entitled to rely on the public records, and the same not disclosing any exclusion of his legal rights of *jus mariti* and right of administration in the properties in question, no secret or latent deed containing such exclusion can be competently pleaded against him. (4) Assuming that, by the terms of said mutual disposition and settlement, defender's legal rights were excluded, the pursuer not having taken infestment thereon, but on a title containing no such exclusion, the defender cannot be affected by the terms of the former deed.

By interlocutor, dated 28th March 1888, the Magistrates granted warrant to officers of Court to eject the defender from the subjects in question.\*

Billown, near Castletown, Isle of Man, heritable proprietor in fee of the subjects and others hereinafter disposed, in consideration of the sum of two hundred and fifty pounds sterling, instantly paid to me by Mrs Mary M'Dowall or M'Lauchlan, residing in Stranraer, widow of the deceased John M'Lauchlan, vintner there, and liferenter of the said subjects and others, as the price of my interest as far thereof, do hereby sell and dispose to the said Mrs Mary M'Dowall or M'Lauchlan and her heirs and assignees whomsoever, heritably and irredeemably," the subjects in question.

\* The interlocutor was as follows :—"Find in fact (1) that the pursuer was, prior to her marriage with defender in 1877, widow of the late John M'Lauchlan, vintner, at Nos. 1 and 2 Agnew Crescent, Stranraer, who was proprietor, *inter alia*, of said subjects ; (2) that, by a mutual disposition and settlement, executed between the said John M'Lauchlan and pursuer, then Mrs Mary M'Dowall or M'Lauchlan, dated 21st March 1867, the said John M'Lauchlan gave, granted, assigned, and disposed to and in favour of the pursuer, in case she should survive him 'in liferent for her liferent alimentary use allanarly, whom failing and at her death, to my own heirs, executors, and assignees whomsoever in fee, All and Whole my heritable and moveable estate,' including Nos. 1 and 2 Agnew Crescent ; (3) that the pursuer being the alimentary liferenter of the subjects in question, by a disposition in her favour, granted by William M'Lauchlan, land-steward, Billown, near Castletown, Isle of Man, dated 16th and recorded 20th, both days of April 1873, acquired right to the fee of the properties in question ; (4) that the pursuer and defender have been living apart since about the month of July 1887 ; (5) that the pursuer legally warned the defender to flit and remove from said premises, Nos. 1 and 2 Agnew Crescent, at and against the term of Whitsunday 1888 : And find in law that the liferent alimentary allanarly provision in favour of pursuer, contained in the mutual disposition and settlement executed by her former husband and herself above referred to, implies an exclusion of the *jus mariti* and right of administration of the defender, and will not fall under the legal assignation implied in the marriage, the effect of such exclusion being to place the pursuer in the same position as if she were an unmarried person : That it is quite competent for pursuer to hold two interests at same time in same property, one the liferent alimentary, the other the fee : That the liferent alimentary provision of pursuer has not been in any way assigned, sold, attached, superseded, or discharged by her acquisition of the fee : That the pursuer's alimentary liferent right has not been consolidated or extinguished by her acquisition of the fee ; and that therefore pursuer is entitled to exercise the whole rights of property over the properties in question without being subject to the control or administration of

No. 36. In May 1888, Robert Wales presented a note of suspension.

Nov. 28, 1888.  
Wales v.  
Wales.

On 8th November 1888, the Lord Ordinary (Fraser) pronounced an interlocutor repelling the reasons of suspension.\*

The complainer reclaimed, and argued on the question of competency;—The complainer here was in possession on an *ex facie* good title. Summary ejection was competent in the inferior Courts only where it was alleged and shewn that the person sought to be ejected was a vitious or precarious possessor.<sup>1</sup> It could not be said here that the possession was vitious, as he had possessed along with his wife till she left him, nor could it be said that it was precarious, *i.e.*, on tolerance—(see *Hally v. Lang*)—as the only infetment produced was in favour of the respondent, viz., the disposition by William M'Lauchlan, and that infetment did not bear that the *jus mariti* was excluded from the liferented subjects. It was alleged that the result of the mutual deed entered into between the respondent and her first husband had the effect of excluding the *jus mariti* of the complainer, but that raised a question of heritable right which could not competently be tried in the Burgh Court. The reasons of suspension should therefore be sustained.

Argued for the respondent;—The magistrates of a royal burgh had jurisdiction on all questions of possession arising between inhabitants of the burgh.<sup>2</sup> The possession here was simply precarious,—*i.e.*, on tolerance,—as the effect of the mutual deed between the respondent and her first husband was to exclude the *jus mariti* of her second husband from the liferent of these subjects. The Burgh Court was entitled to see what was the nature of the possession of the complainer, and if it proved to be precarious then they had power to eject him.

LORD PRESIDENT.—A very interesting question has been raised and partially argued, but according to my view of the case it is impossible to get at that

defender: And therefore, and in respect that the term of Whitsunday has now come and is bygone, the Magistrates grant warrant to officers of Court to eject the defender, his family, servants, and effects furth and from the said premises, Nos. 1 and 2 Agnew Crescent, Stranraer, in terms of the alternative conclusions contained in the prayer of the petition."

\* "OPINION.—The first objection stated by the complainer is that the decree complained of is incompetent in respect the Magistrates of Stranraer had no jurisdiction. The subjects from which the complainer is sought to be removed were subjects within the royal burgh of Stranraer. The whole proceeding was gone about in a formal manner, as in removings in a burgh. The complainer was duly warned, as is certified by the burgh officer's execution. A petition for removing was then presented, and the period for removal having expired, the Magistrates were entitled to grant a warrant of ejection, which they did. The whole proceedings were in accordance with the law as laid down in *Robb v. Menzies* (20th January 1859, 21 D. 277).

"It is next said that the Magistrates of Stranraer had no power to pronounce judgment in such a case as this, because it was not a case between landlord and tenant, but between husband and wife. They had certainly the power to see whether the wife had a title to sue, being the proprietor, and this was all they did. It is of no consequence that this is a litigation between a husband and a wife. The question is simply whether the complainer ought not to be removed from premises within their jurisdiction, and that depends entirely upon the title which is produced, and which the magistrates are entitled to read." (His Lordship then dealt with the question on the merits.)

<sup>1</sup> *Hally v. Lang*, June 26, 1867, 5 Macph. 951, 39 Scot. Jur. 530; *Scottish Property Investment Company Building Society v. Horne*, May 31, 1881, 8 R. 737.

<sup>2</sup> *Ersk. i. 4, 21.*

question in the present case, because we are met by the preliminary objection that the action is altogether incompetent. My view on that point is contained in my opinion in the case of *Hally v. Lang*. No. 36.

Nov. 28, 1888.  
Wales v.  
Wales.

The general rule is that to obtain summary ejection there must be an allegation and proof that the person sought to be ejected is either a vitious or precarious holder. Now, those words are perhaps slightly technical, and require interpretation. A vitious possessor is one who has obtained possession either by force or fear; a precarious possessor is one who holds by mere tolerance. No doubt, as I observed in *Hally's* case, there are certain anomalous and exceptional cases which do not fall under either of those two heads, but I do not think that this case falls under that miscellaneous category, and we must therefore consider whether the possession here was either vitious or precarious.

That it was not vitious is clear, for the husband and wife possessed the house together and lived there as husband and wife—the possession was therefore lawfully obtained. It is said, however, that it was precarious. It seems to me extravagant to say that that is so. The only existing infetment was that of the wife under the disposition from her first husband's heir-at-law. That disposition proceeds on the narrative of a purchase, and though it is mentioned that the widow was liferentrix, nothing is said as to the nature of her liferent. Therefore taking the infetment as it stands, it is demonstrable that the husband is entitled either to the rents of these subjects, or to possession of them, if they are not let, in virtue of his *jus mariti*.

The answer made is—It is true that that is so on the face of the infetment, but the pursuer undertakes to shew that the infetment cannot receive its natural and proper effect, because of the existence of an alimentary liferent over the subjects by the pursuer, which can be represented as a separate title, and founded on altogether apart from the infetment. That raises a very important and interesting question, but it is one which deals entirely with a heritable right. I do not think it is possible to hold that the Burgh Court was entitled to decide that question to form a foundation for their decree of ejectment. The Burgh Court was not entitled to decide the question of heritable right, and as they could not proceed to give decree without settling that question, I think the whole proceedings have been incompetent. I agree with what has been said during the argument as to the way in which the Burgh Court has given its decision. The judgment is very well expressed and altogether excellent, if the Court had had jurisdiction to pronounce it at all. The interlocutor is remarkably well put, but it is self-condemnatory as regards the competence, for it finds in law that there is a certain right in the wife, and that that right is a heritable right.

**LORD MURK.**—I have come to the same conclusion. I should have been glad to decide the important question which has been raised, but I do not see how we can avoid deciding on the competency of this action.

I always thought it a trite proposition that no inferior Court has power to entertain any question of heritable right, except where such a Court is specially permitted by statute to do so. Ever since I read the interlocutor of the Burgh Court here, it seemed to me that it involved the decision of a most important question of heritable right. It is said that it would be hard if, because there are findings in law, we were to recall the decree of ejection. But I find in the proceedings in the original action that there are pleas in law which raise clearly

- No. 36. the heritable question. The Magistrates did not raise this question of their own accord, but they have made special findings to meet those pleas. The question is simply one of heritable right, and therefore I think the action was incompetent in the Burgh Court.

Nov. 28, 1888.  
Wales v.  
Wales.

LORD SHAND.—I am not surprised that the Burgh Court did not take up this question of competency, as the first plea for the defender is quite consistorial, viz., "It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband." That is the only plea which raises the question of the competency of the action in the inferior Court, and even when the question came here on suspension the same view ran through the argument from what the Lord Ordinary says in his note. Further, the opening on the reclaiming note did not suggest the point on which the case is now decided. It was not in fact until Mr Strachan cited two cases which had not before been laid before us that the real question on competency was raised.

Taking, however, the argument, even at this late stage of the case, I do not see any answer to it. The wife here founds on the original deed, the husband on the later disposition, and the question before the Court comes simply to be a competition of heritable rights. Whether the case is an ejectment, or a removing, or any other process, it does not in my opinion make any difference, because the objection is that the Burgh Court had no jurisdiction to settle any question of heritable right. On that ground I think the action was incompetent, and that the grounds of suspension must be sustained.

LORD ADAM.—I have no doubt that this petition was not competently brought in the Burgh Court. Where it appears that the whole question in a petition to that Court is one of heritable right, and that it is on such a question that the decision must turn, it is clearly incompetent for such a Court to decide. The question of heritable right here did not rise incidentally, but was the whole question before the Court; and accordingly I think that the inferior Court had no jurisdiction to entertain it. I therefore agree that the reasons of suspension should be sustained.

THE COURT recalled the interlocutor of the Lord Ordinary, and sustained the reasons of suspension.

ROBERT BROATCH, L.A.—SMITH & MASON, S.S.C.—Agents.

- No. 37. ROBERT MACDONALD, Pursuer (Respondent).—*R. Johnstone—R. L. Orr.*  
ROBERT MACKESSACK, Defender (Reclamer).—*D.-F. Mackintosh—Murray.*

Nov. 30, 1888.  
Macdonald v.  
Mackessack.

*Lease—Summary ejection for failure to stock—Process—Irregularity in proceedings—Sheriff—Jurisdiction.*—In a Sheriff Court petition by the landlord of a farm for warrant to sequester and sell his tenant's effects for rent past due, and for an order on the tenant to replenish the farm if necessary, decree of sale was pronounced of consent, and the sale having exhausted the subjects, the landlord moved for an order on the tenant to re-stock, and on his failure to do so within fourteen days, for decree of summary ejection, and warrant to re-let. The tenant by minute stated that he was proceeding to stock. The Sheriff in respect of this minute remitted to a man of skill to see the stocking carried out, and to report within one month. The man of skill reported at the end of the month that the farm had not been re-stocked. The Sheriff thereupon granted warrant for summary ejection. In an action for reduction of this war-

rant by the tenant, *held (diss. Lord Young)* that as the Sheriff had not fixed a time within which the re-stocking must be carried out, the tenant was not in default, and that decree of reduction of the warrant to eject fell in consequence to be pronounced.

*Question*, whether the Sheriff has jurisdiction to grant warrant for the summary ejection of the tenant of an agricultural subject on account of failure to stock.

*Opinion per Lord Young* that he has.

No. 37.

Nov. 30, 1888.  
Macdonald v.  
Mackessack.

IN July 1887 Robert Mackessack, of Ardgyle, presented a petition in the Sheriff Court at Elgin against Robert Macdonald, tenant of his farm of Cardenhill, Alves, under a nineteen years' lease from Whitsunday 1877, at a yearly rent of £14, for warrant to sequester and sell for arrears of rent, "and in the event of the subject of the hypothec being exhausted, or the premises being insufficiently furnished and hypothecated after any sale hereunder, to ordain the defender to stock and replenish the said premises so as to afford sufficient security for payment of any remaining rent payable or to become payable as aforesaid; and failing his doing so, within such time and at the sight of such person as the Court shall appoint, to grant warrant summarily to eject the defender and his goods, gear, and effects from the said premises, and to authorise the pursuer to re-let the same for such periods and for such rent as may appear best."

2D DIVISION.  
Lord Lee.  
M.

On 27th October 1887, Macdonald by minute consented to decree of sale, and on the same day the Sheriff-substitute (Rampini) granted warrant to sell in satisfaction of arrears of rent and expenses.

Before a sale had taken place, Macdonald petitioned for cessio, and decree of cessio was pronounced on 12th November.

On 10th December the trustee in the cessio sold the stock, &c. on the farm, and the whole proceeds of the sale were subsequently paid to the landlord, in part satisfaction of his claim for rent amounting to £37, 17s. 6d.

On 27th December 1887, the landlord lodged a minute in his own petition, in which he "stated that, in respect the trustee under the cessio of the said Robert Macdonald had recently sold off and displenished the said farm of Cardenhill, the event referred to in the prayer of the petition, viz., 'the subject of the hypothec being exhausted,' had now happened, and the Court is now moved to ordain the defender to stock and replenish the said farm and premises, so as to afford sufficient security for payment of rent now due or to become due at the term of Whitsunday next; and failing his doing so within fourteen days at the sight of Harbourn Marius Straghan Mackay, land-surveyor, Elgin, or within such other time and at the sight of such other person as the Court shall appoint, to grant warrant summarily to eject the defender and his goods, gear, and effects from the said farm and premises, and to authorise the pursuer to re-let the same for such periods, and for such rent as may appear best, all in terms of the prayer of the petition."

The tenant on 18th January 1888 lodged answers to the minute, in which he stated "that he was proceeding to lay down a crop for the incoming season, and was proceeding to stock the said farm of Cardenhill in a husbandlike manner, as craved for in said minute."

On 19th January the Sheriff-substitute pronounced this interlocutor:—"Having advised the minute and answers, Nos. 7 and 8 of process, in respect of the statement in the latter that the defender is now in process of laying down a crop for the incoming season, and of stocking the farm of Cardenhill, remits to Mr Harbourn Marius Straghan Mackay, land-surveyor in Elgin, to see the same carried out *quam primum*, and to report to the Court not later than 19th of February next."

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Mr Mackay's report, dated 18th February 1888, was in the terms quoted below.\*

On 22d February the Sheriff-substitute pronounced this interlocutor:—  
“Having heard parties' procurators on the report by Mr Mackay, No. 9 of process, and in respect of the statements therein contained, grants warrant to eject, in terms of the prayer of the petition; also authorises the pursuer to re-let, and interdicts, all as prayed for: Finds the defender liable in expenses,” &c., “and allows extract of this decree to go out after 12 o'clock on Saturday first.”

Macdonald did not appeal against this interlocutor, but on 31st March 1888 he brought a reduction of the decree of ejection in the Court of Session.

The landlord defended, and, *inter alia*, averred that the pursuer had incurred a conventional irritancy under the regulations and conditions of let of the estate, which the defender alleged (but the pursuer denied) were applicable to the pursuer's holding.

The pursuer pleaded, *inter alia*;—(1) The proceedings complained of being incompetent, illegal, and inept, decree of reduction should be pronounced as craved, with expenses. (2) The pretended decree in question having proceeded upon an incompetent application, and the Court having no jurisdiction, in the circumstances, to pronounce said decree, the same is inept, and should be reduced. (3) Said pretended decree being unfounded and unwarranted, and the proceedings complained of being irregular and oppressive, the pursuer is entitled to have the same reduced and set aside.

The defender pleaded, *inter alia*;—(4) Decree of ejectment having only proceeded upon consent of the pursuer, he is barred from objecting to the same. (5) The decree of the Sheriff having been competently pronounced, and no suspension thereof having been brought, the defender is entitled to absolvitor. (6) In respect that the pursuer has incurred an irritancy, the defender should be assoilzied.

On 6th July 1888 the Lord Ordinary (Lee) pronounced this interlocutor:—“ . . . Finds that the decree of ejection complained of was incompetent, and was not pronounced of consent of the pursuer: Therefore repels the defences; reduces, decerns, and declares in terms of the conclusions of the summons; finds the pursuer entitled to expenses,” &c.†

\* Report by Mr Mackay:—“In terms of remit from the Sheriff-substitute of Elginshire I to-day visited the possession of Cardenhill, occupied by Robert Macdonald. It contains about 23 acres of arable land, divided into six lots. Of this land one lot should have been sown out with young grass, but this has not been done. About 12 acres should have been ploughed, and there is only a little over 4 acres. The turnip shift last season was not properly laid down, and having got no artificial manure the crop was a failure.

“There is no stock of any kind upon the place.

“The ploughing has been done by John Grant, Burnside, a neighbour, and a brother-in-law of the tenant; but even although he should plough the remainder, the land is in such a very poor condition and out of regular rotation, and there being no dung of any kind upon the place, this crop cannot, in my opinion, be laid down in a satisfactory manner by the present tenant.”

† “NOTE.— . . . Two questions were discussed—(firstly), Whether the decree of ejection could be maintained on the ground that it was founded on and justified by the conventional irritancy alleged in the answer to cond. 1; and (secondly) whether it was good as a decree by default, or on the ground that the pursuer, by his minute consenting to decree in terms of the leading conclusions of the petition, was barred from objecting to it.

“The former of these questions, it is clear, must be answered in the negative.

The defender reclaimed, and argued;—(1) The Sheriff had jurisdiction. No. 37. He had jurisdiction to eject summarily for a conventional irritancy, or for desertion, or for a legal irritancy, in the case of urban subjects,<sup>1</sup> but whether he had before 1877 jurisdiction to eject for a legal irritancy in the case of agricultural subjects it was unnecessary to inquire. The Sheriff Court Act of 1877<sup>2</sup> gave the Sheriff jurisdiction in heritable subjects, provided the value of the subjects did not exceed £50 of yearly value or £1000 of capital value and the action was not one of reduction or adjudication. The present action fulfilled these conditions. This was not a declarator that the lease had come to an end—merely an ejection until the tenant chose to come back and stock the farm. (2) The proceedings here had been regular. There was at anyrate no such deviation in point of form as entitled the pursuer to complain, seeing that it was only on account of his answers that the Sheriff did not pronounce the order which the pursuer said ought to have been pronounced.

Argued for the pursuer;—The Sheriff had no jurisdiction.<sup>3</sup> Even if he had, the proceedings had been irregular. It was essential that the Sheriff should have fixed the period within which the tenant must stock. No such period had been fixed, and the tenant consequently was not in default.

The Sheriff Court proceedings shew that the decree of ejection was not, in fact, founded on the irritancy, or upon any allegation that it had been incurred, so that, even if the Sheriff Court had jurisdiction to pronounce decree of ejection upon such a conventional irritancy not declared, the ejection could not be sustained upon that ground. It appears very doubtful, however, whether in this case a process of summary ejection was competent before the Sheriff, for the case was not one in which the pursuer was possessing without any title (*Horn v. M'Lean*, 8 Sh. 329; *Nisbet v. Aikman*, 4 Macph. p. 284).

"But on the question whether the decree can be sustained as a decree by default, there was, it was thought, more to be said. It was contended that the Sheriff's interlocutor of 19th January, remitting to a man of skill to see the defender's proceedings carried out, 'and to report to the Court not later than 19th February next,' followed by the report of 18th February, proved that the pursuer was in default. The decree bears to be, 'in respect of the statements therein contained,' viz.,—contained in Mr Mackay's report. But the pursuer's position, as shewn in the minute and answers, was that he was proceeding to stock the farm, the stock which had been upon it having been sold for behoof of the landlord and other creditors in the way explained on record. Now, the report, although it states that there was no stock on the farm on 18th February, does not instruct that there was no stock upon the 19th, and does not negative distinctly the statement that the tenant was 'proceeding to stock,' &c. In short, the Sheriff Court proceedings do not shew any default committed. I think that, in the absence of any definite order, there was a miscarriage in point of procedure, of which the pursuer is entitled to take advantage.

"With regard to the case of *Scott* (7 Sh. 481), I think it does not apply here—there is nothing in the proceedings to shew that the pursuer consented to decree of ejection, or that he is barred in any way from maintaining his objections to the decree."

<sup>1</sup> *Ross M'Kye v. Nabony*, Dec. 4, 1780, M. 6214; *Tait v. Gordon*, July 3, 1828, 6 S. 1055; *Horn v. M'Lean*, July 19, 1830, 8 S. 329, 2 Scot. Jur. 148, and 2 Deas and And. 192; *Thomson v. Handyside*, Dec. 27, 1833, 12 S. 557; *Wright v. Wightman*, Oct. 30, 1875, 3 R. 68; *Bell's Prin. sec. 1258*; *Bell on Leases*, ii. 8; A. S. Dec. 14, 1756.

<sup>2</sup> Sheriff Court Act, 1877 (40 and 41 Vict. cap. 50), sec. 8.

<sup>3</sup> *Horn v. M'Lean*, *supra*; *Macdougall v. Buchanan*, Dec. 11, 1867, 6 Macph. 120, 40 Scot. Jur. 67; *Dove Wilson*, Sheriff Court Practice, pp. 484-7.



## No. 37. At advising,—

Nov. 30, 1888.  
Macdonald v.  
Mackessack.

**LORD JUSTICE-CLERK.**—This is an action of reduction of a decree pronounced in the Sheriff Court at Elgin in a process between Mr Mackessack, proprietor of Ardyge, and one of his tenants, Mr Macdonald. It appears from the proceedings that the tenant had fallen into arrears to a considerable extent, and the landlord brought a petition against him in the Sheriff Court, part of the prayer of which was to have the stock on the farm sequestrated and sold in payment of these arrears. The tenant consented to decree to this effect being pronounced, and accordingly the Sheriff gave power to sell so much of the tenant's effects as would meet the landlord's claim. The effects, however, were sold under a process of cessio which the tenant brought, and then the landlord lodged a minute in the petition which he had brought, in which he stated that,—“ In respect that the trustee under the cessio of the said Robert Macdonald had recently sold off and dispenished the said farm of Cardenhill, the event referred to in the prayer of the petition, viz., the subject of the hypothec being exhausted, had now happened, and the Court is now moved to ordain the defender to stock and replenish the said farm and premises so as to afford sufficient security for payment of rent now due or to become due at the term of Whitsunday next, and failing his doing so . . . to grant warrant summarily to eject the defender.” Now, if the order asked had been granted, probably this case would never have arisen, but the tenant appeared on 19th January and stated that he was proceeding to lay down a crop for the incoming season, and was proceeding to stock the said farm in a husbandlike manner, and in respect of this statement by the defender the Sheriff did not pronounce an order upon him to stock within a definite period at the sight of a man of skill, but remitted to Mr Mackay, land-surveyor, to see what was being done, and to report not later than 19th February. Upon 18th February Mr Mackay reported that a certain part of the farm had been ploughed, but that even if the remainder should be ploughed, the land was in such poor condition, and there was such absence of manure of any kind upon the place, that the crop could not, in his opinion, be laid down in a satisfactory manner by the present tenant. He also reported that there was no stock of any kind upon the place, but the report does not state in clear terms whether or not any steps were being taken to stock it.

This action of reduction has been raised by the tenant on the ground that he had been summarily ejected without having had any order served upon him to stock within a definite time under pain of summary ejection. The Lord Ordinary is of opinion that that ground of reduction must receive effect. He bases his judgment upon the ground that as there had been no order to stock there could be no decree on account of default. After the most careful consideration I have come to think that the interlocutor pronounced by the Lord Ordinary was the only one that could have been pronounced in the circumstances.

It is perfectly plain on the face of the proceedings that the failure to fix and to certiorate the defender of any definite time within which he must stock was entirely an oversight of the Sheriff, who was misled by the tenant himself to pronounce the interlocutor he did, but he did not so word his interlocutor as to put the tenant in default in the event of failure, and therefore the tenant could not be summarily ejected as being in default. It would be somewhat dangerous to sanction the idea that a tenant may be summarily ejected for non-fulfilment of an order to stock without intimation of a definite term at which if he fail to

stock he may be summarily removed. There was here a remit to a man of skill to see that the stocking was carried out, but there was no notice to the tenant that if he had not stocked before a certain date he would be summarily ejected. There was no definite intimation made to him from which he could draw the distinct conclusion that failure to stock would be followed by summary ejection. I am therefore for adhering to the Lord Ordinary's interlocutor.

No. 37.

Nov. 30, 1888.  
Macdonald v.  
Mackessack.

**LORD YOUNG.**—This case has received and deserves a good deal of consideration. The question was argued to us whether the action brought by the landlord was a competent process in the Sheriff Court. Perhaps it is not necessary in the view expressed by your Lordship, and shared in, I understand, by my brethren, to decide that question, but in the view I take of this matter it is necessary for me to express my opinion upon it. The question is whether a tenant upon failure to stock may be ejected by summary application to the Sheriff, the alternative view being that action must be by declarator in this Court. If by statute only the latter method were competent, of course it would be necessary to resort to that method, although I should even then regret the necessity, as an application to the Sheriff is so obviously a more apt remedy than a declarator. In the analogous case of a tenant of a house failing to furnish it as his implied if not express obligation, it is settled that the landlord's remedy is ejection by summary application to the Sheriff. I am, in the absence of any distinct authority to the contrary, disposed to hold that the remedy of a suffering landlord in such a case as this is also a summary application to the Sheriff, and that it would be a denial of justice to the landlord to say that he can only proceed by declarator in this Court.

A further question remains, which is important although merely formal, indeed a more formal matter it would hardly be possible to conceive. The Lord Ordinary has based his judgment upon the fact that the warrant of ejection was not preceded by a formal order to stock the farm within a definite time, failing which there would be summary ejection. That was undoubtedly the proper course to pursue; it was the course prayed for in the prayer of the petition. I stop to point out that after all the warrant of ejection would not have been pronounced for a breach of an order of Court—that is, for contumacy, but for a breach of the contract with the landlord, ascertained and found to have been committed after a reasonable opportunity had been given for fulfilling it. Now, attending to the circumstances of this case, we see that the tenant was ascertained to be in, and continued to be in, that breach of contract after not only reasonable and fair, but full and ample opportunity had been given to him to fulfil it. After the farm had been displenished by the trustee in the cessio a minute was given in on behalf of the landlord, upon 27th December 1887, stating that fact, and moving the Court to ordain the tenant to stock and farm, and failing his doing so within fourteen days, at the sight of Mr Mackay, to grant warrant for his summary ejection, with the warning that if he failed to do so he would be ejected. As your Lordship has observed, if that course had been exactly followed, and if the Sheriff had ordered the farm to be stocked in terms of the minute, and ejection had followed, there would probably have been no such action of reduction as the present. But that course would have been followed but for the interposition of the tenant himself. Now, what was that interposition? It was at the stage when the proper form would have been to give an opportunity to the tenant to stock within fourteen days,

No. 37. and the order to that effect would have been pronounced had he not interposed with the minute of 18th January stating that he was proceeding to lay down a crop for the incoming season, and to stock the farm in a husbandlike manner. In effect he said—"What is the use of making an order upon me? I am doing what is wished. Don't trouble yourself about it; I am doing it as fast as I can. I don't want a formal opportunity which such an order would signify." Well, what does the Sheriff do? It would have been more regular if he had said—"I won't attend to your minute; it may be a trap. I will pronounce a formal order." But he does attend to it, and in the very spirit in which it was intended. Instead of the order thereby demonstrated to be in the tenant's view superfluous, he remits to Mr Mackay to see whether the tenant is doing what he professes to be doing, and to report if it has been done. Upon 18th February—a month afterwards, and not fourteen days as asked by the landlord—Mr Mackay reports that the farm is totally displenished, and that there is not a trace of either stock or crop upon it, and thereupon the Sheriff pronounces the order for ejection. There was no appeal. There was no attempt to review that judgment, but this reduction is brought on the ground that the warrant was pronounced without being preceded by a formal order to stock. This is not candid or proper conduct on the part of the tenant, and we ought, I think, to give no countenance to it. The tenant has no right to remain in the farm except under the contract, and one of the conditions of his contract is that it should be so stocked as to give to the landlord security for the rent, and if he failed, and continued to fail, to comply with the condition, after due and sufficient notice, he was liable to be ejected. I think therefore there are no grounds for reducing this decree.

LORD RUTHERFURD CLARK.—I give no opinion upon the question whether this summary ejection was competent before the Sheriff. Upon the authorities quoted it would be difficult to hold that the action was competent unless we are further to hold that there has been a change in procedure because of the recent Sheriff Court Act of 1877. I agree with Lord Young that if competent it would be a better form of process to proceed by summary action before the Sheriff rather than by declarator of reduction in this Court. But assuming the competency of the proceedings, I think they were not regularly carried out, and that the tenant therefore is entitled to decree of reduction.

LORD LEE.—I concur with your Lordship in the chair and with Lord Rutherford Clark, and upon this simple ground, that the case was not ripe for a decree by default. In arriving at this conclusion I assume that an action of ejection founded on an irritancy of the contract of lease would be competent in the Sheriff Court if the question were properly raised. The Sheriff Court Act of 1877 expressly provides that declarators of heritable right up to a certain value are to be competent in the Sheriff Court. Here there was a peculiarity which I should say required declaratory words to be employed in the prayer of the petition. What the landlord desired was warrant to sell the stock and crop to pay the rent for 1886, and only after that does the petition go on to ask a further decree ordering the tenant to stock the farm so as to give security for the rent to become due for crop 1887, and for ejection in case of failure. I think that that was a case in which it was essential to justice that the irritancy

should be regularly declared, and that the proceedings should be so conducted as to make it quite clear that the irritancy had been incurred. No. 37.

THE COURT adhered.

ROBERT STEWART, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

Nov. 30, 1888.  
Macdonald v.  
Mackessack.

DONALD M'LEAN, Pursuer (Respondent).—*D.-F. Mackintosh—C. J. Guthrie.*

WILLIAM ADAM, Defender (Appellant).—*Balfour—Shaw.*

No. 38.

Nov. 30, 1888.  
M'Lean v.  
Adam.

*Reparation—Verbal injury—Privilege—Malice.*—The chairman of the public health committee of a local authority stated, at a meeting of the committee, that a case of typhoid fever had been reported to him by a medical man, "who said that it was probably to be traced to the milk supplied" by a certain dairyman. In an action of damages against him by the dairyman it was proved that the medical man had not been of that opinion, and had not said so; but that the defender had misunderstood a conversation which he had held with him, and had made the statement in the belief of its truth and in the discharge of his public duty. *Held* that in these circumstances the defender was entitled to be absolved.

*Observations (per Lord Justice-Clerk)* on the circumstances in which the groundless character of an allegation against another may infer malice.

DONALD M'LEAN, carter, Burghead, raised an action against William ADAM, residing there, for £250 as damages for alleged slander uttered by the defender regarding him. 2<sup>ND</sup> DIVISION.  
Sheriff of  
Elgin.  
I.

The pursuer stated, and it was admitted, that prior to June 1887 he had carried on business as a dairyman in Burghead, and that in that month a serious outbreak of typhoid fever occurred in that place.

In condescendence 3 he averred,—“On or about 22d June 1887, at a meeting of the Burghead Water and Drainage Committee, held in the Free Church schoolroom at Burghead, in the presence and hearing of the Rev. R. Niven, Free Church minister, and A. Jenkins, baker, both residing in Burghead, and John Nicoll, inspector of poor, Hopeman, or one or other of them, the defender stated that a case of typhoid fever had been reported to him by Dr Hay, Forres, who had said that it was probably to be traced to the milk supplied from the pursuer's dairy. That statement was false, and was made maliciously and without probable cause.” The pursuer further averred that in consequence of the defender's false and malicious statement his dairy business had been destroyed, and that he had sustained loss and injury to the extent sued for.

The defender, who was chairman of Burghead Water and Drainage Committee of the Local Authority, admitted the correctness of the following minute of the committee, dated 22d June 1887, which minute he produced, viz.:—“The convener [defender] stated to the meeting that a case of typhoid fever had been reported to him by Dr Hay, Forres, who said that it was probably to be traced to the milk supplied from Mr D. M'Lean's dairy, as cases resembling typhoid had been in that family for some time previous. It was the opinion of the committee that a sample of the milk should be procured, and sent for analysis to Dr Littlejohn, Edinburgh. Mr Adam and Mr Jenkins were appointed a committee to have this done. . . .” He denied the averment that he had acted maliciously, and averred that in his official position he had been desirous to ascertain and remove the cause of the epidemic; that from circulars of the Board of Supervision he had learned that it had been ascertained that such disease had been transmitted through milk, and had been recom-

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mended to give attention to sanitary arrangements and to the existence of contagious disease at all dairies; that on the morning of the 20th June, two days before the alleged slander, he had been sent for to meet Dr Petrie Hay, Forres, who practised in Burghead, and was then attending typhoid fever cases there, and that in the course of the conversation he (defender) learned from Dr Hay that no inquiry had been made as to the milk supply of those infected with the disease; that inquiry was then made, which resulted in its being ascertained that some persons reported to be ill of typhoid fever got their milk from the pursuer; that this was reported to Dr Hay, "whereupon he expressed his opinion that the typhoid fever might have come from the pursuer's dairy, as he had recently attended two children in his house, and could not account for the high fever they were suffering from."

The defender further stated that in consequence of his investigations he called the meeting of 22d June, at which the statement complained of was made, reported to them and received their instructions, and that his investigations and his report to the committee were all in the discharge of his duty as a member of the Local Authority and Public Health and Water and Drainage Committees.

The defender pleaded;—(4) The defender having acted solely in the discharge of a public duty, with probable cause and without malice, in the matter complained of, he is entitled to have decree of absolvitor pronounced in his favour. (5) The defender having, in his official capacity, as convener foresaid, conducted the inquiry referred to in his statement of facts, and having, at the meeting of the said committee, and solely for their guidance in the matter, made the statement complained of, in accordance with a duty incumbent on him to supply all information in his possession relating to the public health of Burghead, he is entitled to the plea of privilege.

Proof was led. It appeared that the pursuer, prior to the occurrence in question, had kept one cow, the milk of which he sold. It also appeared that the defender and another member of Local Authority went, after the meeting of the Public Health Committee at which the alleged slander was uttered, to take samples of the milk sold by the pursuer for analysis. Dr Hay and Mr Dick also visited and inspected the premises. A rumour having in consequence arisen that the pursuer's dairy was a cause of fever, the result was the destruction of the pursuer's business. Subsequent inquiries shewed that the milk had nothing to do with the fever. It appeared that there were at the time cases of illness in the pursuer's house which were at first suspected of being typhoid fever but proved to be only the fever of measles.

Evidence, which is fully referred to in the opinion of the Lord Justice-Clerk, was led as to a conversation, prior to the meeting of the Public Health Committee, between the defender and Dr Hay, and at which Mr Dick, a medical student, and Mr Grant were present. Dr Hay deponed that at this conversation he blamed rather the drainage system than the milk supply, but that the defender suggested milk as the means by which the fever was propagated, and adhered to that opinion. At the time in question the streets of the village had recently been opened up in order to execute a drainage system, and the soil, which was porous and on which sewage matter had been for many years thrown, was saturated with sewage. Dr Hay and Mr Dick both denied that the former had reported to the defender that the fever could be traced to the pursuer's dairy. The defender deponed that he and Dr Hay had discussed the possibility of the milk being a source of danger, and that Dr Hay, after ascertaining that certain of the patients got their milk at the pursuer's dairy, said that the

cases at the pursuer's own house must be typhoid. He (defender) had thereupon called the meeting of Public Health Committee, and made at it the statement of which the pursuer complained.

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The Sheriff-substitute (Rampini), on 28th June 1888, found that the defender's statements founded on in condescendence 3 "were unfounded in point of fact, and that they were made maliciously and without reasonable or probable cause; that they were not privileged in point of law; that in consequence of the said statements the pursuer has suffered serious injury and damage to his business and reputation, and that the defender is liable to him in damages therefor; assesses the same at £100 sterling, and decerns for that sum against the defender."\*

The defender appealed to the Court of Session, and argued;—The circumstances made the case one of exceptionally high privilege. The defender, who held a public position concerned with the maintaining of public health, was reporting to the committee over which he presided a matter which he believed of importance to their duties. The defender's case of privilege was similar to that of a town-councillor speaking to the business of a council meeting, as in the recent case of *Shaw*.<sup>1</sup> Malice must be established against him as a condition of liability. Personal ill-will and desire to injure were disproved by the evidence. It might be that he was mistaken both as to the cause of the spread of fever, and as to the import of his conversation with Dr Hay. But the fact remained that the subject of milk as a source of danger had been discussed, and that the defender believed it to be the result of this conversation that Dr Hay considered that the milk from the pursuer's dairy was a source of danger. Malice might possibly be inferred from an unfounded statement made with gross disregard to truth, and without inquiry, but the circumstances of the case shewed that the defender had been acting honestly, and after inquiry.

Argued for the pursuer;—That the occasion was one of privilege was admitted. But the question was whether the defender's conduct could be sheltered behind that defence. He had destroyed the pursuer's business by a statement which was proved to be unfounded, and by the action he and his committee took in consequence thereof. Dr Hay, his alleged authority for his statement, had never said the pursuer's dairy was to blame for the spread of fever. He had blamed the drains. No doubt there had been talk about fever being often carried by milk, but that was what the defender himself said in consequence of a theory he had determined

\* "NOTE.— . . . It seems very much to the Sheriff-substitute as if the defender having formed his own theory of the cause of this fever, had been determined to maintain it through thick and through thin,—that so convinced was he in his own mind that he was right and that Dr Hay was wrong, that he could not or would not listen to anything that was said on the other side. In no other way can the Sheriff-substitute account for the reckless, and, as it has been proved, entirely unfounded statement he made to the meeting on the 22d of June. This is not the temper in which the chairman of an important committee should approach the discussion of questions which involved so much to the whole community of Burghhead. Nor is this, the Sheriff-substitute thinks, the temper which will entitle him to plead privilege in a case like the present.

"Personal ill-will, the Sheriff-substitute gladly believes, the defender had none against the pursuer. But evidence of personal ill-will is not required to establish malice in law. Malice may be inferred from facts and circumstances, and 'the falsehood of what is said is not always an important consideration in cases of this kind, but sometimes it is conclusive,' and as the Sheriff-substitute has been unable to find the slightest justification in fact for the statements the defender made to the meeting, he thinks it is conclusive here. . . ."

<sup>1</sup> *Shaw v. Morgan*, July 11, 1888, 15 R. 865.

**No. 38.** to support, and to which Dr Hay did not subscribe. It was untrue that "a case of typhoid fever had been reported to" the defender "by Dr Hay, Nov. 30, 1888. Forres, who said that it was probably to be traced to Mr D. M'Lean's dairy, as cases resembling typhoid had been in that family for some time previous." Yet the defender had for some reason chosen to make that statement, representing it not as his own opinion but as in point of fact Dr Hay's opinion, and an opinion communicated to him. This circumstance shifted the *onus* which lay on the pursuer in the first instance and put it on the defender to shew an excuse for a statement not erroneous merely, but made without any reasonable ground whatever, and against the information in his possession. There could be no honest belief in it. Where the false statement related to something not within a person's own knowledge, the mere fact of making it would infer malice.<sup>1</sup>

At advising,—

**LORD JUSTICE-CLERK.**—This is an appeal from a judgment of the Sheriff-substitute of Elginshire. The pursuer claimed damages from the defender on the ground that his business as a milk-dealer in Burghhead, in that county, had been ruined, in consequence of a statement made by the defender that an outbreak of typhoid fever among the inhabitants was probably to be attributed to milk supplied by the pursuer. The defender maintained that the statement was made by him as chairman of the Burghhead Public Health and Water and Drainage Committee, and in the fulfilment of his office as a member of a public body, having a duty to report such matters relating to the sanitary condition of the place as might become known to him, and that he neither acted maliciously nor without probable cause. The Sheriff-substitute has, after taking a proof, decided against the defender, and finding that the statements were made maliciously and without probable cause, has awarded £100 of damages.

The case is a most unfortunate one. The evidence makes it certain that there was no ground for attributing the outbreak or spreading of typhoid fever in Burghhead to the milk sold by the pursuer, and it appears to be highly probable that, but for the unfortunate report of the defender to the committee, and the somewhat ill-judged action taken upon that report, the pursuer might have been selling his milk profitably to this day, instead of having his little business destroyed. I think it would have been much more prudent if the defender had confined his report to the expression of his belief that milk would probably be found to be the cause of the mischief, and if the committee, instead of singling out, and thus pointing the finger of suspicion at, the pursuer's dairy, as distinguished from others, had directed samples to be taken from all the milk-dealers, and thus saved the pursuer from the desertion of customers, which, in so small a place, was sure to follow any indication on the part of the authorities that one dairy in particular was suspected.

But while it is certainly deplorable that such error in discretion should have been committed, leading to disastrous results to the pursuer's milk business, the question whether it is to be held that the defender in making his report was acting maliciously, and therefore is to be liable in damages for the consequent injury, is an entirely different one. It can hardly be suggested that in this case there is any trace of personal malice, producing a direct desire to cause injury. The pursuer's counsel did not in debate maintain that the proof disclosed any such case. He rather argued that malice was to be implied in the legal sense

<sup>1</sup> Denholm v. Thomson, Oct. 22, 1880, 8 R. 31.

from the facts disclosed, on the ground that the true inference from them was that the report had been made in reckless disregard of the pursuer's interests. The highest point to which he attempted to bring up his case was that the evidence did not justify the idea that the defender could have had an honest belief in the truth of what he said, had he well considered the matter, and that he must be looked upon as guilty of such recklessness as is held in law to imply malice from his making so groundless an accusation. Now, it appears to me that the inference of malice from recklessness of statement must depend not merely upon the falsity of the statement, however gross, although that is undoubtedly an element which may be of importance along with others, but upon other considerations. A statement may be absolutely devoid of foundation, and yet may not be uttered in such circumstances of reckless disregard of another's interest or peace of mind as necessarily to be held malicious. Malice may or may not be the necessary implication according to the surrounding circumstances. For example, if the injurious statement accuses the injured party of some gross crime or highly dishonourable conduct—attacks a man in such way as to bring disgrace on his personal character—the inference may readily be drawn from the mere fact of its being recklessly made without any reasonable ground for belief that the person originating the calumnious report or spreading it, acted maliciously, regardless whether his injurious words were true or not. On the other hand, if the direct purpose of the statement complained of is plainly not to injure the person to whom it relates, or to indulge a propensity to tell scandalous tales of one's neighbours, but to effect some laudable or innocent purpose, and particularly if the purpose be one of importance to the public weal, then it is not and cannot be so easy to infer that the rashness of the statement, as indicated by its falsity, amounts to utterly reckless, and therefore, in a legal sense, malicious calumny.

What, then, were the circumstances of the present case, and how do these principles apply to them? There was a serious outbreak of typhoid fever in Burghhead. It was plainly the duty of the defender in his official position to endeavour to trace the disease to its source, and I think the evidence indicates that he was doing so, not with the object of attacking or injuring anyone, but for the purpose of doing what he could to assist in checking the outbreak and stamping out the disease. He had interviews with Dr Hay, who practised in the village, and with Mr Dick, a gentleman acquainted with medical science, at which undoubtedly the milk supply was spoken of by the medical men as a proper subject for inquiry. A circular from the Board of Supervision had called attention to the milk supply as a probable means of communication of enteric disease. It was after the interviews with Hay and Dick that the defender made the report complained of. Now, that he should be engaged in inquiry, should have conversations with the doctors, and should report to his committee, were all proceedings in themselves within his duty, and perfectly laudable. He was no busybody, rushing about to make himself important by professing superior knowledge and making statements without responsibility. His actions are therefore to receive favourable and not unfavourable construction in themselves. The circumstances all point to his being engaged according to his lights in the fulfilment of public duty.

Then the report which he makes is upon a matter of importance in the circumstances. Unquestionably the subject of milk was brought up in the conversations with the medical men, and was considered by everyone as being

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**No. 38.** one for consideration and inquiry. There is a conflict of evidence as to the question whether Dr Hay did or did not indicate milk supply as the probable source of the mischief. It is undoubted that he did direct attention to milk supply, because he states that he cautioned Mr Dick, who was resident in Burghead, about the milk, and advised him to "ascertain in cases of fever where the milk is coming from," and he and Mr Dick inspected the pursuer's milk premises, and made inquiries from the witness Grant as to the place from which the milk supply came to a house in which typhoid fever had broken out. But Dr Hay, while admitting that there was conversation about milk, which, he says, "one is always suspicious of in cases of typhoid outbreak," denies that he gave the defender any ground for believing that he thought the pursuer's dairy a probable source of the evil. He states that he said to the defender that he "could not convince him," meaning by these words that he could not convince him that the fever was to be attributed to bad drainage, and not to milk, and Mr Dick's evidence tends to confirm this. On the other hand, the defender states that Dr Hay on learning that the milk had been supplied from the pursuer's dairy, made the remark, "That is just it, and these cases we met with in M'Lean's house must have been typhoid fever," and this is so far confirmed by the witness Grant, who states that on Dr Hay being informed of the milk supply to the infected house coming from pursuer's dairy he answered that "that was just what he was saying, and that all those children he had seen were suffering more or less of the same."

In the view I take of the case it is unnecessary to solve this conflict of evidence. The whole evidence taken together plainly imports that in the circumstances the question of milk supply was important, and should be investigated, and that rightly or wrongly the defender had taken up the impression that Dr Hay had suggested that the illness in the pursuer's house had probably a typhoid character, and that therefore there were probable grounds for suspicion that the pursuer's milk might be a cause of propagation of the disease. He may have formed a wrong impression of what Dr Hay meant, and the recollection of the four persons present may vary as to details of a general conversation, but I find nothing in the evidence taken as a whole to satisfy me that the defender was not in the *bona fide* belief that suspicion did attach to this dairy of the pursuer, and I am satisfied that in stating that belief to the committee of which he was chairman he acted in his public capacity, and without any motive except the good of the community. I have said already that I think greater prudence would have been shewn had the report been more guarded, and been acted on in a less invidious way. But looking to the whole circumstances, I am unable to come to the conclusion that the defender was actuated either by direct malice, or acted with that outrageous disregard of a neighbour's good name and interests which is to be held so inexcusable in its recklessness as that malice must be held to be implied from the acts done without any evidence of direct malice.

I must move your Lordships, therefore, to recall the interlocutor of the Sheriff-substitute, to find that the pursuer has failed to prove that the defender in making the report to the Water and Drainage Committee acted maliciously, and to assoilzie the defender from the conclusions of the action.

**LORD YOUNG.**—I am substantially of the same opinion. The record in this action does not on reading it make a favourable impression, and the evidence

confirms the impression received from the condescendence that a good deal has been made of very little. The pursuer is designed as a carter in Burghhead, and he kept one cow to add, by the sale of her milk, to his earnings as a carter. The defender is chairman of the committee on public health at the same place. The action is for £250 of damages, because one day at a meeting of the committee, consisting of the defender himself and three other persons, the defender said, according to the pursuer's averment, "that a case of typhoid fever had been reported to him by Dr Hay, Forres, who had said that it was probably to be traced to the milk supplied from the pursuer's dairy."

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I think the demand extravagant. The Sheriff has given the pursuer £100 as damages for this statement to the business I have described. Anything more extravagant I do not remember to have met with. The statement is noted accurately on the minutes of the meeting. It contains no imputation on the character of the pursuer. It is a simple statement that a doctor had reported to the pursuer that typhoid fever was probably to be attributed to the milk from his dairy. Now, no doubt people should be cautious in their speech, but this occasion does not strike me as one for special caution. I think it is one for freedom of speech. No occasion will justify wilful falsehood spoken to a neighbour's prejudice, but it is not suggested that there was wilful falsehood to the pursuer's prejudice. What else, then, could be the malice of the defender, if it was not a case of wilful falsehood? He was not in competition with the pursuer in business. The only thing that can be supplied as a motive is, that he misapprehended the import of the conversation he had with Dr Hay. I quite accept Dr Hay's statement that he did not attribute the fever to the milk, but rather thought the opposite. But I as certainly believe that he did convey to the defender the impression which the defender says he did, and that the defender honestly took it up, and repeated it in the discharge of his duty. I should therefore not be contented with saying that the pursuer has not proved malice. I should be for finding, in fact, that the defender did not act maliciously. It is certain that he took up the impressions I have mentioned from his conversation with the doctor, unless he is committing perjury. He swears it, and I believe him.

I think that is an end of the case, for it results in this, that the defender was acting honestly in the discharge of his duty. It is matter of common knowledge that suspicion attaches to milk in such cases. And here suspicion was the more natural, because there was fever in the pursuer's house. No doubt, that afterwards turned out to be the fever of measles, not of typhoid. But that can make no difference to this action. I daresay there may have been some suffering in the matter, though it be greatly exaggerated, just as in the case of an epidemic of crime, and not as here of disease, suffering may be caused to innocent people who are at first suspected of having been to blame for it. But that will not make this a good action, unless the defender was actuated by malice.

**LORD RUTHERFURD CLARK.**—I concur in the judgment proposed by your Lordship in the chair. The statement which the defender made, and which is complained of, was, I think, made in the discharge of his duty, and in the honest belief that it was true. I see no evidence of actual malice, and there is no proof of anything on the defender's part to which I can apply such a name. I am therefore of opinion that the case of the pursuer is not established.

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**LORD LEE.**—In this case the statement complained of as defamatory was made by the defender as convener of the Water and Drainage Committee of the Local Authority of Burghead, at a meeting of that committee. The record discloses this fact, and therefore it is clear that the defender was in a privileged position, and that the issue to be proved by the pursuer required that he should establish that the statement was made maliciously.

It is no doubt well settled that malice may be inferred from recklessness. But I do not think it is correct to say that recklessness amounts to malice, or necessarily implies malice. The correction of the Sheriff-substitute's interlocutor in *Denholm v. Thomson* (8 R. 31), shews that it was considered necessary in that case to affirm malice in point of fact, and not sufficient to say, as the Sheriff-substitute has said, that the defender "acted with a recklessness amounting to malice in the legal sense." There is also a recent case in the First Division in which this point was considered, and considered more fully than the report indicates. I refer to the case of *Ritchie v. Barton* (10 R. 813). It may be gathered from the opinion of Lord Deas, however—correcting an expression he had used in the case of *Watson v. Burnet* (Feb. 8, 1862, 24 D. 494)—and also from the opinion of the Lord President, that it was not thought sufficient to support the verdict that there was evidence of recklessness. It was dealt with as a question upon the evidence whether the recklessness was such as, combined with the other circumstances, justified the jury in finding malice proved. The Lord President's examination of the evidence was directed to the object of shewing that there was not mere recklessness, but such a repetition of the slanderous expressions as might be held to imply ill-will, and to exclude the idea that the defender in his letters was merely expressing in good faith his view of the pursuer's conduct.

Upon the evidence in the present case, I concur in holding that it is entirely insufficient to prove or to suggest that the defender acted otherwise than honestly, and within his privilege and duty, in reporting to the committee what he understood Dr Hay to have said.

I therefore concur in the proposed judgment.

THIS interlocutor was pronounced:—"Recall the interlocutor of the Sheriff-substitute of 28th June 1888: Find that the pursuer is a carter, and carries on the business of a dairyman at Burghead, and the defender, chemical manufacturer there, is chairman of the Water and Drainage Committee of the Local Authority: Find that, in the month of June 1887, a serious and alarming outbreak of typhoid fever occurred in the village of Burghead, and that on the 22d day of that month, the defender, at a meeting of the said committee, made the statements contained in the 3d article of the pursuer's condescendence, of and concerning the pursuer, in the hearing of the parties therein named: Find that the said statements were unfounded in point of fact: Find that the defender, in making said statements, acted in his official capacity as chairman of the Water and Drainage Committee of the Local Authority of Burghead, and solely for the information of the committee, and that he made them *bona fide*, and in the belief that they were true: Therefore sustain the 4th and 5th pleas in law for the defender; assoilzie the defender from the conclusion of the action Find him entitled to expenses in the inferior Court and in this Court: Remit," &c.

GIBSON & PATERSON, W.S.—CUMMING & DUFF, S.S.C.—Agents.

ROBERT GUDGEON, Pursuer (Appellant).—*J. C. Thomson—C. S. Dickson.* No. 39.  
 GEORGE OUTRAM & COMPANY, Defenders (Respondents).—  
*Asher—Murray.*

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*Reparation—Slander—Issue—Innuendo—"Singular conduct."*—An action of damages at the instance of the manager at Ayr Farina Mills was brought against the proprietors of a newspaper for slander alleged to be contained in the following article:—"Fire at Ayr Farina Mills—Singular conduct of the manager.—A fire occurred at a late hour last night in Messrs Hyland & Company's Farina Mills, Ayr, and before the flames were got under damage to the extent of £150 was done. It appears that the proceedings at the fire were somewhat unusual. The alarm was given, and the fire brigade turned out, but on their arrival at the gate of the establishment they were refused admittance by the manager, Mr Gudgeon, who said they could manage the fire themselves. Superintendent M'Kay, the chief of the police, and some of his men were also refused admittance, although the fire was breaking through the roof of the buildings. Superintendent M'Kay and his men eventually got into the premises by climbing over the wall, and the fire brigade seem to have got in by forcing open the gate. They were followed by the crowd. Mr Gudgeon ordered Superintendent M'Kay to take away the hose, but the superintendent said he had no power to do so, and the fire brigade commenced to play on the flames, which were soon got under. . . . ." The Court held that the pursuer was entitled to an issue whether the article falsely and calumniously represented that he "had endeavoured to prevent the fire at the works referred to in the said article from being subdued, so as to cause destruction of the said works and stock therein, to the loss, injury, and damage of the pursuer."

ROBERT GUDGEON, drysalter, Ayr, manager in Scotland for Messrs 1st Division.  
 Thomas Hyland & Company, manufacturing chemists, Manchester, raised Sheriff of  
 an action in the Sheriff Court at Glasgow against George Outram & Com- Lanarkshire.  
 pany, proprietors of the *Evening Times* and *Glasgow Weekly Herald* news- M.  
 papers, concluding for £2000 in name of damages for an alleged slander published by them in the *Evening Times* of 18th September 1888, and reprinted in the *Glasgow Weekly Herald* of 22d September.

The article complained of was as follows:—"Fire at Ayr Farina Mills—Singular conduct of the manager.—Ayr, Tuesday (special).—A fire occurred at a late hour last night in Messrs Hyland & Company's Farina Mills, Ayr, and before the flames were got under damage to the extent of £150 was done. It appears that the proceedings at the fire were somewhat unusual. The alarm was given, and the fire brigade turned out, but on their arrival at the gate of the establishment they were refused admittance by the manager, Mr Gudgeon, who said they could manage the fire themselves. Superintendent M'Kay, the chief of the police, and some of his men were also refused admittance, although the fire was breaking through the roof of the buildings. Superintendent M'Kay and his men eventually got into the premises by climbing over the wall, and the fire brigade seem to have got in by forcing open the gate. They were followed by the crowd. Mr Gudgeon ordered Superintendent M'Kay to take away the hose, but the superintendent said he had no power to do so, and the fire brigade commenced to play on the flames, which were soon got under. The Farina Mill is rather isolated, and is situated on the banks of the Ayr. The fire originated in a drying-stove, in which a high temperature is kept up."

The pursuer averred, *inter alia*;—(Cond. 6) "The said articles, immediately above quoted, are false, and are slanders and libels of, against, and concerning the pursuer, and falsely, calumniously, and injuriously represented and represent to the public that the pursuer had endeavoured to cause destruction of the said works and stock by fire, or at all events had

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endeavoured to prevent the fire being subdued, and so cause destruction of the premises and stock, and had committed, or endeavoured to commit, the crime of fire-raising, and the crime of causing further destruction by fire to said works and stock as aforesaid, and so defraud the insurance companies with whom the same were insured, or one or more of said crimes or offences. In any event, the pursuer is falsely and calumniously represented thereby as culpably acting in violation of his duty as manager in connection with and regarding the said fire. By these paragraphs, and by the representations thereby conveyed to the public, the pursuer's feelings have been deeply injured, and his reputation and business position have also been, and may still further be, very injuriously affected, to his serious loss and damage."

The pursuer pleaded;—(2) The defenders having falsely and calumniously accused the pursuer of committing, or endeavouring to commit, the crimes or offences libelled, the latter is entitled to *solatium* and reparation therefor. (3) The articles complained of by the pursuer having been published in regard to him by the defenders, and intended and understood to bear the actionable meaning put upon them by the pursuer in his condescendence, he is entitled to *solatium* and reparation therefor from the defenders.

The defenders pleaded;—(1) The pursuer's statements are irrelevant.

The Sheriff (Guthrie), on 30th October, allowed a proof.

The pursuer appealed to the First Division of the Court of Session under section 40 of the Judicature Act.

The following issues were proposed:—“(1) Whether the said articles, or part thereof, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer? (2) Whether the said articles, or part thereof, are of and concerning the pursuer, and falsely and calumniously represent that he, being the manager of Thomas Hyland & Company's works in Ayr, had endeavoured to prevent the fire at the said works referred to in the said articles from being subdued, to the loss, injury, and damage of the pursuer?”

Argued for the pursuer;—On the first issue.—The article complained of was free from ambiguity, and no innuendo was required to be inserted in the issue.<sup>1</sup> [LORD PRESIDENT.—There was no ambiguity in the words in *Macrae v. Wicks*, and on that ground it was properly held that no innuendo was required. Here the words were ambiguous, as in some circumstances a man might properly think that more harm would be done by the water used in putting out a fire than by the fire itself.] The pursuer, however, did not further insist on the first issue. On the second issue.—The sting of the article lay chiefly in the heading “Singular conduct of the manager.” This was followed up by a statement that the manager refused admission to the fire brigade, “although the fire was breaking through the roof of the building.” The whole article suggested that he had not done his duty as a manager, and that he had some sinister motive in refusing the services of the brigade. The word “singular” strongly suggested that, and if the slander were believed it would damage his character in the eyes of the public.

Argued for the defenders;—There was no slander here, and nothing to go to the jury. There was no word directly charging the manager with fault. “Singular” was not an actionable word, though it might be innuendoesed so as to make a relevant case. It might be singular that any man should refuse the services of the brigade, but in some circumstances he might be entitled to do so. If the act stated to be “singular” was innocent in itself, the addition of that word would not be slanderous, and

<sup>1</sup> *Macrae v. Wicks*, March 6, 1886, 13 R. 733.

if the act were a guilty one, "singular" would add no strength to it. The key to the whole article lay in the sentence that the manager "said they could manage the fire themselves." The pursuer suggested several innuendoes—fire-raising, defrauding the insurance companies, &c. At all events, an innuendo must be inserted, as the words were ambiguous, as the manager might have done all that the article said quite properly in certain conceivable circumstances.

LORD ADAM then suggested that the words "so as to cause destruction of the said works and stock therein" should be added to the issue.

The pursuer adopted the suggestion, and the Court (LORD SHAND absent), without giving any opinions, pronounced this interlocutor:—

"DISALLOW the first issue; approve of the second issue as amended at the bar; appoint the same to be the issue," &c.

GILL & PRINGLE, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 39.

Dec. 1, 1888.  
Gudgeon v.  
Outram & Co.

MRS ANN MARTIN AND OTHERS, Petitioners.—*D.-F. Mackintosh—M'Lennan.*

No. 40.

MRS CHARLOTTE STEWART, Respondent.—*R. V. Campbell—W. Campbell.* Dec. 1, 1888.  
Martin v.  
Stewart.

*Parent and Child—Pupil—Tutor—Appointment of tutor to act conjointly with mother—Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27), s. 2.*—A father died, survived by his wife, and by a child in pupillarity. He was at his death possessed of considerable heritable and moveable property, including numerous assets in connection with a mercantile business in London. He left no nomination of tutors or curators to his child. On the petition of the nearest of kin to the pupil on the father's side to have one of their number appointed to act as tutor to the child jointly with the mother, the Court appointed a person, nominated by the mother, to act jointly with her as tutor, in terms of section 2 of the Guardianship of Infants Act, 1886.

JOHN STEWART, shipowner, London, and of Larghan, Coupar-Angus, a 1ST DIVISION. B.  
domiciled Scotsman, died intestate in August 1888, in London, survived by his wife, Mrs Charlotte Stewart, and by an only child, Elizabeth Stewart, aged eleven years.

On 16th October 1888, Mrs Ann Martin and others, the nearest of kin to the pupil Elizabeth Stewart, on her father's side, presented a petition to the Court, to appoint two, or at all events one of the petitioners to act conjointly with the mother, Mrs Stewart, as tutors to the pupil, in terms of sections 2 and 8 of the Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27).\*

Mrs Stewart lodged answers opposing the prayer of the petition.

It appeared from the petition and answers that Mr Stewart left no nomination of tutors or curators to his child, and that there had been no marriage-contract entered into between him and his wife.

It appeared further that the heritable estate of the deceased, which was

\* By the Guardianship of Infants Act, 1886, it is enacted (section 2) as follows:—"On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." By section 8 of said statute it is enacted,—"In the application of this Act to Scotland, the word guardian shall mean tutor, and the word infant shall mean pupil."

No. 40. mainly situated in Scotland, amounted to about £9200, and the moveable estate to about £20,300.

Dec. 1, 1888.  
Martin v.  
Stewart.

The petitioners stated,—“The said Mrs Charlotte Stewart, the mother of the pupil, is entirely without experience in business, and is not qualified to take sole charge of the winding-up of the deceased's London business, the realisation of the numerous and complicated assets, and the administration of the large property now belonging to the pupil.”

They further made averments with regard to the relations between the deceased and his wife, to the effect that she had never enjoyed his confidence. They did not, however, press for a proof of these statements.

At advising,—

LORD PRESIDENT.—We are of opinion that some person should be appointed to act jointly with the mother as tutor, but we are not disposed to adopt the suggestion of the petitioners. The hostility of parties renders harmonious action unlikely if we did so. If the widow will suggest any suitable person to act with her, we should be very glad to appoint him.

Counsel for the respondent suggested Mr William Scott Ferguson, farmer and manure manufacturer, Picton's Hill, Perth, the brother of the respondent. The petitioners opposed his appointment, on the grounds that were he appointed there would be no one to represent the father's side of the family, and that he was not qualified as a business man to manage the winding-up of such a complicated estate.

The respondent maintained that there must be delegation whoever was appointed, as a large part of the estate was situated in London, and that Mr Ferguson was as suitable a person in every way to be appointed as could be found.

THE COURT (the LORD PRESIDENT, LORD MURE, and LORD WELLWOOD) appointed Mr Ferguson to act jointly with Mrs Stewart, and found no expenses due to or by either party.

THOMAS HART, Solicitor—P. H. CAMERON, S.S.C.—Agents.

No. 41. WILLIAM W. BAIN, Pursuer (Respondent).—*R. V. Campbell—Salvesen.*  
ROBERT STRANG, Defender (Appellant).—*J. G. Smith—Shaw.*

Dec. 6, 1888.  
Bain v.  
Strang.

*Loan—Injury to borrowed article—Onus—Reasonable care—Horse.*—Where a borrower returns the article borrowed in a damaged condition, and damages are claimed in respect thereof, the *onus* lies on him to prove that he exercised reasonable care in the use he made of the article.

*Question* whether the *onus* is on him to prove the immediate cause of the injury.

A person borrowed a horse. While he was driving it along the road the horse stumbled and fell, damaging itself seriously. Circumstances in which the Court *assolized* the borrower from an action of damages at the instance of the owner, on the ground that he had proved that he had exercised reasonable care in driving the horse.

1ST DIVISION.  
Sheriff of  
Lanarkshire.  
M.

WILLIAM W. BAIN, Hamilton, raised an action in the Sheriff Court at Hamilton against Robert Strang, concluding for payment of £35, 18s. 3d., in respect of injury to a horse which he lent for the day to the defender on 27th May 1887.

The pursuer averred;—(Cond. 2) “When the defender obtained the custody and control of said cob on the said 27th day of May, it was in perfect order and condition; and while in defender's custody it was, through the reckless or negligent conduct of him, or someone for whom

he is responsible, so severely injured, as to be quite useless for pursuer's purposes. Said injuries are believed to have been caused by defender having driven the cob at an excessive rate of speed with a loose rein, and otherwise in a careless manner." No. 41.  
Dec. 6, 1888.  
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Strang.

The defender answered;—(Ans. 2) "Denied. The pursuer is called upon to condescend on the reckless or negligent conduct of the defender. Explained that the defender left Hamilton about eleven o'clock in the forenoon, and drove the horse carefully to Blackwood, where the horse was stabled until about nine o'clock in the evening, when the defender along with Mr Begg started on their return journey. When they were nearing Hamilton, and about three hundred yards west of the bridge over the river Avon, the said horse stumbled and went upon its foreknees. At the time the animal was being carefully driven, and the defender was exercising every possible control over it. The accident occurred through no carelessness on the defender's part."

The pursuer pleaded;—(1) Said cob having been delivered gratuitously on loan to defender by pursuer in a sound condition, and being in the entire custody and control of the defender, he was bound to return it in the like good condition. (2) Said cob having been rendered useless for pursuer's purposes by injuries sustained through the fault of the defender, or of those for whom he is responsible, while under the use, custody, and control of the defender, he is bound to pay the pursuer the damage sustained by him.

The defender pleaded;—(1) The pursuer's averments being irrelevant and wanting in specification, ought not to be remitted to probation, and the present action falls to be dismissed. (2) The horse not having been injured through the recklessness or negligence of the defender, he is not responsible for any loss that may have been sustained by the pursuer.

Proof was led in the case. The defender and Mr Begg, who were alone in a two-wheeled dogcart when the accident happened, both deponed that the former was driving carefully at the time.\* There was no evidence to

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\* The defender deponed,—“The horse was in good condition when we got it, as far as I know, and went quietly to Blackwood. We drove direct to Blackwood from Hamilton. We stabled at the farmhouse, and started to return about seven minutes past nine in the evening. It was in the beginning of June. It was not dark. The horse came down about a hundred or a hundred and fifty yards on the Hamilton side of Avon Bridge. That would be about a quarter-past ten. I cannot say the distance between Blackwood and Hamilton. I think it must be about nine miles. Avon Bridge is just at the entrance to Hamilton. I was driving when the horse fell. I was driving carefully. Mr Begg and I were alone in the machine. We were both pitched out. The machine was damaged, and so was the horse. It was a dogcart. I should say we were driving six or seven miles an hour when the horse fell. I was not driving with a loose rein. The horse had leather padding on his sole. There was no stone in his foot. When I examined the ground I thought it was a stone that had made him fall. I examined the ground to see if there were loose stones just at the place where the horse fell. I did not see any loose stones. I saw a scar on the road. I saw nothing in the state of the road which would account for the horse coming down.”

Mr Begg deponed,—“Coming home, when near to Avon Bridge, the horse came down. We were not driving quickly at the time. We were going at what you might call a dog's trot—a good trot. Mr Strang was driving. He made an examination to see if there was anything on the road which could account for the horse coming down. I think he said he had found a slip, as if the horse had placed its foot on a stone. I do not know that there were any loose stones. There was nothing that I saw in the state of the road to account for the horse coming down. My opinion was that the horse had fallen asleep.



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the contrary. It was also proved that the defender had been accustomed to driving for many years. It was proved that the horse had, previous to the accident, shewed some symptoms of weakness in the shoulder, and the evidence on this point is fully given in the opinion of the Lord President. It was further proved that up to the date of the accident the horse had always been driven in a four-wheeled vehicle.

On 11th February 1888 the Sheriff-substitute (Birnie) pronounced this interlocutor:—"Finds that the pursuer's horse was injured while on loan to the defender, and that the defender has not proved he used all reasonable care: Finds in law that the defender is liable in damages; assesses the same at £21, 18s. 3d.; Finds the defender liable to the pursuer in said sum."\*

On 24th May following the Sheriff (Berry) adhered.†

The defender appealed to the Court of Session, and argued;—The *onus* on him was to prove that he had exercised reasonable care in using the horse.<sup>1</sup> He and Mr Begg both deponed that the horse was being care-

I do not think it was going at a trot of six or seven miles an hour. It was not much more than a walk. We were not driving with a loose rein. Mr Strang had a good catch of the horse any time I saw him. The horse was cut on the knees, and bleeding."

\* "NOTE.— . . . The law is that a borrower must take all reasonable care, and prove that he has done this. In *Wilson v. Orr*, 1879, 7 R. 266, the Lord Justice-Clerk (Moncreiff) said:—"The hirer of an article under the contract of location is under an obligation to restore the commodity in like good condition as that in which he received it. If the subject of the contract perish without fault on the part of the hirer, it perishes to the owner, and the hirer is sufficiently discharged of his obligation if he have taken reasonable care of it. But if the subject of the contract be not restored in like good condition as that in which it was received, there is a certain burden of proof laid on the hirer. He must shew the cause of the injury or death, and at least produce *prima facie* proof that the cause was one for which he was not responsible." And Lord Gifford says the same burden lies on all parties who, under any other contract, get the entire use, custody, and control of another person's property.

"The point is narrow, as the direct evidence is that the defender was driving carefully, and with a tight rein, and as Mr Begg's surmise that the horse fell asleep is inconsistent with his evidence that it was driven at a fair pace until within three hundred or four hundred yards of the spot where it fell, but I cannot hold that the defender has acquitted himself of the burden thrown on him. There is nothing to account for the horse falling. The road was practically level, there was no stone in the neighbourhood, and the horse's feet were soled with leather so that a stone would not so probably cause it to stumble. Nor has the defender attempted to prove that the horse was liable to fall, or that a horse will fall without cause if driven with proper care."

† "NOTE.—This is certainly a narrow case in which to apply against the defender the general rule of law which presumes fault on the part of a borrower who returns in an injured condition the subject which he has borrowed, and lays on him a certain burden of proof in order to overcome that presumption. In the result, however, on a consideration of the evidence, I am not prepared to differ from the view which the Sheriff-substitute has taken. The horse apparently was not given to stumble, there was no stone on the road where he fell, and it is difficult to suggest a cause for his falling apart from some fault on the part of the defender, who was driving him. . . . I think that, as the authorities stand in the law of Scotland on the subject of burden of proof in such cases, the defender has not discharged himself of the *onus* thrown upon him, and he must be held liable for the damages."

<sup>1</sup> *Pyper v. Thomson*, Feb. 4, 1843, 5 D. 498, 15 Scot. Jur. 256; *Pullars v. Walker*, July 13, 1858, 20 D. 1238, 30 Scot. Jur. 742; *Wilson v. Orr*, Nov. 22, 1879, 7 R. 266.

fully driven, and there was no evidence to the contrary. If that evidence was believed (and none doubted it) the *onus* was discharged. There was no authority for saying that there was an *onus* on the defender to prove the special cause of the accident, but even if there were, the previous history of the horse, which disclosed that it was weak in the shoulder, was sufficient to explain the horse's fall.

Argued for the pursuer;—The defender was bound to do more than to prove that he had used reasonable care. He must shew the special cause of the accident.<sup>1</sup> He had failed to do that. There was no loose stone on the road over which the horse could have stumbled, and unless there was something of that kind to account for the stumble, the only explanation available was that the defender was driving carelessly.

At advising,—

LORD PRESIDENT.—In this case the defender Mr Strang borrowed the pursuer's horse on the 27th of May 1887 for the purpose of driving over from Hamilton to a place called Blackwood, a distance of nine miles, and back again. It was suggested that the loan was not entirely gratuitous, because there was some expectation that Mr Begg, who was to accompany Mr Strang in his drive, might become purchaser of the horse, but I think that is not sufficiently established. I am disposed to take it that the loan was entirely gratuitous upon the part of the defender. In that case the transaction resolves itself into a simple contract of commodate, and that being one of the nominate contracts there are certain conditions implied in it whether they are expressed or not. Now, one of these conditions undoubtedly is that the thing lent is not to be used except for the express purpose for which it is lent; and secondly, that in using the article for the purpose for which it was lent the borrower shall use reasonable care. There is what may be called an incidental condition of the contract also, which is rather to be gathered from decisions of the Court than from anything in the essence of the contract, viz.,—that if the article is returned in a damaged condition there is an *onus* on the borrower to shew that the damage did not arise through his fault. It is argued that the *onus* is heavier than that, and that he is bound to shew what was the specific cause from which the injury arose. I am not disposed to decide that question, because I do not think there is any necessity to do so. We have, I think, sufficient evidence to shew that reasonable care was used by Mr Strang in dealing with this horse. We have on that point the testimony of Mr Strang, and of the gentleman who was driving with him. I do not think that anyone has said that their evidence is not reliable, and, as far as I can see, it is most fairly and frankly given. Their evidence amounts to this, that in driving to Blackwood and back Mr Strang, who was acquainted with horses, and had quite enough skill to drive this horse safely, did use reasonable care. The horse certainly was not over-driven; on the contrary, Mr Strang drove it very discreetly, if the evidence is to be believed. Now, there is no counter evidence on this point, and I agree with a remark made by Lord Mure in the course of the argument that in a district such as that in question if there had been anything of the nature of reckless driving someone would have noticed it, and been able to give evidence about it. No such evidence, however, has been adduced. I think there is sufficient evidence then for us to say that reasonable care was taken.

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<sup>1</sup> Robertson v. Ogle, June 23, 1809, Fac. Coll.; Wilson v. Orr, 7 R. 266.

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Still the fact remains that the horse was brought back with broken knees. There is no doubt that he did come down on the road, and that he broke his knees, and that his value was thereby lessened. It appears to me, however, that the fall of the horse is quite to be accounted for by looking at its previous history, and, therefore, I need not go into an inquiry as to whether in law the defender is bound to prove what was the immediate cause of the accident. I find that the horse had undoubtedly previous to this shewn a certain amount of weakness in the shoulder. Mr Hamilton, a veterinary surgeon, who attended the horse on one occasion, says,—“Cross.—I attended the horse once while with Mr Bain. It was very shortly after Mr Bain purchased it. He was then suffering from a little over-exertion. He was a good while in the stable. We found it necessary to blister him, and until the marks of the treatment had gone away I think he was not sent out. That would be about six weeks. We blistered him on the shoulder. It was not a case of slipping the shoulder. Shoulder-slipping is a very different matter. I could not confuse the two. I do not think that ailment depreciated the value of the horse after he got better. It was a sprain on the muscles from too long a journey by a young horse, and I believe the muscles would be as good as ever. I had the horse a fortnight or three weeks before I sold it to Mr Bain.” Again Mr Bain himself says,—“While I had the horse he had no other accident. Four or five months after my purchase, he was attended by Mr Hamilton, the veterinary surgeon. He was lame. I do not know the cause. He was attended in our own stable. He was three to four weeks lame. I never heard such a thing that the illness was from slipping the shoulder. I do not know what slipping the shoulder is. I am aware there was a dispute as to the lameness. Some said it was in the foot; others said it was in the shoulder. Mr Hamilton said at the time he could not understand where the horse had got lame, but it must have occurred by pulling too hard, or something of that kind. Mr Hamilton operated upon the shoulder.” The pursuer’s brother says,—“The horse once went lame with a stone in its foot. That was about the beginning of the year. It was in the stable another time for some weeks, but Mr Hamilton, veterinary surgeon, said it was only from the straining of some muscles. I have also seen it going lame from a shoe being put on too tight. It does come to this that while my brother had the horse, we had frequently to complain of it going lame. It seemed to be an unfortunate horse in that respect, but there was nothing at all wrong with itself. For a month or two before the accident it was shod with leather pads on its soles. From the fact that it was rather big in the frog of the foot, stones got in, and Mr Copeland, the shoer, advised padding to prevent this.” “Re-examined.—Any time it went lame, it was caused by improper shoeing.” And lastly, Mr Cran, a horse-dealer, says,—“I had seen the horse before, and I thought he had been what we call ‘junked’ in the fore,—that is, the muscles strained. It was not a slipped shoulder. It was just general weakness of the fore parts. I did not examine the horse particularly.” On this evidence I do not think it possible to doubt that there was a certain weakness in the shoulder of the horse, and also that it had suffered a good deal from bad shoeing, the effects of which are apt to be permanent if frequently repeated. Now, these two things together are, I think, quite sufficient to account for the horse coming down, and therefore it is I do not think it necessary to decide the question as to *onus* to which I have referred. On these grounds I think the decision of the Sheriff and Sheriff-substitute must be reversed.

LORD MURK.—I am of the same opinion, and concur in what your Lordship has said as to the rule of law which is applicable to such cases as the present, viz, that it must be shewn that the borrower used reasonable care in his treatment of the article borrowed. Now, the Sheriff and Sheriff-substitute both seem to have thought that Mr Strang was driving carefully when the accident happened, and I see no reason for doubting the accuracy of the evidence given by him, and by the friend who was driving with him; and, assuming that evidence to be correct, I do not see where proof of fault or of want of reasonable care is to be found. As has been pointed out by your Lordship, we have not to go far for an explanation of the cause of the accident. For there is a considerable body of evidence to shew that this horse was weak in the shoulder and tender in his forefeet, and it is proved that he was several times lame, and on one occasion for six weeks, after he belonged to the pursuer. This ailment was not exactly what is known as slipping the shoulder, but it seems to have been something of that kind; and the probability I think is that it was some sudden attack of pain in that quarter which made the horse stumble, and that certainly cannot be attributed to want of care on the part of the defender. I think the interlocutors appealed against should be recalled.

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LORD SHAND.—The law applicable to this case was, I think, fully appreciated and expressed by the Sheriff-substitute in the finding contained in his interlocutor. The difficulty in the case lies in the application of the law to the facts. Where a horse, hired or lent, is taken out sound and brought back damaged, there is an *onus* on the borrower to shew that the injury was not caused through his fault, and that it was sustained notwithstanding all reasonable care on his part. The Sheriff-substitute has found that the defender has not discharged that *onus*, and the Sheriff has adhered to that judgment; but I think with your Lordship that the defender has proved that he used reasonable care in the use of the horse. He and the gentleman who was with him both say that the horse was driven carefully, and not too fast. He examined the spot where the accident occurred, and he could find no loose stone to account for the horse stumbling. Now, the Sheriff founds his opinion that reasonable care was not used, and that the accident was caused by "some fault" in driving, on the mere circumstance that no other direct cause for the horse falling has been shewn. I do not think the evidence warrants this inference, which is directly negatived by the evidence of the defender and his friend, whose account of the accident otherwise is accepted without question. Horses will at times stumble or slip where the cause cannot be certainly ascertained.

But further, there is evidence that there was a certain amount of weakness in the horse's shoulder, and that, to my mind, sufficiently accounts for the accident. If we join to this the fact that the horse had, up to the time of the accident, been regularly driven in a four-wheeled cart or van, and had on this occasion been driven (with the pursuer's knowledge) in a two-wheeled vehicle, necessarily throwing more weight on the forelegs of the horse, I think we have an ample explanation of the accident. I therefore concur with your Lordship in thinking that we must sustain this appeal.

LORD ADAM.—I agree that when any article of property is borrowed in an uninjured condition and is returned damaged there is an *onus* on the borrower to shew that he exercised all reasonable care in the use of it. There is no

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further *onus* on him, I think. If he satisfies the Court on that point, then he is free from the consequences of any accident. That being so, the question is whether the defender here has taken all reasonable care. Now, if the evidence of Mr Strang and Mr Begg is believed, I think there can be no doubt that such care was taken. It will be observed that neither of the Sheriffs throw any doubt on the reliability of those witnesses, and it is difficult to read their evidence without seeing that they have given a very straightforward account of the affair. If that is so, it is, I think, conclusively shewn that reasonable care was exercised in driving the horse. It is, however, suggested that that is not enough, inasmuch as the defender has not proved the specific cause of the accident. It is not, perhaps, necessary to decide whether there is any such *onus* on the defender, but it occurs to me that even though a borrower cannot prove any specific cause, yet if he satisfies the Court that he took all reasonable care, he is entitled to absolvitor. The Sheriff seems to decide the cause, not on the ground that a specific cause must be proved, but on the ground that no specific cause having been proved, it is to be presumed that the horse was not being driven carefully when the accident occurred. Even if we knew nothing of the previous history of the horse, I should not have been disposed to draw that conclusion. Anyone who knows anything about horses knows that even the best horse, although carefully driven, will on occasion make a mistake and come down. But here we have it further proved that this horse had been three times previously lame while in the pursuer's possession, and Mr Cran, the horse-dealer in whose possession it had been for some time, says there was a general weakness of the fore parts. This is enough to account for the accident; and if it is necessary to find any special cause for the accident, I agree that it is to be found in the previous history of this horse.

THE COURT pronounced this interlocutor:—"Find that the pursuer's horse was injured while on loan to the defender, but find that the defender has proved that he used reasonable care in using the horse, and that the accident and injury were not caused by fault of the defender: Therefore assoilzie," &c.

W. R. PATRICK, Solicitor—RHIND, LINDSAY, & WALLACE, W.S.—Agents.

## No. 42.

Dec. 7, 1888.  
Hamilton v.  
Hardie.

MISS A. M. HAMILTON, Appellant.—*Sir Charles Pearson—Baxter.*  
GORDON KENMURE HARDIE AND OTHERS (Hardie's Executors),  
Respondents.—*J. A. Reid.*

*Executor—Confirmation—Proof of domicile—Act 21 and 22 Vict. cap. 56, sec. 9—Sheriff Courts Act, 1876 (39 and 40 Vict. cap. 70), sec. 41.*—The executors-nominate of a deceased Scotsman who had died in England after residing there for many years applied for confirmation in the Sheriff Court of Lanarkshire, in which county there was heritage belonging to the deceased. They produced an affidavit, in terms of the 41st section of the Sheriff Courts Act of 1876,\* to the effect that the deceased was a domiciled Scotsman at the date of

\* The 41st section of the Sheriff Courts Act, 1876, provided,—"Where, under the provisions of the 9th and subsequent sections of the Act 21 and 22 Vict. cap. 56, . . . it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the Sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland, that fact shall be set forth in the affi-

his death. Confirmation was objected to by a person who alleged that she was one of the testator's next of kin, and that the deceased died domiciled in England, where, accordingly, the will ought to have been proved. She stated further that the testamentary deed was liable to reduction on the ground of incapacity and undue influence. *Held* that no ground had been set forth to justify the Court in interfering with the granting of confirmation.

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Hamilton v.  
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GAVIN HARDIE of Lancefield, near Glasgow, was born in Glasgow in 1806, passed at the Scottish Bar, and went to London sometime after 1833. He afterwards resided continuously in England, dying at Ealing, near London, on 25th May 1888, aged eighty-one years.

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He left a disposition and deed of settlement, dated 24th February 1888, appointing Gordon Kenmure Hardie, M.D., Ealing, Major Henry Robert Hardie, Torquay, and John Haswell, of Vienna, to be his executors. He further conveyed his whole estate to these gentlemen, share and share alike, under the burden of two small legacies. The total amount of his personal estate, as appearing from the inventory, was about £25,000. The ground-annuals over Lancefield were valued at £3600 a-year. The deed was drawn by a Scottish conveyancer, and was executed according to the forms of both countries.

The executors-nominate applied for confirmation in the Sheriff Court of Lanarkshire, one of them making affidavit to the effect that the deceased died at Ealing, "where he was temporarily residing, though domiciled in Glasgow, Scotland, upon 25th May 1888, leaving neither widow nor children"; and that he had heritable estate in Scotland.

Thereafter Miss A. M. Hamilton, London, lodged a caveat, and, in the objections which she put in, she stated that, being a granddaughter of an aunt of the testator (a relationship which she traced), she was one of his next of kin; and averred,—(Stat. 3) "The testator had no domicile in Scotland, and for many years previous to 1852 resided in Blackheath, near London. In or about the year 1852 the testator's wife died, and the testator thereupon made a will in England, and according to English form, which, it is believed, conferred substantial benefits upon the objector, and which had never been revoked or altered until the making of the settlement now founded on. The objector is making inquiries both in the United Kingdom and in Australia which she believes will result in the discovery of this will. After the death of his wife the testator continued to reside at Blackheath with his wife's mother until her death some years afterwards. The testator subsequently resided for several years in Piccadilly, then in Queen Street, and afterwards in Doughty Street, all in London, until the date of the events narrated in the next paragraph." (Stat. 4) "In the year 1882 the testator informed the objector, in a letter now in her possession, that he had been invited to spend a few days at Ealing, near London, at the house of Mr

davit to the inventory, and it being so set forth therein shall be sufficient warrant for the Sheriff-clerk to insert in the confirmation, or to note therein, and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland . . ."

The 9th section of the Act 21 and 22 Vict. cap. 56, provided,—“From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or Ireland, or both; provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall by his interlocutor find, that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile.”

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Gordon Kenmure Hardie, one of his trustees and executors, during that gentleman's absence. The testator was at the time advanced in years, very deaf, and in weak health. From his entrance to Mr Gordon Kenmure Hardie's house it is believed that he never resided elsewhere, and he gradually fell under the influence and control of the said Gordon Kenmure Hardie, and latterly none of his relatives and friends were admitted to him, and the said Gordon Kenmure Hardie's servants were forbidden to let him see anyone. All correspondence addressed to the testator passed through Gordon Kenmure Hardie's hands, and were answered by him. Letters were sent to the said Gordon Hardie by the solicitors of the objector in December 1887 alleging unsoundness of mind of the testator, and requesting an interview to discuss the propriety of taking proceedings in lunacy, but the solicitors were never able to obtain such interview, although no denial was given to the alleged unsoundness of mind of the testator." (Stat. 5) "In this state of matters, and while feeble and incapable of managing his own affairs, the testator is said to have executed the settlement founded on. . . . The objector and her mother are entirely ignored, although the testator frequently told the objector's friends that they would be provided for, and being wholly dependent on the testator's bounty they are left in a distressed state." (Stat. 6) "Up till the year 1882 the testator was on the most friendly terms with the objector, who frequently visited him, and to whom he wrote affectionate letters, but from that time, owing to the events narrated in the two last articles, these visits were rendered difficult and at last all access to him was refused. For the last eighteen years he has allowed the objector's mother the sum of £480 per annum, and to the objector the sum of £90 per annum, besides presents from time to time." (Stat. 7) "The said settlement was made by the testator under duress. He was eighty-one years of age, was not of testamentary capacity and had been for some time of weak intellect." (Stat. 8) "Over £20,000 of the inventory is situated in England, and the objector maintains that as the domicile was there the inventory should have been returned there. She is prepared to prove her allegations there, and she doubts not that said settlement will be set aside." (Stat. 9) "The objector and her witnesses are in London. The settlement was made near London. If her objections are sustained it will then be incumbent on the respondents to prove the validity of said settlement where the facts are best known, and where the witnesses are. The objector believes that the ends of justice will be sacrificed if confirmation is granted here. She has already lodged a caveat in the proper Court in London. If confirmation is granted here and the settlement quashed there, a conflict may arise, which ought not to be. She is thus constrained to object to confirmation here, as it manifestly ought to have been expedited in England."

The executors-nominate in answer averred that the testator's domicile at the time of his death was in Lanarkshire, although admitting that he had resided in England for a number of years, and gave a general denial to the allegations of undue influence, &c. set forth in Statements 4, 5, 7, and 9. They admitted that the deceased had for some time before his death made a voluntary allowance to the objector's mother, and given presents to herself.

The objector pleaded;—(1) The objector being related to the testator in the manner stated, is entitled to insist in the present question. (2) The testator having been domiciled for many years in England, and upwards of four-fifths of his moveable estate being there, the title of the trusts should have been confirmed there. (3) The testator having been under duress when said settlement was executed, it is right and proper that

validity should be tried where it was made. (4) The application for confirmation in this Court was incompetent in respect that the deceased did not die domiciled in the county of Lanark, and in respect that Edinburgh is the only Court in which confirmation is competent when the deceased dies domiciled furth of Scotland.

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On 20th July 1888, the Sheriff-substitute (Spens) granted warrant to the Clerk of Court to issue confirmation in favour of the executors-nominate.\*

The objector appealed to the Court of Session.

Argued for her;—(1) The Sheriff had gone wrong in assuming against her, as he must have done, that she was not one of the testator's next of kin. She averred that she was one. The Confirmation and Probate Act, 1858, sec. 9, required the person applying for a confirmation intended to include property in England to satisfy the Sheriff that the deceased was domiciled in Scotland.<sup>1</sup> Section 41 of the Sheriff Court Act of 1876 in changing the procedure, and substituting an affidavit for an interlocutor by the Sheriff with a finding as to the domicile, did not preclude the inquiry which was competent under the 9th section of the Act of 1858, the object of which was merely to obviate two inquiries, one in each part of the island. Confirmation ought not therefore to be granted without allowing the objector an opportunity of proving her allegations as to domicile. (2) Further, the allegations that the testator had been subjected to undue influence by the respondents were of the greatest importance, and if the objector succeeded in establishing an English domicile, the Courts of that country would allow her an opportunity of proving these allegations before probate was granted. This element ought to be taken into account by the Court.

Argued for the respondents;—(1) By the 9th section of the Act of 1858 the Sheriff's interlocutor as to domicile was final, and not subject to review, and the 41st section of the Act of 1876 was now substituted for that section. (2) It had been held that allegations which pointed to a reduction of the testamentary deed were not relevant to interfere with the granting of confirmation.<sup>2</sup> Besides, the objector had not set forth any interest in the estate. Her relationship to the deceased, as set forth by herself, was not clear.

At advising,—

Lord PRESIDENT.—The deceased Mr Gavin Hardie, who died on 25th May last, executed in February of this year a will in the Scottish form, which was also attested in the English form, he being then resident at Ealing, near London. Under the authority of the Act of 1858 (21 and 22 Vict. cap. 56), confirmation of that settlement was applied for in the Sheriff Court of Lanarkshire by the executors-nominate of the deceased. By section 9 of that Act, it is provided that "from and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or Ireland, or both; provided that the person applying for confirmation

\* NOTE.—The deed of settlement of Gavin Hardie is executed in the Scotch form, and is *ex facie* valid. In it the deceased describes himself as of Lancefield, his origin is Scotch, and the bulk of his property appears to be in Scotland. The objector does not appear to be one of the next of kin, and she has therefore no title or interest to oppose confirmation. In these circumstances, I see no reason for refusing to grant warrant to confirm the executors-nominate."

<sup>1</sup> Alexander's Commissary Practice (1859 edn.), 190, 191.

<sup>2</sup> Grahame v. Bannerman, Feb. 28, 1822, 1 S. 362.



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shall satisfy the Commissary, and that the Commissary shall by his interlocutor find, that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile."

That section, in so far as regards the finding as to the domicile of a deceased party, is altered by the Act of 1876 (39 and 40 Vict. cap. 70), for "amending the law relating to the administration of justice in civil causes in the Sheriff Courts." The 41st section of that Act provides as follows,—“Where, under the provisions of the 9th and subsequent sections of the Act 21 and 22 Vict. cap. 56, . . . it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the Sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the Sheriff-clerk to insert in the confirmation, or to note therein, and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland. . . .” Whatever one may think of the change introduced by that Act, we are bound to give effect to it. At the same time, it appears to me that the practice which is substituted in the Act of 1876 for the provision in the former Act is a somewhat loose one, but we must take it as it is.

In the present case the affidavit which accompanies the inventory contains the required statement to the effect that the deceased was a domiciled Scotsman, and the Sheriff-clerk has proceeded accurately. Accordingly the provisions of the statutes have been fully complied with by the persons applying for confirmation.

But the peculiarity of the case is that a lady has appeared to resist the granting of the confirmation, alleging that she is one of the testator's next of kin, and also, although this allegation is of a very vague nature, that the deceased had executed a previous will, under which she took benefit, whereas under the present she takes none. There is a further allegation that the deceased was not a domiciled Scotsman at the date of his death. The question is, what is to be done under these circumstances.

The will, which contains a nomination of executors, is *ex facie* valid and effectual, but the objector says it is liable to reduction on the ground of the incapacity of the testator, and of undue influence. The application for confirmation has now been going on for six months, and no proceedings have as yet been taken to set aside the will of this year, and if that allegation stood alone I do not think there can be any doubt that we should disregard it. Loose statements such as are made here can never interfere with the confirmation of executors-nominate. There is authority to that effect in the case of *Grahams v. Bannerman and Others*, 1 S. 403, where it was held that the mere proposing by way of statement, in a petition for confirmation, of averments in support of a reduction of the testamentary deed cannot stop the application for confirmation.

Whether, in view of the other allegations which are set forth by the objector we should take a different course, is matter for consideration. But I do not see my way to stop the confirmation after fully considering all the circumstances. The allegations which the objector makes about the domicile are not very satisfactory. That Gavin Hardie, the testator, was a Scotsman by origin, and there-

fore that his domicile of origin was Scottish, is admitted. The allegation that one would look for in these circumstances is not a mere assertion that there was an English domicile at the date of death. There should be a further allegation that there was a change of domicile, and a statement as to how and when that change took place. As we have had occasion to remark lately (*Steel v. Steel*, 15 R. 896), a change of domicile is not very easily brought about, and there must be a clear indication of intention to change his domicile by the gentleman whose domicile of origin is said to be lost. That is an observation which occurred to me early in the case. No doubt the statement which the objector makes to the effect that she is one of the next of kin of the deceased must be taken to be made in good faith. But she has not applied for confirmation either here or anywhere else.

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Upon the whole matter I cannot see any definite or intelligible ground upon which we can stand between the respondents and their right to the appointment of executors-nominate. It is not as if there had been an allegation that they were impecunious or insolvent. It is true that they are not within the jurisdiction of the Court. But by expediting confirmation in Scotland to a domiciled Scotsman they have subjected themselves to the jurisdiction of this Court, and the effect of their being themselves domiciled Englishmen is thus neutralised.

I am therefore for adhering to the Sheriff's interlocutor.

LORD MURE.—I do not see my way to any other result in this case than that proposed by your Lordship. The domicile of the deceased was *ex facie* Scottish, his will, although executed in England, appears to have been made in Glasgow, and he was proprietor of the estate of Lancefield in that neighbourhood. In these circumstances his executors-nominate presented a petition for confirmation to the Sheriff Court of Lanarkshire, and all the ordinary requisites have been complied with. A caveat was lodged by a party who alleged that she was one of the next of kin of the deceased, but she did not present any competing petition for confirmation. It is, however, objected on her behalf that it was inexpedient, if not incompetent, for the executors to make this application, as the deceased had been long resident in England, and had died, as she avers, a domiciled Englishman; and it is maintained that steps ought to have been taken to obtain confirmation in England, because it would be more convenient for the objector to raise the question of the deceased's capacity to make a will in the Courts of that country than in Scotland. But that does not appear to me to be a ground for stopping a confirmation, the proceedings in which are *ex facie* regular and valid, more especially in a case where six months have elapsed since the death of the deceased and the objector has not taken any steps to obtain a reduction of the testamentary deed. As to whether, if she had taken such steps, we should have been warranted in sitting proceedings in the confirmation, I give no opinion. But in the circumstances, as they stand, I do not think any case has been made out for interfering.

LORD SHAND.—The course proposed by the appellant here would lead to the introduction of a novelty. It is maintained that the Court ought to allow a proof of the domicile of the deceased, necessarily involving the examination of a number of witnesses, and it may be an expensive and protracted inquiry, as preliminary to the question of granting confirmation. There is no precedent,

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so far as I know, for such a course, and looking to the fact that by our law the effect of confirmation is merely to give a title to the executors to administer the estate of the deceased, and that they are liable to an action not only of accounting but also to have the deed set aside, I do not think the contention is a reasonable one, nor such as we can give effect to. The purpose of the appellant, as appears from the record, is to compel the respondents to go to England for confirmation, because in that way she would obtain an incidental advantage—it being necessary, it is said, according to the practice prevailing there, that the validity of the will be proved before probate is granted, and open to the appellant to appear and be heard on that question. In this country the practice is to give confirmation—subject to any challenge of the will at a future time.

That being the nature of the question which is raised by the appellant, I have come to the conclusion that she has not made out her case. The respondents' affidavit is in form and substance complete, and accordingly the Sheriff was entitled to proceed upon it on that footing. The whole proceedings being *ex facie* valid and regular, the executors-nominate were *prima facie* entitled to have confirmation. There is, no doubt, this peculiarity in regard to the position of executors-nominate, that they are by statute relieved from having to find caution. And if in this or in any other case there was an obvious objection to the will, and that objection was followed up by the bringing of an action of reduction to set it aside, and if the executors-nominate applying for confirmation were persons of no means, who might perhaps dissipate the estate after getting possession of it, then I should say that the Court should, in such special circumstances, stop the granting of confirmation, and might appoint a judicial factor on the estate who would be bound to find security. But it is not said that the present respondents are impecunious, or that there is any danger of the estate being lost. On the contrary, they appear to be persons who are thoroughly responsible, and who will be quite able to account for their intromissions with the estate.

Then in regard to the point which was strongly urged as a justification of her opposition to confirmation, that the appellant would be able to have the will set aside at less expense in England than here, it seems to me to be still open to her to bring her action in England, notwithstanding the confirmation of the executors. Two of these executors-nominate are resident in England, and subject to the jurisdiction of the English Courts; and accordingly these Courts would, I cannot doubt, entertain proceedings at her instance.

It is a somewhat remarkable feature of the case, which seems to call for some explanation, that the deceased seems to have paid the objector and her mother sums amounting to £570 per annum for many years down to the time of his death, and yet there is no provision for either of them in the will. Even if probate of a will has been granted in England, there must be many cases in which the deed has afterwards been rescinded, and many cases where the grounds of reduction have only come to be known after probate has been granted. Accordingly, even assuming that the appellant has a good claim to set the will aside, I do not think she will be in the least degree prejudiced by the granting of an administrative title to the respondents.

LORD ADAM was absent.

THE COURT adhered.

MURRAY, BEITH, & MURRAY, W.S.—ANDREW FLEMING, S.S.C.—Agents.

MICHAEL CHRISTISON PIGGOTT, Pursuer (Reclaiming).—*Jameson—R. L. Orr.* No. 43.

THE GOVERNORS OF THE FETTES TRUST, Defenders (Respondents).

—*Gloag—Maconochie.*

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Piggott v.  
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the Fettes  
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*School—Scheme under the Educational Endowments (Scotland) Act, 1882 (45 and 46 Vict. c. 59)—Summary dismissal of pupil.*—The scheme for the administration of the Fettes College Endowment, which was issued under the Educational Endowments (Scotland) Act, 1882, by section 45, provides,—“Any boy shall be liable, at the discretion of the governors, to dismissal, and to forfeiture of any benefit derived from the endowment for such continued idleness, or breach of discipline, as shall, on report from the headmaster, disqualify him, in the opinion of the governors, for continuing a member of the college. Any boy may also be dismissed summarily for immorality or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the governors a full report upon the subject.”

Held that the headmaster of the college was acting within the powers conferred upon him by this section when he summarily dismissed from the college a foundationer whom the medical officers reported as suffering from an attack of leprosy, which, in their opinion, might be communicated to the rest of the school.

A SCHEME for the administration of the Fettes Endowment, Edinburgh, 2<sup>d</sup> Division. was issued under the “Educational Endowments (Scotland) Act, 1882,” Lord Fraser. and approved by order of Her Majesty in Council on 3d April 1886. I.

By section 45 of the scheme it is provided,—“Any boy shall be liable, at the discretion of the governors, to dismissal, and to forfeiture of any benefit derived from the endowment for such continued idleness, or breach of discipline, as shall, on report from the headmaster, disqualify him, in the opinion of the governors, for continuing a member of the college. Any boy may also be dismissed summarily for immorality or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the governors a full report upon the subject.”

On 17th and 18th July 1884, Michael Christison Piggott, residing in Glasgow, attended an examination at Fettes College of applicants for admission to the foundation. Being successful, he was admitted by the governors as a foundationer of the college on 19th September. On 4th June 1888, Piggott raised this action against the governors of the college for the sum of £500 for loss and damage sustained in consequence of his dismissal from the school in April 1887. He averred that by his admission as a foundationer he became entitled to free board and education for six years from the date of his admission, the estimated value of his board and education being £130 per annum.

The defenders averred that a few months after Piggott's admission suppurations appeared in his leg. He was sent to the sick-house, and the medical officers came to be of opinion that he was suffering from leprosy. As, however, they were of opinion that leprosy was not transmissible by mere personal contact, they did not consider it imperative to disclose to anyone the nature of his disease, as they thought such disclosure would have a disastrous effect on the boy's prospects. On the 7th April 1887, a skin disease, *impetigo contagiosa*, broke out in the school, and the medical officers, in these circumstances, considered it no longer safe to allow him to remain with the other boys, because they thought it was possible that he might communicate the leprosy to them through the medium of the other skin disease. They therefore informed the headmaster of the state of the facts, and the headmaster ordered him to leave the school.

The pursuer denied that he was suffering from leprosy, or that there

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was any danger to the other boys from his remaining in the school while the attack of eczema lasted, and averred that the defenders, or those for whom they were responsible, had acted illegally and unwarrantably and in violation of their contract with him; and that the headmaster had not complied with rule 45 of the scheme in respect he had not before dismissing the pursuer reported the matter to the governors, and they had not ordered or authorised the forfeiture of his foundation. They were bound in terms of their contract with him to give him board and education for the remaining period of three and a-half years, and their action was in breach of that contract.

The defenders answered that under rule 45 the headmaster was entitled to summarily dismiss the pursuer.

The pursuer pleaded;—(1) The defenders being bound in terms of the contract libelled to provide the pursuer with board and education for a period of six years, and having failed to implement said contract, they are liable to compensate the pursuer for the loss thereby sustained. (3) The pursuer having been awarded a foundation and admitted to said institution, and thereafter expelled illegally and unwarrantably, and without fault on his part, the defenders are liable to compensate the pursuer as craved.

The defenders pleaded;—(1) The statements of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2) By the terms of section 45 of the scheme condescended on, the headmaster was entitled to dismiss the pursuer.

On 24th November the Lord Ordinary (Fraser) assoilzied the defenders from the conclusions of the action.\*

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\* "OPINION.—It is not necessary to define very strictly what is the nature of the relationship between the governors and youths whom the former have elected to the foundations of Fettes College. It is contended by the pursuer that, by his admission to the college as a foundationer, a contract was entered into between him and the governors which the latter could not terminate at their pleasure. Such a case is not presented for decision at present; and no opinion is therefore called for in regard to it. The pursuer of this action was admitted to the benefit of a foundation in September 1884. A scheme for the administration of the Fettes Endowment was approved, by order of Her Majesty in Council, on the 3d of April 1886. This scheme is applicable to all persons who had any right or privilege under the governing bodies in charge of Educational Endowments in Scotland, such as the Fettes College, at the time when the Act 45 and 46 Vict. cap. 59, was passed—(see section 14). Therefore, any rules laid down in that scheme are applicable to the present case. The 45th rule or section is as follows:—'Any boy shall be liable, at the discretion of the governors, to dismissal, and to forfeiture of any benefit derived from the endowment for such continued idleness, or breach of discipline, as shall, on report from the headmaster, disqualify him, in the opinion of the governors, for continuing a member of the college. Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the governors a full report upon the subject.' This is not expressed with that clearness and precision that might have been expected in the circumstances of this endowment. The Lord Ordinary puts a different construction upon that rule from that put upon it by the headmaster of Fettes College. It is stated by the defenders upon record that the headmaster told the pursuer to leave the institution for the reasons assigned in the record. This proceeding on the part of the headmaster was *ultra vires*. The 45th rule of the scheme gave him no authority to order the pursuer away from the institution. The only persons who could do so were the governors, acting, no doubt, upon the report of the headmaster. The first part of the rule states that 'any boy shall

The pursuer reclaimed, and argued;—He had been illegally dismissed by the headmaster, whose powers were in this respect unequivocally expressed in rule 45 of the scheme of the college. Under that rule the power of summary dismissal, given to him in certain contingencies, was only to be exercised after a report made by him to the governors, which he had here failed to make. At common law a headmaster had no such

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be liable, at the discretion of the governors, to dismissal, and to forfeiture of any benefit derived from the endowment for continued idleness or breach of discipline.' And then the rule proceeds to say that 'any boy may also be dismissed summarily for' two causes mentioned, viz., immorality, or whenever there are circumstances rendering it 'necessary in the interests of the school.' Dismissed by whom? Clearly by the same parties as were to dismiss according to the first part of the rule, viz., the governors. No doubt the circumstances (other than immorality) must be according to the judgment of the headmaster; but the ultimate judges of the matter are the governors, and the rule concludes with these words,—'In all such cases the headmaster shall forthwith lay before the governors a full report upon the subject.' The rule is very inartistically expressed, but the Lord Ordinary cannot hold it to mean that the headmaster should have the absolute power of dismissal whenever he considered that the interests of the college required that a particular boy should be sent away. It would be a very extraordinary thing to confer such a power as this on any headmaster, when the first part of the rule limits the discretion of the governors to dismissal for continual idleness and breach of discipline. The ambiguity arises from not embodying in one sentence the statement that they could dismiss for idleness, breach of discipline, and when it was required for the interest of the school.

"But, practically, the governors have made the dismissal in the present case according to the statements in the record. All difficulty is obviated upon this head by the governors coming forward and adopting and defending the action of the headmaster. They do not plead that the headmaster acted without their authority or subsequent approval, and therefore that they are not liable in damages. They adopt what he has done, and the Lord Ordinary is willing to hold that this subsequent adoption is equivalent to their approval of the conduct of the headmaster, as if it had been given before the dismissal of the pursuer.

"Now, then, the only other point in the case is, whether or not, assuming that there was no absolute right of dismissal at pleasure, was there sufficient ground in the circumstances of this case to bring it within rule 45? The boy was ill with leprosy when he entered the institution, although at that time the disease remained dormant. It broke out at intervals afterwards, and the headmaster said nothing about it, not being willing to do anything that might blight prospects of the pursuer as a student in the college. This was acting with all kindness for the youth, and no one can blame the headmaster for taking a course at once considerate and humane. But, then, at the time that the pursuer was dismissed, his leprosy again came to the front; and there being an epidemic of other disease among the boys, it was absolutely necessary to take action so as to prevent the whole of them becoming lepers by contagion. A learned argument was submitted to the Lord Ordinary by the pursuer's counsel to the effect that leprosy was not contagious. Upon this matter the Lord Ordinary is incapable of pronouncing any opinion; but the existence of such a disease in the midst of a community of boys like that at Fettes College was calculated to create such terror as to impair the usefulness of the institution, and therefore the headmaster (approved of afterwards by the governors) was justified in sending the pursuer away. But here, again, the Lord Ordinary must add that he is not reviewing the action of the governors or the headmaster upon the merits. Their *bona fides* is not impugned. They had a right to dismiss a foundationer when they thought it was 'necessary in the interests of the school.' Having come to the conclusion that it was necessary, no Court of law can, in the absence of an averment of want of *bona fides*, interfere with their judgment."

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power unless he could shew a just and reasonable cause.<sup>1</sup> The Lord Ordinary had assumed that this existed. The only possible cause, however, was the medical opinion given him as to the boy's state of health, and this the pursuer was prepared to shew was erroneous. The view of the Lord Ordinary that the governors had homologated the action of the headmaster was unsound. What was originally illegal in the headmaster could not be made legal by their subsequent approval of it.

Counsel for the respondents was not called upon.

**LORD JUSTICE-CLERK.**—The pursuer's case is a very unfortunate one. He seems to have been able by his own exertions to obtain admission as a foundationer in the Fettes College Endowment, though, unfortunately for him, he has not obtained the full benefits of his success. It appears that he was afflicted from time to time with something of the nature of a suppuration in one of his legs, which might or might not have a serious effect on the safety of the rest of the school, and that, on an outbreak of eczema occurring, the headmaster came to the conclusion that he could not allow the pursuer to remain any longer in the college, and accordingly dismissed him. It is not alleged that the headmaster took this course otherwise than in consequence of the advice given him by the medical officers of the college, in accordance with which he was bound to act.

It is in these circumstances, then, that the question arises, What is the legal position of parties?

I have no doubt that it is the duty of the headmaster of a school, if so advised with reference to a pupil, to remove him, where he has power to do so, and where he has not that power it is his bounden duty to report the matter to those who have it.

The Lord Ordinary has indicated that his reading of the latter part of clause 45 of the endowment scheme of the college is, that the headmaster of the college has no power of dismissal, but merely a duty to report to the governors of the college, who, after considering the report, may dismiss the pupil. I think that that is an erroneous reading of the clause. I think that the words "any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school," plainly mean that the right and duty of exercising this authority rests with the headmaster, as the officer who alone can deal summarily with such a matter. I am also of opinion that the concluding words, "in all such cases the headmaster shall forthwith lay before the governors a full report upon the subject," do not mean that he is to lay a full report before them prior to exercising the power of dismissal, but that, after he has exercised the power, he shall lay before them a full report in order that they may review it. The dismissal is his dismissal, and is summary dismissal in the interests of the school. That is my reading of the 45th clause, and if I am right it is unnecessary to consider the question whether—the action taken by the headmaster being beyond his powers—it is to be held as homologated by the subsequent action of the governors. Had it been necessary however to determine that, I think it would not have been difficult to arrive at an opinion favourable to the dismissal.

<sup>1</sup> *Fitzgerald v. Northcote and Another*, 1865, 4 *Foster and Finlason*, 656; *Hutt and Another v. Governors of Hayleybury College and Others*, June 19, 1878, 4 *Times Law Rep.* 623.

I am clear that the power lay with the headmaster, and there is nothing to shew that he exercised it otherwise than in *bona fides*. It would not, in my opinion, be competent to send the proceedings of the medical officers, on which they made their report to the headmaster, to a jury in order to have it determined whether they had come to a right conclusion or the reverse. I am therefore for adhering to the Lord Ordinary's interlocutor.

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LORD YOUNG.—I am of the same opinion, and I agree in your Lordship's construction of the 45th clause of the scheme of endowment. The Lord Ordinary thinks that the clause is not expressed so clearly as it might be, and he puts a different construction upon it from that of the headmaster.

I think the clause is divided into two parts—the first part provides that any boy shall be liable, at the discretion of the governors, to dismissal and forfeiture of any benefit derived from the endowment, for such continued idleness, or breach of discipline, as shall on report from the headmaster disqualify him, in the opinion of the governors, for continuing a member of the college. Under this part of the clause, the headmaster may report to the governors with regard to any boy for continued idleness—if he is of opinion that his conduct is such that he ought to be dismissed, and if the governors, after considering the report, concur they may dismiss him. The other part of the clause is,—“Any boy may also be dismissed summarily for immorality or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school.” There is no reference to the governors, and a power of summary dismissal is given to the headmaster whenever, in his judgment, it is necessary in the interests of the school. The report which in that case he is required to make is regulated in these words,—“In all such cases the headmaster shall forthwith lay before the governors a full report upon the subject.” The headmaster's power of dismissal referred to in the second part of the clause is in contrast to the power referred to in the first—I think that this is the true reading of the clause, and it appears to me perfectly clear and precise.

This action is one of damages against the governors of the college for breach of contract. It is not a personal action at all. Any contract which existed between the pursuer and the governors must be according to the statutory scheme, and the pursuer complains that he was summarily dismissed by the headmaster, and that this dismissal was approved of by the governors, because it was believed that he was suffering from a disease which rendered his continued presence dangerous to the rest of the pupils. He avers that on inquiry it will be found that this belief was erroneous, and therefore that the defenders were guilty of breach of contract. I am of opinion that this is not a relevant ground for an action of damages at all. There is no charge of want of conscientiousness against anyone, and the case as presented is just that the medical officers of the college having informed the headmaster that it was no longer safe for the pursuer to be allowed to remain in the school, he summarily dismissed the pursuer, and thereafter submitted his report to the governors under the 45th clause. But then it is said that a legal wrong would be established if the pursuer could satisfy a jury that the medical officers were incorrect in their representations. That would lead to the funds of the college being subject to a claim of damages, to be determined in an action in which the question was whether the opinion or representations of the medical officers attached to the college were sound or not. I cannot listen to that for a moment. There may



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possibly have been some mistake made, but all conscientious men are liable to make mistakes, and even in such cases there can be no question of legal wrong. I am therefore of opinion that we ought not to send the matter to a jury. I think it was according to the contract the right and duty of the headmaster to form a judgment on the matter, and to act upon it, just as it was the duty of the governors to interfere on the report being made to them, or to refrain from doing so, according as they deemed it right in their judgment to do either of these things.

I am therefore on the whole matter clearly of opinion that there has been no invasion of legal right, and no wrong done here, and that the action ought to be dismissed.

LORD RUTHERFURD CLARK and LORD LEE concurred.

THE COURT adhered.

J. D. MACAULAY, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

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Dec. 12, 1888.  
Steel's Trustees v. Steel.

JAMES STEEL AND OTHERS (Robert Steel's Trustees), First Parties.—

*R. L. Orr.*

JAMES STEEL AND ROBERT STEEL, Second Parties.—*Gloag—Fleming.*

REV. WILLIAM WILLAN AND OTHERS, Third Parties.—*Balfour—*

*C. K. Mackenzie.*

*Succession—Vesting—Payment postponed till death of liferenters—Clause of survivorship.*—A testator directed that the fee of the residue of his estate, including certain subjects liferented by his wife (who survived him), should be held by his trustees for behoof of his children in different proportions—the sons' provisions to be payable, to the extent of £2000, twelve months after the testator's death, and the remainder twelve months after the death of his widow, the daughters' provisions to be held for their liferent alimentary use alienably, and for the heirs of the body of each of them in fee, and failing any daughter without leaving heirs, her share to form part of the residue. The testator further directed that should any of his children die upwards of twelve months after his widow without issue, and any part of the shares of the estate in that event devolve on his sons, the trustees should pay the same to the sons as soon after the death of the persons so dying as might be convenient. It was further provided "that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively, in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid."

The widow died, her death being followed, nine years after, by that of one of the sons unmarried. On the subsequent decease of one of the daughters without issue, *held* that the fee of the share liferented by her did not vest until the term of payment, and that no part of it therefore belonged to the representatives of the deceased son.

*Per the Lord President.*—Where in a testamentary deed a fund is settled on the children of the testator for their liferent use alienably and their children, if any, in fee, whom failing, to another person or class of persons in absolute property, if the person or persons so called are known or the individuals composing the class are ascertained at the death of the testator, the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters or any of them leaving issue; if they are not so known or ascertained, the fee will not vest until the occurrence of the event which will determine

who are the persons called, or until the individuals composing the class are ascertained. No. 44.

*Observations* (per the Lord President) on the case of *Haldane v. Murphy's Trustees*, Dec. 15, 1881, 9 R. 269, and *correction* by his Lordship of the report of that part of his opinion in that case which dealt with the case of *Bell v. Cheape*, 7 D. 614. Dec. 12, 1888.  
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ROBERT STEEL, merchant in Port-Glasgow, died on 2d December 1841, 1st Division.  
B. survived by his wife, Mrs Jean M'Leish or Steel, who died on 16th November 1852, and by three sons and four daughters.

Mr Steel left a trust-disposition and settlement, dated 25th December 1833, and codicil thereto, dated 28th July 1840. The testator disposed and conveyed to trustees therein mentioned his whole estate, heritable and moveable, in trust for the purposes therein mentioned. The deed contained this clause,—“In the sixth place, I hereby appoint my said trustees and their foresaids to hold the fee of the said subjects liferented by the said Mrs Jean M'Leish or Steel, and the whole rest, residue, and remainder of my said estates, heritable and moveable, real and personal, subject to the option in favour of my sons after written, for behoof of the lawful children procreated of my body, in manner after mentioned, in the following proportions, viz. :—For and on account of each of my sons, four shares or portions, and for and on account of each of my daughters, three shares or portions of said residue,—that is to say, for every sum of £4 sterling set apart for a son a sum of £3 sterling shall be set apart for a daughter, with the exception and under the declarations and provisions after written; . . . . and I provide and appoint that the provisions hereby made in favour of my sons shall be payable to them as follows, viz, the sum of £2000 sterling, subject to the eventual deduction after mentioned, to each of my said sons upon the expiry of twelve months after my death, and the remainder upon the expiry of twelve months after their mother's decease; . . . . and I provide and appoint that the provisions hereby made on account of my daughters shall be held by my said trustees . . . . for behoof of my said daughters respectively, in liferent for their liferent alimentary use altogether of the annual proceeds of the capital of the said provisions, . . . . and for behoof of the heirs of the bodies of each of my said daughters respectively, . . . . in such proportions and under such conditions and restrictions as they, my said daughters respectively, shall appoint by a writing under their hands, which failing, equally among them in fee; and failing any of my said daughters without heirs of her body, then the share of such decessor or the residue thereof, so far as not disposed of under or by virtue of these presents, shall form part of the residue of my estate; . . . . and I provide and appoint that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such decessors, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively, in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions without lawful issue, then the provisions of such decessors, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid.”

By the codicil the testator entirely recalled the provisions made by him to one of his sons, named Robert, in the trust-disposition and settlement, and directed his trustees to hold and pay the same to his son William and his sisters, “rateably and proportionally, according to the other shares or portions of the residue of my estates before destined to them, and under the same conditions.” The codicil further provided,—“Should any of my children interested die upwards of twelve months after the death of my

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wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve on my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient."

A deed of declaration and renunciation of the direction regarding Robert's share was after the truster's death granted by all the beneficiaries interested in the succession, and it was thus restored to an equal footing with those of the other brothers, on the narrative that the recall of Robert's provisions was not intended to be final.

William Steel, one of the sons, died unmarried on 27th April 1861, leaving a trust-disposition and settlement, dated 16th June 1854, under which his four sisters and their heirs were the residuary legatees. Mrs Elizabeth Hagart Steel or Johnstone having died in 1875 without issue, and Misses Catherine and Margaret Steel having both also died unmarried, a question arose with regard to the right to the fee of the shares of the residue which were liferented by them.

A special case was accordingly presented to the Court, in which the question was,—“Did a part of the fee of the shares of the testator's estate, liferented by Mrs Johnstone, Miss Catherine Steel, and Miss Margaret Steel, vest in the said William Steel at the testator's death, or otherwise, at a period prior to the death of the said William Steel, subject to defeasance in the event of the said liferentrics leaving issue, or was vesting postponed till the death of the said liferentrics respectively?” The parties to the case were (1) The trustees of Robert Steel, the truster; (2) James Steel and Robert Steel, the truster's two surviving children; and (3) the Reverend William Willan (husband of the truster's fourth daughter Jane, who had died in 1878 leaving issue) and others, the beneficiaries and trustees under William Steel's trust-disposition and settlement.

It was contended by the second parties, the surviving children of the testator, that William Steel had not a vested right in any part of the fee of the shares of the testator's estate liferented by his three sisters, that no part of the fee of the shares vested until the death of the liferentrics, and that accordingly the capital set free by their death should be divided among themselves and the family of Mrs Jane Steel or Willan in the proportions of four-elevenths to each of themselves, and three-elevenths to Mrs Willan's representatives.

It was contended by the third parties that the fee of the shares liferented by the testator's three daughters vested *a morte testatoris*, or at all events, on the expiration of twelve months after the date of the death of the testator's widow, subject to defeasance in the event of the liferentrics leaving issue; that therefore William Steel at the date of his death had a vested interest in a part of the fee of the shares of the testator's estate liferented by his three daughters, subject to defeasance in the event of their leaving issue.

Argued for the second parties;—There were three terms of payment contemplated by the truster; (1) twelve months after the truster's own death; (2) twelve months after his wife's death; and (3) at the death of any of the daughters more than a year after his wife's death. The term “provisions” in what may be called the survivorship clause covered everything to which the sons might at any time succeed under the deed, and was not to be restricted to the shares falling to them on the death of the truster and his wife. If that were not so, the other alternative was, that the fee of the daughters' shares would vest in the sons at the truster's death, subject to defeasance—while the fee of the sons' other provisions might never vest at all, *e.g.*, in the case of a son who survived the truster, but died within twelve months afterwards. The proper construction of

the provisions of the deed was that vesting was postponed until the term of payment in each case.<sup>1</sup> No. 44.

Argued for the third parties;—(1) Assuming there had been no clause of survivorship here, it was not necessary to distinguish the case from *Steel's Trustees v. Steel*,<sup>2</sup> Dec. 12, 1888. *Bell v. Cheape*,<sup>3</sup> nor to enter upon a criticism of *Wannop's case*,<sup>4</sup> because, upon the terms of the destination to the daughters in the present case, there was a primary gift of the fee to the sons, unless the contingency of the daughters leaving issue took their shares out of residue. The terms of the bequest were important. They were not "shall fall into residue," but "shall fall back into and make part of the residue of my estate." The case of *Taylor*<sup>5</sup> was a *fortiori* of the present. (2) The so-called survivorship clause did not suspend the vesting of the provisions liferented by the daughters. It had no reference to the accruing shares, and applied only to the original and primary provisions. The words "before receiving payment of their provisions" referred to the terms of payment before mentioned, i.e., in the case of the £2000, twelve months after the death of the truster, and in the case of the rest of the estate, twelve months after the widow's death.<sup>6</sup> The codicil provided for an omission in the settlement as to what would happen in the case of a daughter dying without issue more than twelve months after the widow's death. It supplied a code for the payment of the fee of a daughter's provisions at whatever time it might fall in, but it had really no bearing on the present case.

At advising,—

**LORD PRESIDENT.**—The settlement of the late Robert Steel of Port-Glasgow disposed of the residue of his estates as follows:—

1. The whole fee of residue, including subjects liferented by his widow, is to be held by his trustees for behoof of his children, in the proportions of four shares to each son and three shares to each daughter,—that is to say, for every sum of £4 set apart for a son a sum of £3 shall be set apart for a daughter.

2. The sons' provisions are to be payable to each of them, to the extent of £2000 twelve months after the testator's death, and the remainder twelve months after the widow's death.

3. The daughters' shares are to be held by the trustees for the liferent alimentary use alienably of the daughters, and for behoof of the heirs of the bodies of each of them respectively in fee, and failing any daughter without heirs of her body, the share of such decesser shall form part of the residue of the testator's estate.

There were three sons and four daughters, all of whom seem to have been of full age at the date of the settlement in 1833. But one of the sons having incurred his father's displeasure is cut off from his share of the succession by a codicil in 1840, which also contains this provision,—“Should any of my children interested die upwards of twelve months after the death of my wife

<sup>1</sup> *M'Alpine, &c.*, March 20, 1883, 10 R. 837; *Haldane's Trustees v. Murphy*, Dec. 15, 1881, 9 R. 269, Lord President, p. 278; *Bell v. Cheape*, May 21, 1845, 7 D. 614; *Murray v. Gregory's Trustees*, Jan. 21, 1887, 14 R. 368.

<sup>2</sup> *Bell v. Cheape*, 7 D. 614.

<sup>3</sup> *Haldane's Trustees v. Murphy*, Dec. 15, 1881, 9 R. 269.

<sup>4</sup> *Taylor, &c. v. Gilbert's Trustees*, July 12, 1878, 5 R. (H. L.) 217; *cf.* also *Lord v. Colvin*, Dec. 7, 1860, 23 D. 111, 33 Scot. Jur. 55, and July 15, 1865, 3 Macph. 1083, 37 Scot. Jur. 568.

<sup>5</sup> *Chalmers' Trustees*, March 16, 1882, 9 R. 743; *Snell's Trustees v. Morrison*, March 20, 1877, 4 R. 709.

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without leaving lawful issue, and any part of the shares of my estate before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient." It is obvious that "children" at the outset of this clause must mean "daughters," and that the phrase "two sons interested," is explained by the exclusion of one of the three sons by a previous clause of the same codicil.

The testator died in 1841, and the widow in 1852. The son William died in 1861, leaving no issue, and was survived by all his brothers and sisters. The other two sons still survive. The daughters are all dead, and only one of them, Jane (Mrs Willan) left issue.

In these circumstances, and but for the effect of a clause in the settlement to which I have not yet adverted, I should have little difficulty in holding that, though William Steel died before any of his sisters, his testamentary dispositive would be entitled along with his surviving brothers or brother to a share of the part of the residue set free by the death of those of his sisters who died without issue, on the ground that the whole residue vested in the sons on the death of the testator, or at all events twelve months after the death of the widow, subject only to defeasance in so far as the daughters left issue.

I think the result of all the cases on this subject may be summarised thus: Where a fund is settled on daughters of the testator for their life or for their life or until they marry, and their children, if any, in fee, whom failing, to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last-named person or persons will depend on these considerations,—whether the person so called to the succession, if only one, was a known and existing individual at the death of the testator, or if more than one, whether the persons so called were all of them known and existing at that date; or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the life-tenants or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called or the individuals composing the class are ascertained. But, when the person or persons called are known, or the individuals composing the class are ascertained at the death of the testator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the life-tenants, or any of them, leaving issue.

There was a great division of opinion in the case of *Haldane's Trustees*, 9 Ret. 269, as to the construction of the settlement. But it appears to me that all the Judges, or almost all of them, assumed the soundness of the rule I have endeavoured to formulate. This is clearly shewn in the opinion of Lord Moncreiff (Justice-Clerk) who was one of the majority. His Lordship puts the question thus (p. 282),—"Does the testatrix mean by 'my own nearest heirs' those who are or may be 'my own nearest heirs' at her death, or those whom the trustees shall find to be 'my own nearest heirs in moveables' when the obligation comes to be fulfilled. If the first of these interpretations is the sound one, it would raise a very strong, probably a conclusive, presumption of the testator's intention that vesting was to take place at her own death; and if, on the other hand, the persons to whom the trustees are to pay the residue are those whom they

shall find to be at the time of payment the nearest heirs of the testatrix in moveables, it is equally plain that the right cannot vest till the period of payment comes." No. 44.  
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I am anxious to make it clear that the cause of the dispute in *Haldane's Trustees*, and of the difference of opinion among the Judges, was not any doubt as to the legal principle applicable to such cases, but turned entirely on the words of the particular deed which fell to be construed; because I think there was in the arguments in this case some evidence that the import and effect of that previous case has not been thoroughly appreciated or understood.

In connection with the report of the same case I am desirous of correcting what appears to be a serious blunder in a passage of my own opinion, on p. 278. My words, as reported, are,—“It cannot be disputed that if the residue of an estate is destined to A in liferent, and his issue in fee, and failing his leaving issue, then on the expiry of the liferent to B, no right vests in B till the death of the liferenter without issue. This was authoritatively settled in the case of *Bell v. Cheape*.” Now, this as it stands is not sound law, and nothing of the kind was settled in *Bell v. Cheape*. But the blunder consists in this, that after the words “on the expiry of the liferent to B,” there ought to be added, “and his heirs, executors, and assignees,” which makes the proposition good law, and truly represents the judgment in *Bell v. Cheape*, for that judgment proceeded on the ground that B's heirs and executors were called as conditional institutes after B, and were entitled to succeed in place of B if he predeceased the death of the liferenter and the term of payment. I am not at all prepared to ascribe the occurrence of this blunder to the reporters, for my opinion was in writing, and I do not doubt that the omission of the words occurred in the transcription of the manuscript.

The provisions of Mr Steel's deed of settlement, so far as I have hitherto considered them, point to one conclusion only, that the sons took a vested interest in the whole residue of the estate *a morte testatoris*, subject only to defeasance in the event of the daughters leaving issue. But there is a clause in a later part of the deed (p. 16 of the printed copy of the settlement), which throws a new light altogether on the intentions of the testator. It provides and appoints “that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid.”

Both of the branches of this clause seem to me to be inconsistent with any vesting in the sons prior to the terms of payment of the different parts of their provisions, i.e., of the residue. I do not, of course, construe the words “before receiving payment” as referring to the fact of payment being made, but only to the time when payment ought to be made, or in other words, to the term or terms of payment specified in the deed.

But the plain meaning of the clause is that if a son dies before the arrival of the term of payment of any part of his provision, that part falls to his issue if he any has, as conditional institutes, and if he has no issue, then it falls back into the general residue of the testator's estate, and belongs to the residuary legatees who survive the term of payment.

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The result, in my opinion, is that William Steel's testamentary disponees are entitled to take all that became payable to him twelve months after the testator's death, and all that became payable to him twelve months after the death of his mother, because he survived these terms, but that they have no right or interest in any part of the residue, which became payable to the sons only after the said William Steel's death.

LORD MURE.—I concur in the result of your Lordship's opinion, and also in the grounds on which it is based.

LORD SHAND.—It seems to me that this case is not attended with any serious difficulty.

Several clauses of the deed of settlement and of the codicil have been referred to in the argument. So far as regards those contained in the codicil, they do not seem to me to have any bearing upon the question we have to determine. The question, I think, depends entirely upon the terms of the settlement itself. The provisions of that deed are as follows:—In the first place, the testator provides a *liferent* of a part of his estate to his widow if she should survive him, and the fee of the subjects so *liferented*, and “the whole rest, residue, and remainder” of his estates, he appointed his trustees to hold for behoof of his children in certain proportions, which have been already mentioned by your Lordship. There is therefore a provision of a *liferent* of part of the estate, and a clear destination of the fee to the children in certain proportions.

In regard to the shares of the residue destined to daughters, it is provided that they shall have a mere *liferent* of them, but that in the event of their leaving children, the children shall take the fee of the shares *liferented* by their mothers respectively, and failing children, then that the share of each daughter shall fall back into residue,—that is, shall belong to the sons, who accordingly have right in that case to an enlarged amount of the fee of the testator's estate. The only other provision which need be noticed is the provision that the sons' shares shall be paid to them at certain fixed dates—part twelve months after the testator's death, and part twelve months after their mother's death should she be the survivor.

If these provisions stood alone, I have no doubt that there would have been vesting of the fee *a morte testatoris* in the sons. For, so far as I have gone, the deed simply comes to this—and it is an ordinary case of testamentary provision—that there is a provision of a *liferent* to the testator's widow if she survive him, while the fee of the estate is to be held for the children, the daughters having a *liferent* only of their shares, with a fee to their children if any, and the sons having each a right of fee which would be enlarged by the death of a daughter or daughters without issue.

The only element which it might be suggested would postpone vesting is the mention of certain dates of payment. But it is settled that that does not suspend vesting. Accordingly I have no doubt that the fee would have vested *a morte testatoris* unless the clause to which your Lordship last adverted had the effect of suspending vesting till the term of payment of each part of the provisions arrived. But I am equally clearly of opinion with your Lordship that the clause in question has that effect. The clause is as follows:—“In case of the decease of any of my sons before receiving payment of their provisions” (which really means, as your Lordship has said, before the terms of payment),

"leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid."

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The question to be determined is what is the meaning of the word "provisions" as occurring in that clause, and we have had an argument upon that point. The word occurs twice, and one thing is clear, that in both branches of the clause it must mean the same thing. On the one hand, it has been maintained that the word "provisions" has a limited meaning, and refers to what I may call the primary provisions only, viz., the sons' immediate shares, which are payable twelve months after the death of the testator and twelve months after the death of his widow; and that the words are not to be extended further. If that be so, and the primary provisions only are to fall into residue in the event of a son predeceasing either of the terms of payment of his own share without issue, it follows that the provisions liferented by daughters would vest *a morte testatoris*. But that construction would lead to the anomalous result that if a son died before twelve months had elapsed after the death of his father or his mother without leaving issue, his share, so far as not due when he died, would drop into residue; but that the share of residue which would fall to him on the death of a sister, and which might not be payable till many years afterwards, would be held to have vested *a morte testatoris*. That is a construction which I cannot adopt. Accordingly, I think the word "provisions" in the clause now under consideration must be held to apply not only to what I have called the primary bequest, but to everything which fell to any of the sons under the deed, including what would come to them owing to the death of a sister without issue. I think that this is the natural meaning of the term, which is broad enough to cover all the benefits given to the sons. There is no reason for suggesting that one class of provisions or part of the residue should be in one position, and another part in a different position.

Accordingly, taking that view of the deed, and applying the term "provisions" to all parts of the residue, whether primary or eventual, given to the sons, I think there was no vesting in William Steel of any share of the daughters' provisions till each daughter died without issue, for the simple reason that in the case of any son predeceasing the term of payment without issue, there was a destination over of the share he would have taken had he survived, for the deed directs that such share was to fall into residue, and so be divisible among the other sons. I have said that there is nothing in the codicil bearing upon this point. There is one passage to the effect "that my son William shall only be entitled to call up £1000 upon the expiry of twelve months after my death, and the remainder shall lie with my trustees until his whole provisions are payable." I should rather be disposed to read that as a special direction applicable to the provisions payable at the two dates mentioned in the settlement. In regard to the subsequent clause, "should any of my children interested die upwards of twelve months after the death of my wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient," it appears to me that that clause was added for



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the purpose of supplying a want in the original deed, viz., a provision as to the term of payment of the shares of daughters dying after the testator without issue. But this has no material bearing upon the point involved in the case.

LORD ADAM.—Having had an opportunity of considering the opinion which has been delivered by your Lordship in the chair, I shall say no more than that I entirely concur in it.

THE COURT accordingly found that “no part of the fee of the shares liferented by Mrs Johnstone, Miss Catherine Steel, and Miss Margaret Steel vested in William Steel at the testator's death, or at any period prior to the death of the said William Steel.”

MORTON, NEILSON, & SMART, W.S.—WALLACE & BEGG, W.S.—HOPE, MANN, & KIRK, W.S.—Agents.

## No. 45.

MORRISON & MASON, Pursuers (Reclaimers).—*D.-F. Mackintosh—Guy.*

Dec. 14, 1888.  
Morrison & Mason v. Scottish Employers' Liability and Accident Assurance Co. Limited.

SCOTTISH EMPLOYERS' LIABILITY AND ACCIDENT ASSURANCE COMPANY, LIMITED, Defenders (Respondents).—*R. Johnstone—Shaw.*

*Insurance—Policy—Liability “under or by virtue of Employers Liability Act, 1880”—Action at common law.*—An assurance company granted a policy of insurance in favour of a firm of contractors under which they contracted to “pay to the employer all sums which such employer shall become liable for under or by virtue of the Employers Liability Act, 1880, as and for any compensation for personal injury caused to any workman in their service, while engaged in the employer's work,” during the currency of the policy. A workman in the employment of the contractors raised an action against them for personal injury suffered by him while in their employment through the fault of one of the firm. The action was laid solely at common law, and damages were found due. In an action at the instance of the contractors against the assurance company to recover from them under the above clause the amount of these damages, *held* that the workman's claim not having been made and prosecuted under the Act, the contractors had not been found liable in damages “under or by virtue of” the Employers Liability Act, 1880, and that, therefore, the assurance company was not bound under the policy to indemnify them therefor.

*Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. c. 42).*—*Observations* on the new liability introduced by the Employers Liability Act, 1880.

1ST DIVISION.  
Lord Lea.  
B.

IN February 1886 John Martin, a workman in the employment of Messrs Morrison & Mason, contractors, Glasgow, raised an action against them concluding for damages for injuries received by him by the fall of a scaffolding on which he was working at a railway cutting. The action was laid at common law, and did not contain any reference to the Employers Liability Act, 1880. The grounds of Martin's action were that Morrison, one of the partners of the defenders' firm, had personally designed and supplied him with an insufficient scaffolding, and particularly that the figures or scaffold supports should have been larger and of a different construction, and that the bolts which fastened the figures or scaffold supports were round, and should have been wedge-shaped. It was admitted by Morrison that he had himself designed both figures and bolts, and that they had been made to his order.

A verdict was returned for the pursuer, and the damages were assessed at £200. Messrs Morrison & Mason paid the above sum of £200, together with the expenses incurred by the pursuer, and their own expenses in defending the action.

On 12th December 1887 Morrison & Mason raised this action in the Court of Session against the Scottish Employers' Liability and Accident Assurance Company, Limited, concluding for payment (1) of the £200, with £3, 4s. 1d. of interest, (2) of the expenses of the action, and of £33, 16s. 9d., being the amount of certain sums paid weekly to Martin from the date of the accident up to the time of the raising of his action. The defenders acknowledged liability for the last-mentioned item.

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The pursuers averred,—(Cond. 2) “On 21st July 1885 the pursuers effected an insurance with the defenders, under Table B of their prospectus,\* against all accidents of occupation to their workmen, including accidents for which the pursuers might become liable under the Employers Liability Act, 1880, and at common law, to the extent of three years' wages, and the defenders issued to the pursuers a policy of assurance, dated 28th July 1885, numbered 6929, and marked ‘Table B,’ by which policy, in respect of the payment of a premium of £600 sterling, the defenders insured the pursuers, to the extent of £80,000 sterling, against such sums as the pursuers might become liable for in respect of personal injuries caused to workmen in their service during the twelve calendar months from the 21st day of July 1885.”

The defenders answered,—(Ans. 2) “Admitted that the policy of insurance was issued. It is referred to for its terms. Explained that the defenders do insure at common law to the extent of three years' wages, and issue policies to that effect, a form of which is produced and referred to. The policy founded on is not such a policy. Explained that when the assurance was arranged between the pursuers and the defenders, the latter advised and solicited the pursuers to insure at common law to the extent of three years' wages, and offered to cover that risk for 1s. to 1s. 6d. extra per £100 of wages, but the pursuers declined, and stated that they had had many years' experience of the common law liability, and that they were prepared to continue to take that risk upon themselves. *Quoad ultra* denied.”

The policy † contained the following clause :—“(1) The company, so far as regards injuries caused during the period covered by the premium so paid as aforesaid, or any further period, in respect of which the company shall accept a premium or premiums, shall pay to the employer all sums which such employer shall become liable for, under or by virtue of the Employers Liability Act, 1880, as and for compensation for personal injury caused to any workman in their service, while engaged in the employer's work in either of the occupations, and at any of the places, mentioned in the schedule hereto.”

\* Quoted p. 218, note.

† The policy of insurance was in the following terms :—“TABLE B.”—[See Prospectus, p. 218]—“Whereas Morrison & Mason, contractors, Glasgow, hereinafter called the employers, by a proposal, dated 21st July 1885, applied to the Scottish Employers' Liability and Accident Assurance Company, Limited, hereinafter called the company, for an indemnity against all such claims as hereinafter mentioned for compensation for personal injuries caused to workmen in their service, in any of the occupations mentioned in the schedule hereto, and have paid to the company the sum of £600 sterling as the premium for such indemnity for twelve calendar months from the 21st day of July 1885. Now, it is hereby agreed as follows :—(1)” (quoted above.) “(2) If at any time during the period covered by the said premium, or during any future period as aforesaid, any workman in the employer's service shall sustain personal injury caused by accidental, external, and visible means while engaged in the employer's work in either of the occupations, and at any of the places mentioned in the schedule hereto, and for which personal injury the employer shall not be liable under or by virtue of the Employers Liability Act, 1880, and the direct effect of such

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It appeared from the record that when Martin brought his action Morrison & Mason intimated the fact to the assurance company, who, however, denied liability to indemnify them under the policy, and it was thereafter arranged that the employers should defend the action, under reservation of all questions between them and the company.

The pursuers pleaded, *inter alia*;—(1) The pursuers having become liable, under or by virtue of the Employers Liability Act, 1880, for the said sums of £200 sterling and £3, 4s. 1d. of interest, as compensation for personal injury to a workman in their service, while engaged in their work, and the defenders having by their said contract of insurance and indemnification, and by their policy of assurance, agreed to indemnify the

injury shall occasion the death of such workman within three months of the happening thereof, then the funds and property of the company shall be subject and liable to pay to the employer, according to the scale in schedule hereto, in respect of such injury, and that within a month after proof of such death to the satisfaction of the directors of the company shall have been furnished. And if any workman in the service of the employer as aforesaid shall sustain any personal injury, caused as aforesaid, and during the employment as aforesaid, which shall not be fatal, and for which injury the employer shall not be liable under said Act of 1880 as aforesaid, then, on medical proof of such injury as aforesaid, and of such consequent incapacity as hereinafter mentioned, satisfactory to the directors, being proven, compensation shall be paid to the employer at the rate per week of one-half of the week's wages receivable by such workman at the time of the injury so long as such workman shall have been totally and absolutely incapacitated from attending to work of any kind in consequence of such injury. But the period during which such compensation for total disablement is to be paid shall not exceed twenty-six consecutive weeks for any single accident, and the company shall not be liable for and the employer shall not be entitled to demand payment of the said compensation in the events aforesaid for a greater or longer period than what is above set forth. . . . Provided always that this policy, and the covenant to indemnify herein contained, are subject to the conditions endorsed hereon, which are hereby agreed to be conditions precedent to the right of the employer to sue or recover hereunder."

THE CONDITIONS referred to contained the following clauses:—"1. Upon the occurrence of any accident, notice of it shall within three days of its occurrence be given to the company. The fullest particulars of the cause of the accident must be carefully preserved, so that in the event of legal proceedings such may be produced or be open to inspection. The failure to preserve such particulars has been an element against employers in the law Courts. The employer on receiving notice of a claim shall, within three days, send on the same or a copy thereof to the company, with such further certified information as to the time at and the circumstances under which the injury was caused, and the nature and extent thereof, and the name and occupation of the claimant, and such other information as the company may, by their rules or otherwise, require, and he shall cause to be supplied to the company such further certified information as to and such evidence of the circumstances connected with such claim as the company may from time to time apply for. 2. On receiving from the employer notice of any claim the company may take upon themselves the settlement of the same, and in that case the employer shall give them all necessary information and assistance for the purpose. The employer shall not, except at his own cost, pay or settle any claim without the consent of the company, but if any proceedings be taken to enforce any claim in respect of which such notice shall be given, the company shall have the absolute conduct and control of the same throughout in the name and on behalf of the employer, and shall, in any event, indemnify the employer against all costs and expenses of and incident upon any such proceedings, and the employer shall, at the cost of the company, render them every assistance in his power to enable them to resist any claim wholly or in part or to defend any such proceedings. . . ."

pursuers in all sums for which they might so become liable, the pursuers are entitled to decree therefor against the defenders. (2) Alternatively, the pursuers having become liable at common law for the said sums of £200 sterling and £3, 4s. 1d. sterling as compensation for personal injury to a workman in their service, while engaged in their work, and the defenders having by their contract of insurance and indemnification with the pursuers agreed to indemnify the pursuers in all sums for which they might so become liable, to the extent of three years' wages of the workman, the pursuers are entitled to decree therefor against the defenders.

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The defenders pleaded, *inter alia*;—(2) The claims made by the pursuers being (with the exception of the claim for the £33, 16s. 9d.) claims of relief arising out of or in connection with an action against them not under the Employers Liability Act, 1880, and the same not being covered by the policy or contract of insurance between the parties founded on, the defenders should be assoilzied *quoad* these claims. (6) On a sound construction of the policy libelled, the defenders are not liable to the pursuers as concluded for, and they fall to be assoilzied.

On 22d February 1888, the Lord Ordinary (Lee) pronounced an interlocutor granting decree in favour of the pursuers for the above-mentioned sum of £33, 16s. 9d., and for the expenses incurred by both parties in Martin's action down to a certain date (these claims being admitted by the defenders), and, *quoad ultra*, assoilzieing the defenders from the conclusions of the summons.\*

\* "OPINION.—This action is founded on a policy of insurance, by which the defenders undertook, in consideration of a premium of £600, to pay to the pursuers, as employers of labour, 'all sums which such employer shall become liable for, under or by virtue of the Employers Liability Act, 1880, as and for compensation' for personal injury, 'caused to any workman in their service, while engaged in the employer's work in either of the occupations, and at any of the places, mentioned in the schedule hereto.'

"On 4th August 1885, and during the period covered by this policy, John Martin, a mason in the service of the pursuers, sustained personal injuries while engaged in the pursuers' work; and on 4th February 1886, Martin raised an action of damages in the Court of Session against the pursuers, alleging that the accident occurred in consequence of the insufficiency of a scaffolding, through the pursuers' fault.

"The action came to depend before me; and an issue was adjusted for the trial of the cause, in the following terms:—

"Whether on or about the 4th day of August 1885, the pursuer, while working in the employment of the defenders on a scaffolding fixed to a retaining wall on the Glasgow and Cathcart Railway, near Dixon's Avenue, was injured in his person, in consequence of the insufficiency of the said scaffolding, and the falling thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuer.

"Damages claimed, £1000."

"The trial resulted in a verdict for the workman, and against the present pursuers, with £200 of damages; and an attempt to set aside the verdict as contrary to the evidence was unsuccessful.

"The defence in the present case raises no question that Martin suffered his injuries while in the pursuers' service, and engaged in their work, in one of the occupations, and at one of the places, mentioned in the schedule appended to the policy. But the defenders dispute their liability to indemnify the pursuers, on the ground that the employers' liability for the above sum was not 'under or by virtue of the Employers Liability Act, 1880.'

"It is admitted that the workman's action was not founded on the Employers Liability Act. He had given no notice under the statute, and raised his action

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The pursuers reclaimed, and argued;—The test of the defenders' liability under the policy was not whether the action brought by Martin was

in the Court of Session as for compensation at common law. The common law was sufficient for his purpose, because he alleged and proved that the accident arose from the insufficiency of a scaffolding for which the pursuer Mr Morrison was personally responsible.

"But it is contended for the pursuers that the policy is not exclusive of risks of liability arising at common law, but covers all risks of liability for injuries to workmen for which the employer insuring is responsible. The argument is, that the statute merely extends and amends the common law, and that the meaning of the reference in the policy to the Employers Liability Act is to make it clear that the policy applies to cases in which the employer is liable under the statute, as well as to cases where there is liability at common law, or at all events, if there be liability under the statute as well as at common law, it is of no consequence that the claim of the workman is constituted under the common law; for it is the nature of the accident, and not the nature of the workman's action, that must decide the question.

"I am of opinion that it depends on a construction of the policy of insurance, whether it covers a case of liability both at common law and under the statute.

"Allegations are made by the defenders pointing at an inquiry into prior communings as shewing that the pursuers understood that the policy applied exclusively to claims arising out of the Employers Liability Act. It is stated that they refused an offer to cover common law risks for an extra premium. The pursuers, on the other hand, also propose to refer to the terms of the proposal and relative prospectus, as shewing that 'Table B' mentioned in the policy includes 'all accidents of occupation' even at common law. I think that the question of construction must be decided upon the terms of the policy alone, and that it is incompetent to inquire into extrinsic circumstances in order to control or explain the policy.

"It was contended for the defenders that liability on the part of an employer under or by virtue of the Employers Liability Act, 1880, is purely statutory, entirely new, and quite distinct from, and exclusive of, liability at common law. In support of this argument there was cited the case of *The Queen v. The Judge of the City of London Court* (14 Q. B. Div. 905). I am bound to say that although the judgment of the Master of the Rolls in that case reserves the question whether these causes of action are new, the opinions appear to shew that the defenders' view is that which is taken in England. But a different view of the statute has been taken in Scotland, and has been applied in practice ever since the case of *M'Avoy v. Young's Paraffin Oil Co.*, in 1881 (9 R. p. 100). In the case of *Morrison v. Baird & Co.* (10 R. p. 271), I explained the grounds on which, in my opinion, the view of the Act taken in *M'Avoy's* case necessarily leads to the conclusion that the ground of action under the statute was not distinct from or exclusive of an action at common law. I adhere to the views then expressed, and as my judgment was affirmed in the Inner-House, and the practice is now quite settled in Scotland, (so much so that cases founding both on the common law and on the statute are tried under one issue), I cannot in the Outer-House hold this question to be open.

"The result is that an employer's liability for injuries suffered by workmen in his employment always arises out of fault for which he is responsible. It may be that he is responsible for that fault only by reason of the statute, or that he is responsible for it both under the statute and at common law. But it is always fault on his part, actually or constructively, that is the ground of liability. That there may be liability at common law as well as under the statute in some of the cases enumerated in the first section of the Employers Liability Act, appears to me to be clear. This may be illustrated by the first subsection of clause 1, as qualified by subsection 1st of clause 2. It is thereby enacted, *inter alia*, that a workman shall have the same right of compensation as any third party, in the case of injury from any defect in the machinery or

brought under the provisions of the statute, but what was the nature of the accident for which damages were claimed. If the accident were shewn to be due to any of the causes narrated by the Act, that was sufficient to infer liability against the assurance company. This accident was covered by sec. 1, subsec. 1, of the statute.\* The employer was therefore liable for damages here "under or by virtue of" the Act. The practice in cases of this kind was to try them, when laid alternatively at common law or under the statute, under one issue, shewing that there was no difference in the kind of liability. The one issue was, "Is there fault?" The defenders therefore had to bring their case up to this, that the policy only applied to cases where a new liability was introduced by the Act, and where there was no antecedent liability at common law.<sup>1</sup> Here, however, the action would have been competent either under the Act or at common law. The result of the Lord Ordinary's interlocutor would be that any workman might affect the liability of the assurance company according to whether he brought his action under the common law or under the Act. There was in this policy, to say the least, an ambiguity, and in such contracts where that was the case the terms must be construed *contra proferentem*.<sup>2</sup> There being an ambiguity in the

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plant used in the business of the employer, provided the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the machinery and plant are in proper condition. Excepting in so far as this enactment refers to injuries caused by the negligence of a fellow-servant, the liability of the employer in such a case exists not less under the common law than under the statute.

"Now, as this is precisely the kind of case that was raised by the issue in the action at Martin's instance against the pursuers, viz., defect in plant arising from the negligence of the employer, the question is whether the employer in such a case became liable under the Act for the sum awarded? I think that he became liable under the Act as well as under the common law to make compensation.

"But is this enough to give the employer a claim against the insurance company under this policy? My opinion is that it is not. I think that in all such cases it is for the assured party to establish his claim, and that in this case he can only do so by shewing that his liability to Martin for the sum found due arose under or by virtue of the Employers Liability Act, 1880. I think that he has failed to shew this, not because Martin's claim was not constituted under that Act, but because the Act was not required to create the liability, and was not in any sense the cause of the risk which in Martin's case the pursuers incurred. If advantage had been taken of the Act, and liability for the sum in question had been attached to the employer under it, that might have been conclusive against the company, for it would have been no answer to them to say that the employer was also liable at common law. But seeing that the Act was not in fact made the ground of liability, and was not required in law, my opinion is that the risk was not covered by the terms of the policy."

\* Sec. 1 of the Employers Liability Act, 1880, provides that the workman "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work," where personal injury is caused to the workman "(subsec. 1) by reason of any defect in the condition of the ways, works, machinery, or plant, connected with, or used in, the business of the employer."

<sup>1</sup> *M'Avoy v. Young's Paraffin Co., Limited*, Nov. 5, 1881, 9 R. 100; *Morrison v. Baird & Co.*, Dec. 2, 1882, 10 R. 271.

<sup>2</sup> *Life Association of Scotland v. Foster*, Jan. 31, 1873, 11 Macph. 351—See Lord President, at p. 358, 45 Scot. Jur. 240.

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policy, it was competent to go beyond its terms and import the prospectus of the company, which was expressly referred to by the marking Table B upon the policy itself. By the prospectus policies issued under Table A were to cover all cases of employers' liability under the Act, and at common law, to the extent of three years' wages, while policies under Table B were to cover all accidents of occupation, including legal obligations under Table A. For the additional liability of the defenders a higher premium was charged, and this was obtained from the workmen by a deduction of 1d. per £ per week from their wages, this system of deduction from wages being recognised by the defenders in the schedule to the policy. The policy in question being a Table B policy, the first clause covered liability under the Act and at common law to the extent of three years' wages, the second clause of the policy covering what was paid for by the workmen, namely, accidents for which the masters were not liable at all.\*

\* **EXTRACTS FROM PROSPECTUSES (No. 29 of Pro.)** :—"The passing of this Act subjects the employer not only to the serious pecuniary claims thereby provided for, but also to claims for accident to the workman never contemplated by the Act. Many claims of this latter kind will doubtless be advanced, and trouble and litigation will surely follow. By insuring under Table A the employer will relieve himself of the claims for which he is legally responsible, and of the litigation, trouble, and expense that wrongous claims may incur. The company, under the name of the insured, will defend all actions, and relieve the employer of the trouble and expense. It is one of the main objects of the company to provide for the insurance of the workman against all accidents of employment. Many accidents will befall them for which they can have no claim on their employer. To meet such cases the rates under Table B have been prepared. It is confidently expected that workmen will readily agree to give the small additional sum—averaging from 2s. to 5s. per man per annum—necessary to accomplish this end. By this plan all questions as to liability and consequent litigation will be avoided.

"**TABLE A.**—Rates to cover all employers' risks under the Employers Liability Act, 1880, for every £100 per annum paid in wages 5s.

"**Class IV.**—In the building trades—mason, carpenter, slater, painter, plumber, plasterer, in dock and harbour service, ironfounder, quarrier.

"**TABLE B.**—Rates to cover all accidents of occupation, and in the event of an accident for which the master is not liable, giving compensation to the employee as under :—In case of death one year's wages ; in case of total disablement, two-thirds of a week's wages for a period not exceeding 26 weeks ; for every £100 per annum paid in wages 12s. 6d. to 15s. **Class IV.**"

"(No. 30 of Pro.)—By the payment of a small premium either on the amount of annual wages or on fixed sums, policies are issued by the company to cover—1. Employers' liability under the Act, and at common law, to the extent of three years' wages, per Table A ; 2. All accidents of occupation to workmen, including legal obligations (under Table A) per Table B.

"With a policy under Table A employers are relieved of all liability for personal injuries sustained by workmen in their service, whether these injuries have been caused (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, &c. &c. . . . Special quotations will be given to any employer wishing to cover the risk of all claims—which are exigible at common law—beyond three years' wages. Under Table A policy, all wrongful claims on the employer will be resisted at the company's expense.

"By insuring under Table B, compensation will be secured for all actions of occupation to servants, not younger than fourteen years nor older than sixty-five years, in the following manner :—If the injuries are caused through the employer's fault, as defined by the Act, all claims, including medical fees, will be paid ; but if there is no liability under the Act, or at common law, on the

Argued for the defenders;—Under the policy they only undertook liability for cases where the master was liable in damages “under or by virtue of” the Act, that is to say, where the Act was invoked by the pursuer. The form of the action was the test of liability, and unless the statutory requirements of notice, &c. were carried out there was no liability on the part of the defenders. If the pursuers’ contention were right the word “under” would mean nothing. The conditions annexed to the policy clearly shewed that the company had guarded themselves from being liable for damages sued at common law, because they had stipulated that any notice of claim given under the statute should be notified to them, and had reserved the right to themselves to settle or to defend any action brought against the employers. Further, they issued special policies, as was pointed out in the prospectus, at special rates, where they undertook both classes of liability, and where, therefore, they were subject to heavier calls under the common law than they would have been under the statute.

At advising,—

**LORD PRESIDENT.**—The defenders in this case are a company calling itself the “Scottish Employers’ Liability and Accident Assurance Company.” The company issues policies for the purpose of indemnifying masters against claims by workmen who suffer personal injury in the course of their employment. It appears that Messrs Morrison & Mason, the reclaimers, took out a policy which bears to be an indemnity “against all such claims as hereinafter mentioned for compensation for personal injuries caused to workmen in their service, in any of the occupations mentioned in the schedule hereto, and have paid to the company the sum of £600 sterling as the premium for such indemnity for twelve calendar months from the 21st day of July 1885.” Accordingly in that recital the company undertook to indemnify the company in certain specified cases.

During the period for which the policy subsisted, a workman in the employ-

part of the employer, the proportion of wages or equivalent of wages fixed in the policy will only be paid through the employer.

“Under this system all questions of liability will be removed and litigation avoided.

“Classification of Trades, shewing annual premiums for each £100 paid in wages for policies covering the employers’ liability under the Act, and for joint policies covering all accidents while at work, whether the employer is liable or not. The rates in Table A are for policies covering the whole of the employer’s liability under the Act. The rates in Table B are for joint policies, covering the whole of the employers’ liability under the Act, and providing for all accidents of occupation outside the Act, and giving the following allowances to the workpeople, excluding those over sixty-five years of age and under fourteen :— One year’s average wages in case of death ; and two-thirds of the weekly wages during temporary total disablement, limited to twenty-six weeks—provided there is no liability under the Act.

“(No. 31 of Pro.)—Table shewing annual premiums for each £100 paid in wages for policies covering employers’ liability under the Act of 1880, and at common law, not exceeding three years’ wages. Building trades contractors 5s. Special quotations to cover claims under the Act only.

“(No. 24 of Pro.)—Policies are issued by the company to cover, viz :—1. Employers’ liability under the Act and at common law, to the extent of three years’ wages, per Table A ; 2. All accidents of occupation to workmen, including legal obligations (under Table A), per Table B.”

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Morrison &  
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Scottish  
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**Act.** No notice was given in terms of that Act, and the action was laid and damages awarded entirely at common law. That being so, the words of the policy seem to me to be insufficient to cover the claim now made against the defenders. For, in the passage read by your Lordship, the words are express, to the effect that what the indemnity clause was intended to cover was those cases only which were brought under or in virtue of the Employers Liability Act. I therefore concur in the result at which the Lord Ordinary has arrived. And I also concur in the opinion expressed by your Lordship that the new liability introduced by the Act was substantially this, that it puts the workman in the same position in the matter of remedy against his employer as he would have been had he not been a workman but an ordinary member of the public.

**LORD SHAND.**—This case raises simply a question of construction of the policy of insurance granted by the defenders. In considering the terms of the clause of indemnity which the policy contains it is important to keep in view the distinctions which exist between an undertaking to indemnify employers against claims at the instance of their workmen, where the liability arises under the Employers Liability Act, and where it arises under the common law.

There are certainly many claims which may be enforced at common law which cannot be pursued under the statute; for example, the large class of cases where the accident in respect of which the claim is made was caused by the direct fault of the employer himself. Many of these are not dealt with, and could not be pursued under the statute. Again, there is this material consideration, that though the assurance company may become bound to indemnify the employer whether the claim arose against him at common law or under the statute, yet under the common law the damages recoverable are not limited, whereas the damages under the statute are limited in amount. It is farther an important consideration for the insurance company that under the Act a limited time is fixed within which notice of a claim must be given to the employer, and besides this, the action must be prosecuted within a certain short time fixed by the statute. The cases under the statute are limited in their nature, the liability is limited in amount, and the claims can only be made after timeous notice and if the prosecution has begun within six months of the accident. It is therefore obviously a serious consideration for the company in granting a policy of assurance to have it clearly fixed whether the policy is to cover the larger number of cases which may arise without any defined limit of liability at common law, or the smaller number which can be prosecuted with limited liability and under conditions as to time under the statute.

Coming, then, to the policy with which we have here to deal, I am of opinion that its intention and effect was that the company should, and did, undertake liability for those cases only which might arise "under or by virtue of" the Act, and which should, if not settled, be prosecuted under the statute, and not at common law. That that is the effect of the policy is to be gathered from the words used in the body of the policy itself, and that reading is, I think, borne out by the conditions annexed to the policy, and which must be taken to be embodied in it. The obligation in the policy is to pay "all sums which such employer shall become liable for under or by virtue of the Employers Liability Act." In the conditions the company stipulates that they shall have the advantage of any notice of claim being communicated to them within three days of the notice being given, and that they shall, if they think fit, have the power to take

the settlement of any case upon themselves, and the conduct and control of any resulting litigation. They have also this important advantage, that the action, if founded on the Act, must be raised within the time allowed by its provisions. Having in view these considerations, I think it is clear that the company only contracted to indemnify the employers in cases brought and prosecuted under the provisions of the statute. It is not unimportant that we have before us a document which may fairly be looked at in illustration of the argument and of the ground on which the judgment proceeds—I mean a form of policy under which the company agrees to indemnify the employer not only against claims made under and in virtue of the Employers Liability Act, but claims at common law. In that policy it is distinctly stated that the company accepts responsibility in both classes of case, and in that event they charge a larger premium.

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If this is the proper reading of the policy, this action necessarily falls. There was here no claim made under the statute, and no notice was given so that the company might settle or defend the case if they chose.

The pursuers, however, maintain that though the liability here arose and damages were awarded at common law, yet the action might have been brought to a successful issue under the statute. I do not think that with a policy so expressed the Court can enter on that consideration after the close of an action against the employer in which liability at common law has been established. The test is, I think, Was the action *de facto* prosecuted "under or by virtue" of the Act? To hold otherwise would be to allow the insured to prosecute a claim for indemnity, on one ground, of a loss made good against him on another ground not covered by the language of the policy, and would deprive the insurers of the notices required by the statute.

The question might be put,—Supposing an action brought under the Act, and liability made out against the employer, could the company have contended that though the liability was made out under the Act the claim could have been successfully prosecuted at common law, and could it in that case be maintained that they were not liable? I think they could not successfully maintain that plea. The test in each case is,—How was the action raised—under the statute, or at common law? No doubt the respondents are at this disadvantage, that the pursuer in an action of damages may affect the liability of the company by bringing his action under the Act or at common law as he chooses. But I do not think the Court is entitled to take into account what is merely an incidental circumstance in such a case. The liability of the defenders arises on a collateral contract between the employer and the insurance company, to which the employed was no party, and with which he had no concern.

On these grounds, which differ in some respects from those of the Lord Ordinary's judgment, I think the interlocutor reclaimed against should be affirmed.

**LORD ADAM.**—The sum for which indemnity is here sought is the sum of damages awarded against the pursuers in an action of damages brought against them at common law by one of their workmen. There is no reference in the action to the Employers Liability Act. I concur that that being the nature of the action it cannot be brought under the indemnity clause of the policy, because the pursuers have not been found liable in damages "under or in virtue" of the Act. On that short ground I have no difficulty in concurring in the judgment proposed by your Lordship.

With regard to the construction of this very ill-expressed policy, it is contended

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that the clause of indemnity means that the liability referred to therein implies liability arising under the Act, and in no other way,—that is to say, that the clause only applies to cases where but for the passing of the Act there would have been no liability in damages at all. The result of that would be that where there was an antecedent liability at common law, the company would in no case be liable to indemnify the employer. That would simply come to this, that supposing the action was brought under the provisions of the Act the defence would still be open that the liability was a liability antecedent to the Act, and that, therefore, it did not arise “under or by virtue” of the Act. The other view of the clause is this, that where the action might be laid alternatively at common law or under the statute, and where proceedings were taken under the statute, then the company was to be liable. That, however, leads to this, that it would be in the power of any workman who is injured in his employment, to affect the liability of the insurance company according to the way in which he brought his action. That does not seem to me a likely view, but it is not in my opinion necessary to decide which is the true interpretation of the policy. If, however, I were called on to give an opinion, I should be disposed to say that the clause was only intended to guarantee the employer against liabilities created by the Act, and that therefore if it were shewn that there was an antecedent liability at common law, that would be a good defence to the company in such an action as the present.

THE COURT adhered.

MACANDREW, WRIGHT, & MURRAY, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

## No. 46.

Dec. 14, 1888.\*  
Ross v. Cowie's  
Executrix.

JOHN ROSS, Pursuer (Appellant).—*J. C. Thomson—Rhind.*  
JANE M'KENZIE OR COWIE (Cowie's Executrix), Defender (Respondent).  
—*Gloag—Sym.*

*Triennial prescription—Tradesman's account.*—A joiner, after the death of a customer, raised in December 1887 an action against his representative for payment of an account, stated continuously, and containing entries from June 1875 to May 1886. A portion of the account, from June 1876 to May 1877, amounting to upwards of £350, consisted of charges incurred for work and materials supplied in a building adventure in which the customer had been engaged at that time. *Quoad ultra*, it was a jobbing account, and for the last nine years of its currency amounted only to £3, 9s. 7d. The defender maintained that the portion which related to the building adventure was a separate account, and pleaded prescription in regard to it. The Court *repelled* the plea, holding that the whole account was to be considered as one.

*Proof—Triennial prescription—Entries made to avoid plea of prescription.*—Where in an action on a tradesman's account the defender stated that the last two entries therein were fictitious, and had been stated in order to avoid the operation of prescription, the Court *allowed* proof before answer as to these items.

*Proof—Advance of money—Mandate.*—A tradesman in an action for payment of an account containing charges for sums said to have been paid by him on behalf of his customer, produced receipts by the creditors in the sums said to have been so paid. *Held* that it was competent to prove by parole that the payments had been made on the authority of the customer.

2D DIVISION.  
Sheriff of Kin-  
cardineshire.  
I.

IN December 1887 John Ross, joiner, Stonehaven, raised an action in the Sheriff Court of Kincardineshire against Jane Cowie, widow and

executrix of Alexander Cowie, sometime feuar in Stonehaven, who died No. 46.  
on 25th September 1887, concluding for £379, 4s. 6½d. as the amount of  
an account said to be due to him by Cowie. The pursuer produced an Dec. 14, 1888.  
account which bore to commence on 2d June 1875 and to end on 4th Ross v. Cowie's  
May 1886.\* Executrix.

With reference to the item of £50 mentioned in the account below, the  
pursuer stated that it "was advanced and paid by the pursuer out of his  
own funds to the said John Lindsay at the special request of the said Alex-  
ander Cowie, and in his presence. The money was on that date drawn by

\* The account contained under the date "June 1875" a number of charges  
for work done in Cowie's dwelling-house and fencing his garden. These  
amounted to . . . . . £23 2 6

Then followed entries beginning thus :—

"1876.

June 22. To paid John Lindsay & Sons, Montrose, being first	
instalment for concrete work, . . . . .	50 0 0
To timber supplied for concrete houses,	
To 750 lineal feet 9 × 2½ joists, red wood, 3d., . . . . .	9 7 6 "

Here followed a number of similar entries.

"Aug. 9

to 1877. To workmen's time at concrete houses, from 9th  
August 1876 to 28th May 1877 :—

May 28. To 3922 hours at 6d. per hour, . . . . .	98 1 0
To 335 do. 3d. do., . . . . .	4 3 9
To 80 do. 2d. do., . . . . .	0 13 4 "

Then came a number of entries for other house building  
materials in wood, iron, and plaster, all of the same date  
(May 28). Among these was this entry :—

"To amount of James Garvie & Sons' account for doors, . . . . .	29 0 0 "
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The entries in this part of the account under date 28th May  
1877 closed with an entry :—

"To preparing plans and specifications, and carrying out the various work of the houses, . . . . .	30 0 0 "
---	----------

In all, the charges in this, the second portion of the account,  
amounted to £350, 17s. 3½d. Added to the first portion  
under date June 1875, they made the account, £373 19 9½

From this certain alleged payments to account in 1875 and 1877 were deducted, . . . . .	150 0 0
--	---------

Leaving a balance of, . . . . .	£223 19 9½ "
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Then came this item :—

"1877.

May 28. Interest thereon from this date to 28th December 1887, . . . . .	117 14 3 "
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Then followed a few other items of a jobbing nature said  
to have been incurred in the years 1879, 1881, 1883, 1885,  
and 1886. These items amounted in that whole period to  
about £3, 9s. 7d.

The last three items were as follows :—

"1884.

July 9. . . . .	0 1 3
To night steps repaired, . . . . .	

"1885.

Aug. 15. To new pail and handle, . . . . .	0 3 9
--	-------

"1886.

May 4. To attendance at sale of furniture, . . . . .	0 2 6 "
--	---------

After that entry the account was summed up.

No. 46. the pursuer out of his current account with the North of Scotland Bank at Stonehaven. An excerpt from the bank books shewing the entry and Lindsay & Sons' receipt are herewith produced and referred to."

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The defender denied that the account was due. She stated with regard to what is above described as the second portion of the account, and the pursuer admitted, that the items therein contained had reference to two concrete houses which her deceased husband had erected in Stonehaven, and the joiner work of which the pursuer had done. She stated that it was usual for such work to be contracted for, and settled for at completion, whether done under contract or otherwise, but admitted that no formal contract appeared to have been made for the joiner work in question.

She averred,—“The account prior to and under date June 1876, amounting in whole to £373, 19s. 9½d., falls to be treated as a separate and independent account from the subsequent items, and the pursuer has himself so treated it, by charging interest on it separately, . . . and the account prior to and under date June 1876 is not a continuous or running account with the few small items, amounting in the next ten years only to £3, 9s. 7d.; and the account prior to and under date June 1876 falls by itself under the triennial prescription, and is prescribed.” With regard to the last two items in the account, the defender averred that they were not performed for or on the order of Cowie, and were not due by his estate, and were “inserted in the account libelled with the view of attempting to obviate the plea of prescription, and the whole account is thus prescribed.”

With reference to the payment of £50 to John Lindsay & Sons, the defender averred that the matter there referred to did not fall under the pursuer's work, and that if he had made the payment he had been simply the medium of handing the money from Cowie to John Lindsay & Son, and had done so with money supplied by Cowie. She further stated that no such claim had ever been made in Cowie's lifetime.

With reference to the £29 said to have been paid to James Garvie & Son for doors, the defender averred that the putting in of doors fell within the pursuer's contract, and that he appeared to have bought these from Garvie & Son, and to have made that entry in the account in lieu of a detailed account as to the doors. She further averred that the payment, if made, was made with funds supplied by Cowie.

On the assumption that the account was not prescribed, the defender stated certain counter claims.

The defender pleaded, *inter alia*;—(1) The whole account, or at least that part of it prior to and under date June 1876, is liable to and has suffered the triennial prescription, and can be proved only by the writ or oath of the defender. (2) The payment to Messrs Lindsay & Son of £50, if made by the pursuer, having been so by him simply as the medium of the late Mr Cowie, for handing the money to them, and with money supplied by him, is not due or resting owing, and the pursuer can prove by the defender's writ or oath only that the payment was not made from the funds of Mr Cowie.

The Sheriff-substitute (Dove Wilson), on 20th February 1888, pronounced this interlocutor:—“Finds that the portion of the account libelled, which is said to have been incurred prior to 23d May 1879, can be proved only by the writ or oath of the defender,” &c.\*

\* “NOTE.—The earlier portions of the account for which the action has been brought are unquestionably prescribed unless it can be made out that the later portions are mere continuations of them. It appears to me, however, that the later portions are of quite a different character, and that it would be a mere evasion of the Prescription Statutes to say that they were done under the same

On 15th March 1888 the Sheriff (Guthrie Smith) affirmed the interlocutor "with this qualification, that the pursuer is at liberty to reform the account by excerpting the payment of £50 to Laidlaw & Sons, and £29 to Garvie & Son, and any other disbursements made by him on behalf of the deceased Alexander Cowie. . . ."

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Thereafter proof *pro ut de jure* having been allowed on the points specified in the Sheriff's interlocutor, the pursuer appealed under the 40th section of the Judicature Act to the Court of Session.

Argued for the pursuer;—(1) The Sheriffs had erred in holding that the greater part of the account was prescribed. To reach that result they had held that it was not continuous, and had treated it as several accounts under several employments. In fact they had treated it, not as it was stated by the pursuer, as a continuous account for work of various kinds, but as if it had been the accounts of three joiners for different jobs. But there was no principle for such a course. The account should be looked at in a question of prescription as the pursuer brought it forward. The same man might have different classes of work to do, and state them all in one account. The defender said that work of the kind, stated in what she described as the second branch of the account, was usually settled at completion, but she admitted on record that there was no formal contract for it, and could not therefore get the benefit of an alleged custom which depended on there being regular contracts for such work. The so-called second part of the account would have been subject to the triennial prescription, but only as part of the whole account, and the whole account was saved by the last two items. It was attempted to make the last portion, and therefore the whole account, subject to the triennial prescription by a random statement that the last items were put in to avoid prescription. That could only lead to inquiry by proof before answer on that point.<sup>1</sup> In a recent case of the kind an item, for which nothing was charged, followed by an item "to postages and incidents, 10s.," had been sustained as preventing the application of the triennial prescription on the Court being satisfied

employment as the earlier. The later portions of the account are for trifling bits of jobbing work of a few shillings each, such as one might order from the nearest carpenter without anything in the shape of contract or arrangement. The middle portion of the account—that incurred in 1876 and 1877—was for the building of two houses at a cost of some £350, which undoubtedly had been the subject of special contract and arrangement; and it seems to me that it is not possible to speak of the account for the trifling repairs and supplies as being a continuation of the employment to build. The first portion of the account—that incurred in June 1875—has more analogy with the last portions, but it is separated from them by an interval of more than three years, as well as by the house building contract.

"The defender treats the account for building the houses as falling under the triennial prescription. I should rather myself have thought that it fell under the quinquennial, but whether it fell under the one or under the other it seems to me to have no sort of connection with the other portions of the account, and if this view be sound it is plain that it can be proved only by writ or oath.

"There are two large items in the account, one of £50 and one of £29, which apparently are claimed as having been cash advances on behalf of the defender's author. If they were they would be equivalent to loans to him, and are therefore also provable by writ or oath only. I may add that it would appear to me to be exceedingly unfortunate were any other result to be reached. The defender's husband, who knew all about the work, is dead, and the defender at an interval of ten years from the conclusion of the transactions would necessarily be quite unable to obtain materials for her defence."

<sup>1</sup> *Wotherspoon v. Henderson's Trustees*, July 10, 1868, 6 Macph. 1052, Lord Neaves, at p. 1061, 40 Scot. Jur. 584.

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that these were *bona fide* entries.<sup>1</sup> (2) The sums of £50 and £29 were paid by the pursuer for the deceased, as he undertook to shew by the receipts produced and by proof that he had a mandate to pay them. Mandate to pay money might be proved by parole, and the plea of triennial prescription did not apply to a claim by a mandatary against a mandant for outlay.<sup>2</sup>

Argued for the defender ;—The pursuer after the death of his customer presented to the widow an account for a sum of more than £300, which, even assuming it to be continuous, was only saved from prescription by items for a purchase of a pail and for attending a sale of furniture. Such an account was suspicious, and no explanation had been offered of the delay which had occurred in rendering the account though the pursuer's counsel had been invited by the Court to explain it. The Sheriff-substitute was right in examining the account to decide on its true nature, and in overruling the pursuer's contention that such examination was ousted by its being stated by him continuously. Of the whole account only £3, 9s. was said to have been incurred within a period of nine years prior to the death of Cowie. Of the rest a great part, rightly described as the second of three accounts, was for a large piece of work of a character totally different from the rest, and never in practice to be found in a house jobbing account. But the whole virtue of the law of prescription lay in its recognition and enforcement of the usual mode of doing business. It was because in practice tradesmen's accounts and house maills were not hung up indefinitely, but paid soon, that the law enforced the bringing of action on them in a limited time under penalty of restricting the mode of proof. That reason was against the treatment of these charges so different in kind as part of a jobbing account. It did not make several accounts into one, that they were said to be all incurred to one man, or even to one man for joiner work, if the work were different in kind. The remote and large part of the account thus kept back till after the death of the alleged customer could not, therefore, be prefixed to a small jobbing account. It must stand on its own merits. If so, it either suffered a separate course of triennial prescription, or as the Sheriff-substitute suggested, it suffered the quinquennial prescription, either of which would be fatal to the pursuer's argument. The quinquennial prescription applied to all bargains "concerning moveables or probable by witnesses," and provided that payment should be sued for within five years from the "making of the bargain."<sup>3</sup> That would apply to this transaction of doing the joiner work in the course of a few months upon the concrete houses which Cowie had been erecting in 1876.

In any view, the pursuer would have to establish by proof that he had furnished the last two items in the third part of the account before the plea of prescription could be repelled.

The alleged payments of £50 and £29 could not be treated as the pursuer proposed. The presumption of law was, if he had paid them, that the payment was made with the money of Cowie the debtor. There was no relevant averment of mandate to pay them, even assuming the pursuer's case of mandate to be well founded in law.

At advising,—

LORD LEE.—This is an action for payment of a joiner's account, commencing

<sup>1</sup> Aytoun v. Stoddart, Feb. 4, 1882, 9 R. 631.

<sup>2</sup> Grant v. Fleming, Dec. 10, 1881, 9 R. 257; Annand's Trustees v. Annand, Feb. 6, 1869, 7 Macph. 526, 41 Scot. Jur. 278.

<sup>3</sup> Act 1669, c. 9.

in June 1875, and purporting to be continued subsequent to May 1877 by sundry charges for work done and materials supplied in May 1879, in September 1881, in March 1883, in July 1884, in August 1885, and in May 1886.

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The Sheriff-substitute and the Sheriff have held that the whole account prior to 23d May 1879 is subject to the triennial prescription, and upon the ground that the charges subsequent to June 1875 must have been the subject of special contract and arrangement, in which view there would be a period of more than three years between the charges in 1875 and the later portion of the account.

I think that the account cannot be so dealt with upon the record as it stands. There is nothing in the character of the account for June 1876 and for the period from 9th August 1876 to 28th May 1877 which is at all inconsistent with the pursuer's allegation that it was incurred for work done and materials supplied by the pursuer in the ordinary course of his business, and upon what he calls a running account. The joiner work upon the buildings referred to is not alleged to have been done under any special contract. Both the work and the materials are charged in detail according to time and price. I therefore think that the Sheriff-substitute's interlocutor of 20th February, and also the interlocutors of the Sheriff proceeding upon the same view of the account, must be recalled.

There is, however, another view in which the account is said to be prescribed. It is pointed out that if the items charged on 15th August 1885—"to new pail and handle, 3s. 9d."—and 4th May 1886—"attendance at a sale of furniture, 2s. 6d."—are struck out, prescription has run. For the action was not raised for more than three years after the preceding items under date July 1884.

It is alleged by the defender that these two last items are not due, and have been inserted with the view of obviating the plea of prescription. This raises a point which was referred to by Lord Neaves in the case of *Wotherspoon*, 6 Macph. 1052, and I think that the course there suggested should in substance be followed by allowing the parties a proof before answer as to these items. I think this proof must be taken before the plea of prescription is disposed of.

Another question is raised as to two entries in the account charging sums of £50 and £29, said to have been paid to other tradesmen by the pursuer on behalf of the defender for work done by them upon the buildings on which the pursuer was employed to do the joiner work and to prepare the plans and specifications.

The pursuer produces receipts for these sums as paid by him, and I think that there is authority for holding that parole proof is competent on the question whether the disbursements, so instructed, were made upon the authority of the deceased as a customer of the pursuer—*Annand's Trustees*, 7 Macph. 526; *Grant v. Fleming*, 9 R. 257.

On these grounds I think that we should recall the interlocutor of 20th February 1888 and whole subsequent interlocutors, and remit to the Sheriff to allow the parties before answer a proof of their averments on record as to the last two items charged in the account, and thereafter to proceed in the cause as may be just.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THIS interlocutor was pronounced:—"Recall the interlocutor of the Sheriff-substitute of 20th February 1888, and all the interlocutors



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subsequently pronounced in the inferior Court; remit the case to the Sheriff, with instructions to allow to the parties, before answer, a proof of their averments on record as to the last two items charged in the account libelled, and thereafter to proceed as may be just: Find the pursuer entitled to expenses in this Court, and remit," &c.

W. OFFICER, S.S.C.—WM. B. RAINNIE, S.S.C.—Agents.

No. 47.

Dec. 14, 1888.  
Macfarlane v.  
Matheson.

JOHN FINLAYSON MACFARLANE, Pursuer (Respondent).—*A. J. Young—J. P. Grant.*

DAME MARY JANE MATHESON, Defender (Appellant).—*D.-F. Mackintosh—M'Kechnie—Orr.*

*Public burdens—Poor-rate—Valuation-roll—Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29).*—In an action for payment of an assessment of poor-rates laid upon the defender (1) as proprietor and (2) as occupier, in respect of tenants paying under £4 of rent,—the entries in the Valuation-roll being the basis of assessment,—the defender stated that she was unable to recover payment (1) of her rents, and (2) of the rates which she had paid for tenants under £4; that her tenants were crofters, and that prior to the making up of the Valuation-roll they had made application to the Crofters Commission for reductions of rent, which, if granted, would take effect from the date of application, and that the Commission had pronounced an order sisting *in hoc statu* her right to sell in execution of any decree for rent she might obtain. She maintained that as, subsequent to the date of the Valuation-roll, her only available remedy for the recovery of rents and rates had been suspended by the action of the Crofters Commission under the Crofters Acts, the remedies of the collector for enforcing payment from her of rates founded on the Valuation-roll ought also to be suspended.

*Held (diss. Lord Lee)* that the defence was irrelevant.

2D DIVISION.  
Sheriff of  
Ross-shire.  
I.

JOHN FINLAYSON MACFARLANE, collector of poor, registration, school, and cemetery rates for the parish of Stornoway, raised an action against Lady Matheson, proprietrix in liferent of the island of Lewis, for £222, 7s. 4d., the balance of rates due by her in respect of her proprietorship and occupancy of subjects in the parish of Stornoway.

The pursuer averred, and the defender admitted, that the defender had been assessed by the Parochial Board for the year from Whitsunday 1887 to Whitsunday 1888 in the sum of £764, 7s. 7d., that she had paid thereof £542, 0s. 3d., leaving the balance of £222, 7s. 4d. sued for.

The defender stated that she had been assessed in rates on the assumption that the rental of her tenants who paid less than £4 per annum of rent would produce a sum of £168, 2s. 6d., but that she had only recovered £102, 2s. of that sum; that, with regard to tenants whose rent was £4 and upwards, she had been assessed on the assumption that the rates applicable thereto would amount to £508, 16s. 8d., "but she had only been able to collect rents representing an assessment of £352, 9s. 10d."

The defender further stated;—(Stat. 3) "In the event of the defender adopting legal proceedings against her tenants who are in arrear of rent, the same would, in terms of the Crofters Holdings (Scotland) Act, 1887, be liable to be prohibited till the crofter's application to fix a fair rent has been determined. There is no immediate prospect of their application to fix fair rents being entertained or determined." This statement was admitted by the pursuer, under the explanation that "the defender has not attempted to sue any of her tenants who are in arrear of rent; and

that until she does so, the Crofters Commission has no power to sist the proceedings." No. 47.

The defender pleaded;—The defender not having recovered payment of the sums sued for in respect of rates from her tenants who pay less than £4 per annum, and in respect of rents from those who pay £4 per annum and upwards, she is not bound to pay rates in respect of the sums not recovered by her as aforesaid, and she is entitled to be assoilzied, with expenses. Dec. 14, 1888. *Macfarlane v. Matheson.*

The Sheriff-substitute (Fraser) decerned against the defender for the £222, 7s. 4d. sued for.

The defender appealed to the Court of Session.

It was stated at the bar for her that she was unable to pay the rates, as the rents of the estate had not been recovered; that from over two thousand crofters she had only recovered at the last collection £9 of rent; that she had raised numerous actions for rent against crofting tenants, but that the crofters had in June 1887 applied to the Crofters Commission to have fair rents fixed,\* and that the Commission thereafter, on the application of the respective crofters, had issued an order prohibiting *in hoc statu* the sale of the crofters' effects by virtue of any decree for rent or arrears of rent.†

Argued for the appellant;—The rates were payable in respect of the rents received. But in this case the rental out of which the rates should come was non-existent. The subject of taxation, in fact, had perished.

\*The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), section 6, enacts that "the landlord or the crofter may apply to the Crofters Commission to fix the fair rent to be paid by such crofter to the landlord for the holding, and thereupon the Crofters Commission, after hearing the parties and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding, and suitable thereto, which have been executed or paid for by the crofter or his predecessors in the same family may determine what is such fair rent, and pronounce an order accordingly."

Section 6, subsection 3, enacts,—“Where the Crofters Commission shall fix a rent which shall be less in amount than the present rent, the crofter shall be entitled, at the next payment of rent, to deduct from the amount of the fixed rent such sum or sums as he may have paid over and above the amount of the fixed rent in respect of the period between the date of the notice of application to fix the fair rent and the date when such rent was fixed.”

Subsection 4 enacts,—“When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission . . . to sist all proceedings for the removal of the crofter in respect of non-payment of rent till the said application is finally determined, upon such terms as to payment of rent, or otherwise, as they shall think fit.”

Subsection 5 gives the Crofters Commission power to decide as to whether the whole or any part of arrears of rent to become due before the application is finally determined ought to be paid.

†The Crofters Holdings Act, 1887, enacts, by sec. 2,—“Any crofter who has made or shall make any application to the Crofters Commission to fix a fair rent for his holding, and against whom legal proceedings have been taken for payment of rent, may apply under the same or any subsequent application to the Crofters Commission for an order prohibiting the sale of the crofter's effects upon the said holding by virtue of any decree for payment of such rent; and the Crofters Commission, if satisfied that such sale would have the effect of defeating in the case of such crofter the intention of the principal Act, may, upon such terms as to payment of rent or otherwise as they shall think fit, grant an order prohibiting such sale till the application to fix a fair rent has been finally determined.”

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Where the subject of a lease perished in whole or in part rent was not exigible for what had perished.<sup>1</sup> On the like reasoning, the taxation which public law laid upon the subject could not be exacted.<sup>2</sup> The appellant's property did not yield profit on which it could be rated. Poor-rate was in its nature a tax upon income, as appeared from the earliest statutes on the subject. Thus the Act 1579, c. 74, made provision, in order to the relief of the poor of a parish, "to tax and stint the hail inhabitants within the parochin according to the estimation of their substance." Thus also the Valuation Act of 1854<sup>3</sup> furnished machinery for imposing the burden of rates on the value of subjects, according as they were capable of being "let from year to year." The Valuation-roll was the warrant of the collector of poor-rate for laying on taxation, and in an ordinary case it was the test of the rental for the year to which it applied. But a *vis major* had supervened, just as much as if part of the subject had been swept away by a flood. The Crofters Commission had deprived the appellant of her power to recover her rents by the appropriate diligence of law, a sale on a decree. Thus the collector's warrant was cut down. Again, this stoppage of the power to recover the rent would, if the Crofters Commission reduced the rents, destroy the subject of taxation as it appeared in the Valuation-roll. The crofters had made their applications in June, and the Valuation-roll was made up in August following. But the reductions if granted would in their effect on the rental draw back to June.

Argued for the pursuer;—The rating authorities were bound to assess according to the Valuation-roll. The appellant could not be relieved on the ground that she had not recovered her rents. Besides, she had not done what she could to recover them. The Crofters Commission had indeed prevented her from selling in implement of any decree, but there was no prohibition against her obtaining such, or even enforcing it (if obtained) by arrestment. The basis of the argument of the appellant was that the estate was not really of the value stated in the Valuation-roll, by which the respondent was bound to assess. But if so, the true remedy was to have objected to the entries in the roll applicable to the estate at the time that roll was made up. That course not having been taken, the appellant must impute to herself the consequent loss, if any.<sup>4</sup>

LORD JUSTICE-CLERK.—I think there is only one way in which we can deal with this case. It discloses a history as deplorable as, I think, ever came before the Court. Lady Matheson has been unable to recover even so much of the rent due to her as will enable her to pay to the collector the rates for which she has been assessed. It appears that the Crofters Act (with its Amending Act) has had the result that while a proprietor is liable to pay the assessments according to the rent which he and his tenant agreed upon, the Crofters Commission has power to step in and to say that those rents shall not be paid by the tenants to their landlord. Yet it is not provided that the proprietor who is liable to be called upon to pay his assessment while his right to recover his rents is stayed is to have his obligation to pay also stayed. It has been argued

<sup>1</sup> Muir v. M'Intyre, Feb. 4, 1887, 14 R. 470.

<sup>2</sup> Tod v. Mitchell, Jan. 26, 1858, 20 D. 445, 30 Scot. Jur. 232, per Lord Neaves (Ordinary); Govan Police Commissioners v. Armour, Feb. 3, 1887, 14 R. 461; Cassells' Law of Rating, p. 35 and p. 42; Mayor of Worcester v. Droitwich Assessment Committee, Nov. 10, 1876, L. R., 2 Ex. Div. 49.

<sup>3</sup> Valuation Act, 1854 (17 and 18 Vict. cap. 91), sec. 6.

<sup>4</sup> M'Lachlan v. Tennant, May 4, 1871, 43 Scot. Jur. 390.

to us with much force that the action of the Crofters Commission subsequent to the date of the imposition of the assessment is a *vis major* which disturbs the whole position. The Commission has stopped the landlord's proceedings. At least it has stopped his right to sell in execution of his proceedings for rent, and the effect of these two things is practically the same, for if he cannot sell, a landlord has practically no means to recover his rent, and out of that rent alone can his rates be expected to come. The result is unfortunate. But when we look at the legislation which provides for the imposition of the assessments and their collection, we find no option in the matter. The duty of the rating authorities is to take the rent in the Valuation-roll (which, when the lands are let, is the rent actually payable) and finding there the true rent, to place upon that property the proportion of rates applying thereto. This is the case whether the rents be above £4, or whether they be under £4, in which latter case the landlord may be called upon to pay to the collector the whole rate.

The statutory authorities for the collection of rates have here performed their statutory duty, and though the case is as hard a one as can well be conceived, I am of opinion there is nothing either in the circumstances or in the Crofters Act which prevents their recovering them.

LORD YOUNG.—I am of the same opinion. I think the case for the appellant is unstateable. The action is by the collector of the poor and school rate, acting under authorities who are in duty bound to assess the appellant and other rate-payers according to the Valuation-roll in operation for the time, and who, as required by their statutory duty, did make these assessments according to that roll. When the Valuation-roll is being made up the proprietor has notice of it, and may appeal against it, but when once it is made up, the rating authorities have simply to assess according to it. Was the defender then duly assessed? I should have thought that the only question. The pursuer states that she was assessed to the extent of £764, 7s. 7d., that she paid to account £542, 0s. 3d., leaving a balance still due to him of £222, 7s. 4d., being the sum sued for, and her answer to the statement is simply "admitted." Is it possible to say that her case is stateable after that? There is no case here of destruction of the subject by fire or earthquake, or flood, such as has been figured. It is the case of an existing proprietrix of an existing subject assessed for £764, and who has only paid £542. In defence she states that she has been assessed on the assumption that the rental of her tenants paying less than £4 per annum would produce £168, 2s. 6d., and that that of those paying £4 and upwards would produce £508, 16s. 8d.; that from the former class she has only recovered £102, 2s., and from the latter class, notwithstanding all her efforts, she has only been able to collect rents representing an assessment of £352, 9s. 10d. What have the rating authorities to do with that? She also states that in the event of her taking legal proceedings against her crofter tenants in arrear, these proceedings would be liable to be prohibited till their applications to fix a fair rent are determined, and she pleads as her only plea in law,—“The defender not having recovered payment of the sums sued for in respect of rates from her tenants who pay less than £4 per annum, and in respect of rents from those who pay £4 per annum and upwards, she is not bound to pay rates in respect of the sums not recovered by her as aforesaid, and she is entitled to be assoilzied, with expenses.” It is not maintainable that a proprietor duly assessed according to the Valuation-roll at the time is not liable to pay rates because she has not recovered her

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No. 47. rents. No doubt it is a peculiar case,—a case of hardship,—that a tribunal  
 Dec. 14, 1888. been appointed with power to deal with arrears and to reduce rents, but  
 Macfarlane v. rating authorities have no concern with that. They have no other course  
 Matheson. to lay on their rates according to the Valuation-roll, and they have merely a  
 according to their statutory duty. It is impossible not to sympathise with  
 landlords of crofter tenants who may be abusing the advantages extended to  
 It is very hard for them to have to pay rates when deprived of the rents  
 which they stipulated. But on the other hand, the Commissioners will not  
 assume, interfere with fair rents, and the defender will, I doubt not, maintain  
 to them that hers are fair rents. It is out of the question to suspend the col-  
 lection of assessments till that question is settled.

I ought to say in addition that I think the Crofters Commission have  
 authority to interfere with ordinary legal proceedings to obtain decree for  
 recovery of rent due. Their authority is limited to preventing the sale of  
 stock of the tenant in execution of the decree, which they will do to such ex-  
 tent as they may see just, and I have no doubt they will not proceed to exercise  
 power unless in exceptional circumstances. The only power is to interfere  
 to prevent a sale.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—I agree that we have nothing to do with the policy of the statute  
 referred to at the debate, and that on the record as it stands there is really no  
 question of the defender's liability. But I understood that the record was  
 amended so as to raise formally certain questions which were mentioned  
 at the bar. It was stated at the bar, that under the Crofters Act the Crofters  
 Commission has *de facto* interfered to suspend action on the defender's part  
 to obtain her rents. It was also, I understood, averred that the Commission  
 received and entertained claims for a revision of the rental, which, if sustained,  
 will, by the Act, draw back to June 1887, prior to the making-up of the Valua-  
 tion-roll. Now, as to the irrelevancy of these allegations I have the misfor-  
 tune not to be so clear as your Lordships. I am, for one thing, not in a position  
 to give an opinion on the extent of the powers of the Crofter Commission. The  
 matter was not fully argued, nor is it competently before us. Then I take  
 the case on the footing that *de facto* the rental has been altered or rendered  
 subject to alteration by a supervening event since the Valuation-roll was made up  
 in September. I should have thought that that raised a serious question on  
 the Valuation Act. That Act, I think, is concerned with valuation only, not  
 with the validity or effect of assessment, but with the amount of the rental on  
 which they are to be calculated, and the manner of imposing them if they are effective.  
 Now, I think that if a subject is destroyed by some fire or flood, or suffers altera-  
 tion in value from an unforeseen cause, the question of the effect of that on  
 the finality of the assessment is not necessarily decided by the Valuation Act.  
 I take section 31 of the Valuation Act as affording an illustration of the  
 point of question which arises,—“In all cases where any land or heritages shall  
 be separately let at a rent not amounting to £4 per annum, and the names of the  
 occupiers thereof shall not have been inserted in the Valuation-roll, the proprie-  
 tor of such lands and heritages shall be charged with and have to pay the  
 whole of the assessments on such lands and heritages separately let as aforesaid,  
 but every such proprietor charged with and paying such assessment shall be

relief against the tenants and occupiers of such lands and heritages for reimbursement thereof, if, and in so far as, such assessments may by law be properly chargeable upon such tenants or occupiers." Now, the Crofters Act entitles the crofter to apply to the Crofters Commission both to stay action and diligence, and to revise the rental, and the effect of the applications the defender's crofting tenants have made may draw back to June 1887. It does appear to me that that may affect the landlord's claim against the tenant for relief from the rates paid by him for the tenant under this section. In fact the effect of the Crofters Act has been to make the Valuation-roll not conclusive of the rental against the tenant, and therefore the right of the landlord to relief is interfered with. I think that raises a serious question, but your Lordships differ from me as to this, and I will only say that I do not see my way to concur.

THIS interlocutor was pronounced:—"Find in fact that the rates sued for were duly assessed according to the Valuation-roll in force at the time: Find in law that the pursuer is entitled to insist for payment thereof accordingly: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-substitute appealed against; of new decern in terms of the prayer," &c.

J. MURRAY LAWSON, S.S.C.—STUART & STUART, W.S.—Agents.

R. ROBERTSON & SONS, Petitioners (Appellants).—*C. S. Dickson*.  
ALEXANDER FALCONER, Defender (Respondent).—*Strachan*.

No. 48.

Dec. 15, 1888.  
Robertson & Sons v. Falconer.

*Cessio bonorum*—*Trust-deed for behoof of creditors*—*Discretion of Sheriff*—*Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), sec. 9, subsec. 3.*—Sec. 9, subsec. 3, of the Debtors (Scotland) Act, 1880, provides that in petitions for *cessio*, the Sheriff shall "either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *in hoc statu*, or make such other order as the justice of the case requires."

A creditor of a bankrupt gave notice to him that he was about to present a petition for *cessio*. The day after the notice was given the bankrupt granted a trust-deed for behoof of his creditors in favour of a person who had been trustee under a previous trust-deed, and to whom he knew the creditor would object. The Sheriff refused decree of *cessio* on the ground that the estate was almost realised under the trust-deed. The Court, in the circumstances, *sustained* an appeal at the instance of the petitioner, and remitted to the Sheriff to grant decree of *cessio*.

R. ROBERTSON & SONS, manufacturers, Glasgow, on 2d October 1888, presented a petition (after notice duly given on 25th September, in terms of the Act of Sederunt, 22d December 1882, anent processes of *cessio*) in the Sheriff Court at Elgin against Alexander Falconer, tailor there, in which they prayed the Court to appoint a trustee on the defender's estate, and to ordain the defender to execute a disposition *omnium bonorum* in favour of the trustee.

The petitioners stated that on 21st September 1888 they had charged the defender, on a decree of Court dated 25th July 1888, to pay the sum of £24, 13s., with expenses contained in the decree, that the days of charge had expired without the debt being paid, and that the defender was insolvent, and unable to pay his debts. They further stated that there were three other creditors of the bankrupt.

It appeared from the deposition of the bankrupt, made in presence of the Sheriff-substitute (Rampini), and from the statements of parties, that about 1884 Falconer had granted a trust-deed in favour of Mr Craig, C.A.,

No. 48. Edinburgh, for behoof of his creditors. At that time the petitioners were not creditors of the bankrupt.

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In the summer of 1888 the petitioners asked Falconer to grant a second trust-deed for behoof of his creditors in favour of a trustee other than Mr Craig. This he refused to do, and on 25th September the appellants gave notice that they were about to petition for cessio. On 26th September Falconer granted a trust-deed in favour of Mr Craig, "because he had my business before."

On 2d November the Sheriff-substitute pronounced this interlocutor:—"Finds that the defender executed a trust-deed on 26th September last in favour of Mr James Craig, C.A., Edinburgh, for behoof of his creditors: Finds that his estate is in process of being realised, and is in fact almost realised under said deed; therefore refuses the prayer of the petition; dismisses the same."\*

The petitioners appealed to the Court of Session.

Argued for the appellants;—The refusal of the Sheriff to grant decree of cessio was in the circumstances an abuse of the discretion given him by the Debtors Act, 1880.† The trust-deed was granted the very day after notice of the petition for cessio was given, and it was granted in favour of the trustee under the first deed, to whose appointment the appellants objected, and who would have to judge upon any question which might arise with regard to his own actings under the first trust-deed.

Argued for the respondent;—The Sheriff had an absolute discretion as to whether cessio should be granted, and he gave a very good reason in his note why it should be refused in this case. He thought it was best that the estate should be wound up under the trust-deed. The winding-up had gone on satisfactorily so far, and the application made by the appellants was an abuse of the process of cessio.<sup>1</sup>

LORD PRESIDENT.—If it were not for the discretion given to the Sheriff by the Debtors Act of 1880 (sec. 9, subsec. 3), I should have been clearly of opinion that there was nothing to prevent the creditors represented here by Mr Dickson from refusing to accede to this trust-deed and proceeding to use the diligence of obtaining cessio (for it appears to me that a cessio prosecuted by a creditor is in its nature simply a form of diligence). We must, however, take into account the discretionary power of the Sheriff, and he is of opinion that it is most expedient that the trust-deed should be used here for the distribution of the

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\* "NOTE.—The Sheriff-substitute has no difficulty in refusing the prayer of this petition. The estate is all but wound up under the trust-deed of 26th September 1888, and not a word has been said against the manner in which the trustee under that deed has done or is doing his duty. Looking to the fact that cessio is a mere distributive process, and that distribution has already taken place, or nearly so, by another process equally effectual and apparently more agreeable to the debtor and the majority of his creditors, the present application is a mere abuse of the process of this Court, and accordingly the Sheriff-substitute has felt bound to exercise the discretion allowed him by the statutes."

† Sec. 9, subsec. 3, of the Debtors Act, 1880, provides,—“The Sheriff shall on such examination being taken allow a proof to the parties if it shall appear necessary, and hear parties *viva voce*, and either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *in hoc statu*, or make such other order as the justice of the case requires. The trustee shall be nominated by the Sheriff on the suggestion of the creditors represented at the meeting for examination, and if they do not agree on a person the Sheriff shall make his own selection.”

<sup>1</sup> Ross v. Hairstens, Nov. 16, 1885, 13 R. 207.



estate. He has therefore decided that decree of cessio should not here be pronounced. I cannot agree with him in that opinion. I think that in any case where a trust-deed is granted under such circumstances as the present any creditor is entitled to object on the ground that it was improperly granted, and ought to have no effect. No. 48.  
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The appellants say that they asked the bankrupt to grant a trust-deed in favour of another person than Mr Craig, in whose favour a trust-deed was subsequently granted, and that the bankrupt refused to do so. In such circumstances it appears to me that these creditors had no alternative but to apply for cessio, or if they were in a position to do so (which they were not) to obtain sequestration of the bankrupt's estates. They did therefore give notice in terms of the Act of Sederunt of 22d December 1882, and the very next day the bankrupt granted a trust-deed in favour of Mr Craig, who was in his confidence, and to him he knew these creditors would object. The Sheriff-substitute now decides that that gentleman is to distribute the estate under the trust-deed, and therefore refuses cessio. I do not think that in the circumstances that decision is justified, or that it falls fairly within the discretion given to the Sheriff by the statute. The advantage which creditors get by obtaining cessio is that the trustee is bound to find caution and to account to the Court for his dealings with the estate, but here, if the trustee were to distribute the estate and obtain his discharge, there would be no security to the creditors that he had duly accounted for the whole estate under his charge. Mr Craig was trustee under a former trust-deed, and if his conduct under that trust-deed were in any way objectionable he would be the only person who could call upon himself to account for his previous intromissions. I think, therefore, we ought to sustain this appeal.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal; recall the interlocutor appealed from, and remit to the Sheriff to grant decree decerning the respondent, Alexander Falconer, as debtor to execute a disposition *omnium bonorum* for behoof of his creditors, and to proceed further in terms of the Statute 43 and 44 Vict. c. 34."

CAIRNS, M'INTOSH, & MORTON, W.S.—PETER DOUGLAS, S.S.C.—Agents.

ARCHIBALD CURRIE, Pursuer (Appellant).—*Balfour—Crole.*  
MRS A. H. PELHAM CLINTON OR CAMPBELL AND OTHERS (Campbell's Trustees), AND ANOTHER, Defenders (Respondents).—  
*Gloag—G. R. Gillespie.*

No. 49.  
Dec. 18, 1888.  
Currie v.  
Campbell's  
Trustees.

*Property—Sale—Description by boundaries inconsistent with measurements—Plan.*—A feu-contract described the subject by boundaries. It also described it by measurements, and referred to a plan or sketch annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In an action brought by the vassal for declarator that his property extended to the limits shewn by the measurements and plan, held that the description by boundaries must prevail, and defenders assoilzied.

Lord Young *dissented*, on the ground that the deed and plan having been prepared by the agent for the superior they were to be construed against the superior.



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2D DIVISION.  
Sheriff of  
Argyllshire.  
I.

In 1881 Archibald Currie, shoemaker, Tarbert, Argyllshire, applied to the late Colin George Campbell of Stonefield, for a piece of ground in Tarbert upon which to erect a dwelling-house, and a feu-contract was entered into between the parties.

By the feu-contract, which was framed by the proprietor's agent, and was executed in February 1882, the whole subjects feued were described as follows:—"All and Whole that area or piece of ground situated in the town or village of Tarbert aforesaid, bounded on the west by the public street called Kintyre Street, along which it extends 40 feet 9½ inches or thereby; on the north, partly by ground belonging to the said Colin George Campbell, and presently occupied by Finlay Smith and Duncan M'Arthur, along which it extends 41 feet 7 inches or thereby; on the east, partly by the house also belonging to the said Colin George Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet 9 inches or thereby; and again on the north, by the said house, along which it extends 20 feet or thereby; and again on the east, partly by Burnside Lane, along which it extends 26 feet 9½ inches or thereby; and on the south, by ground feued to Robert Lyon Dawson, along which it extends to Kintyre Street 62 feet or thereby, as the said area or piece of ground is shewn on a plan or sketch thereof annexed and signed by the parties of even date with the said feu-contract as relative thereto, together with the houses and other buildings erected on the said area or piece of ground."

The plan or sketch referred to was drawn by the proprietor's factor. It had the measurements mentioned in the feu-charter placed upon the appropriate lines, but it was not drawn to scale, and was more of the nature of an illustrative sketch than of a formal plan.

A difficulty subsequently arose as to the boundaries of the feu on the north.\* The house occupied by Donald Johnston, fisherman, when the feu-charter was signed, was taken down in 1883, and the site disposed by the superior to Dr M'Millan. In 1886 Currie began to build a wall upon a part of the site as being within his feu, but Mr Campbell obtained interim interdict against his proceeding further.

Currie, in March 1887, brought this action in the Sheriff Court at Campbelltown against Mr Campbell for declarator that the pursuer had the "sole and exclusive right and property of All and Whole that piece of ground situated in the village of Tarbert, bounded on the west," &c. The boundaries narrated in the petition were the same as those stated in the feu-contract, with one exception. In lieu of the words, "and again on the north, by the said house, along which it extends 20 feet or thereby," which were the words used in the feu-contract, the petition contained the following words:—"And again on the north by a stone wall erected by the pursuer on the site of said house, along which it extends 20 feet or thereby."

The defender Mr Campbell and his disponent maintained that no part of the site of Donald Johnston's house was included in the feu.

On 8th April 1887 the Sheriff-substitute (Bell) remitted to Alexander Frew, civil engineer, to inspect the premises, and to report. Mr Frew reported that the description by boundaries in the feu-contract did not correspond with the plan and measurements, as the plan shewed the southern boundary of Donald Johnston's house three feet further north

\* The plan shewed the line of the northern boundary drawn eastward at a right angle from the western boundary for 41 feet 7 inches to a point A, where it met at a right angle a line drawn southwards from A to B, representing the western boundary of Donald Johnston's house. The line A to B was marked 14 feet 9 inches. A line drawn eastwards from B to C, representing the southern boundary of Donald Johnston's house, was marked 20 feet.

than its actual site as shewn in the Ordnance map. The pursuer subsequently admitted that the Ordnance map shewed correctly the site of Donald Johnston's house. Mr Frew prepared the plan referred to by Lord Young.

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On 14th October 1887, owing to the death of Mr Campbell, his trustees were sisted as parties to the action.

On 8th May 1888 the Sheriff-substitute gave effect to the defenders' objections, and pronounced findings fixing the boundaries.

The pursuer appealed, and on 23d July 1888 the Sheriff (Forbes Irvine) affirmed the interlocutor appealed against.

The pursuer appealed to the Second Division.

Argued for the pursuer;—The plan and the measurements, which agreed with one another, and supported his contention as to the limits of his feu, must prevail over the descriptive boundaries given in the feu-contract.<sup>1</sup> The portion of ground claimed belonged to the defenders, and therefore this was not an error which was incapable of being rectified. Moreover, the superior's agent had prepared the feu-contract and plan, and they should be construed *contra proferentem*. The superior was therefore responsible for any mistake that had been committed, and was not entitled to take advantage of his agent's actings to the detriment of the pursuer. The removal of Johnston's house was in contemplation at the date of the feu-contract.

Argued for the defenders;—The boundaries were perfectly distinct, and could not be altered by a rough sketch not drawn to scale, and only intended to illustrate the feu-contract. The case was the same as if there had been no plan. If, however, the plan was looked at at all it was in their favour, for it shewed Johnston's house to be outside the feu. The measurements were demonstrative, not taxative. The pursuer would not have had a stateable case but for the fact that the ground in dispute belonged to the defenders. What bounded a feu could not form part of a feu.<sup>2</sup> Besides in 1882 Johnston's house was standing, and the pursuer's boundary could not go through a house which bounded his feu.

At advising,—

LORD JUSTICE-CLERK.—This case relates to a heritable subject which is of trifling value. The difficulty arises out of the description in the title of the piece of ground feued by the respondents to the appellant. The feu-contract gives a complete description by the boundaries surrounding the feu, but I think there can be no doubt that, if the measurements there given are taken as correct, there is a mistake somewhere. But the gentleman who drew up the feu-contract, with a view to make matters more clear, added to the description by boundary contained in it a description by a plan or sketch. That was a very reasonable and sensible thing to do, if it had been well done; but there can be no doubt that the addition of this sketch has been the origin of the present dispute. If no sketch had been added, there would have been no difficulty in ascertaining what the boundaries were, and they would have been the boundaries contended for by the respondents. The question therefore comes to be, which of these is to rule,—the sketch or plan attached to the feu-contract, which is without any scale at all, or the boundaries as they are described by the names of the subjects surrounding the feu? The question is a difficult one

<sup>1</sup> North British Railway Co. v. Magistrates of Hawick, Dec. 19, 1862, 1 Macph. 200, 35 Scot. Jur. 94; North British Railway Co. v. Brown's Trustees, Feb. 8, 1879, 6 R. 640.

<sup>2</sup> Reid, &c. v. M'Coll, Oct. 25, 1879, 7 R. 84.

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as it stands with this informal sketch, and would have been still more difficult if the sketch had been elaborately drawn to scale. I have, however, come to be of opinion that the boundaries, as given in the description in the feu-contract, must prevail over the sketch, which, I think, must be taken as merely illustrative of the description by boundaries.

LORD YOUNG.—I assent to the proposition as generally true, that where boundaries and measurement conflict in the description of a subject, the boundaries must prevail. I think, however, that that is only a general rule, adopted because experience has taught the Court that it generally leads to the true conclusion as to the meaning and intention of the parties. If a field or estate of any dimensions is conveyed by distinctly specified boundaries, these will not be excluded and other boundaries substituted in order to satisfy the state of the measurements, which may be wrong to the extent of feet, yards, or acres. That error must be submitted to, and the intention of the parties as to the subjects really conveyed given effect to, although somewhat in excess or somewhat short of the measurements. This is not, however, a case of that kind. This is a feuing stance conveyed to a feuar by the proprietor, the feu-contract being prepared by the proprietor's man of business, and the subject having been laid off on the ground, and the drawing made by his factor. It happens that the description of the subject by boundaries in the deed does not correspond with the measurements there given and with the plan. The plan, however, or sketch—it is immaterial which it is called, as it is the only kind of plan appropriate here—is one on which the direction and measurement of each line is given and marked down, so that a surveyor, to whom a remit was made by the Sheriff-substitute, had no difficulty in adapting the plan to the ground. His plan gives the very direction and the very dimensions indicated in the sketch, but it is said it does not answer to the description contained in the deed. How? Only in the matter of boundaries, for the measurements are all in accordance with the measurements contained in the feu-contract. It is contended for the proprietor, whose man of business framed the deed, and whose factor drew the sketch or plan, that there is to be an interpretation between the deed and sketch which will give the feuar a different subject both in boundaries and measurements from that laid down in the sketch.

Now, there is a maxim of our law to which I adverted in the course of the argument, and which is, I think, applicable here—*verba cartarum fortius accipiuntur contra proferentem*. This maxim has been interpreted so as to apply against the man who prepared the deeds. Here the proprietor's man of business is responsible for the deed and his factor for the sketch, and in determining whether the description of the boundaries or the measurements are to be given effect to, I should interpret most strongly against the superior and his man of business and factor rather than against the feuar, who is entirely innocent in the matter. On the whole matter, I am for giving the pursuer the decree he asks.

LORD RUTHERFURD CLARK.—The pursuer feued a piece of ground from Mr Campbell of Stonefield, the predecessor of the defenders. Before he obtained his feu-disposition he built a house on part of it. His title was ultimately completed in 1882, and the ground was disposed to him with the buildings erected thereon.

In so far as the pursuer has built on the ground his title cannot be disputed.

It appears, however, that a house which belonged to Mr Campbell, and which at the date of the feu-disposition was occupied by Donald Johnston, was pulled down. The pursuer claims a part of the site of this house as being conveyed to him by his feu-disposition. The only question in the case is whether this claim is well founded.

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In order to have his right declared the pursuer has raised this action. He asks the Court to declare that he has the sole and exclusive right to the area of ground described in the petition. The boundaries therein given are the same as those contained in the feu-disposition, with one exception. In the disposition the boundary with respect to which the dispute arises is this,—“On the east partly by the house also belonging to the said Colin G. Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet 9 inches or thereby, and again on the north by the same house, along which it extends 20 feet or thereby.” In place of this boundary the pursuer introduces into his petition the following words,—“And again on the north by a stone wall erected by the pursuer on the site of said house, along which it extends 20 feet or thereby.” The question is, whether the pursuer is entitled to have decree of declarator in terms of the new boundary which he has substituted for the boundary contained in the disposition.

The portion of the south gable of Johnston's house is known and admitted. It is further conceded by the pursuer that his claim in this action involves a claim to a portion of the site of this house. But he says that his feu was given out according to a plan appended to the disposition, and that the area thereon on the plan, and defined by the measurements contained in the disposition itself, comprehends the ground which he claims in this case.

The defenders, on the other hand, maintain that Johnston's house is the northern boundary of the pursuer's feu, and that no part of that house is comprehended within it.

I take it to be settled law that what is described as the boundary of a feu in the feu-disposition which creates it is by that very fact excluded from the feu. There may be exceptions where the boundary is a river or a wood. But with such exceptions we have here nothing to do. The northern boundary of the pursuer's feu is Johnston's house. Hence I think it clear that according to the disposition no part of that house or of its site was included within the pursuer's feu.

Nor is the plan inconsistent with the disposition. It shews, and I think that it was designed to shew, that Johnston's house was wholly excluded from the feu given out to the pursuer.

The pursuer relies on the measurements contained in the disposition and also transferred to the plan. And there is no question that, according to the view which I take of the case, certain of these measurements are wrong. Johnston's house is the boundary partly on the east and partly on the north, cutting out a corner from what would otherwise be a quadrilateral figure. Measuring along Johnston's house on the east, the true length of the east boundary at that part should be 17 feet 9 inches or thereby, instead of 14 feet 9 as given in the disposition, and of course there is a corresponding error in the other portion of the eastern boundary. I cannot, however, adopt these measurements to the effect of giving to the pursuer ground which I think was plainly excluded from his feu. The boundaries given in the feu-disposition must, in my opinion, prevail. To my mind it is plain, both from the disposition and the plan, that Johnston's

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house was wholly excluded from the feu, and as the measurements would include a part of it, I must hold that this was wrong. An error of that kind may easily be made. I cannot hold that the measurements are right to the effect of assigning to the pursuer a piece of ground which the disposition expressly declares to be excluded from it.

For these reasons I think that we cannot give declarator in terms of the prayer of the petition, and therefore that the defenders are entitled to absolvitor. In pronouncing this decree we decide the only question which has been raised, and even if it were desirable to pronounce any other form of decree we have not the means of doing so, inasmuch as the parties, when they were before us, renounced all further probation.

**LORD LEE.**—My opinion is that the Court in this case is not called on either to make a new plan or a new description, and that we ought not to deal with any point excepting that which was raised by the defenders' objection to those words of the prayer which substitute a new boundary instead of Donald Johnston's house. On that point I concur with the majority of your Lordships. We can only gather the intention of parties by construing the contract according to the ordinary rules. It appears to me that the one point clearly ascertained by the terms of the title is, that the feu did not include any part of Johnston's house. That house is not only described as a boundary in the feu-contract, but is also shewn in the plan or sketch referred to as outside the boundary of the feu. Upon this point there is no conflict between the words of the description and the plan or sketch. There is a slight discrepancy elsewhere in the measurement or on the sketch, but as to such discrepancy my opinion is that the description by boundaries according to the usual rule must prevail.

I therefore think that on the only point in controversy the defenders are entitled to prevail.

**THE COURT** pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 8th May 1888, and the interlocutor of the Sheriff on 23d July following: Find that no part of Donald Johnston's house is included in the feu given off by the late Colin George Campbell, author of the defenders, to the pursuer: Therefore assoilzie the defenders from the conclusions of the petition: Find them entitled to expenses in the inferior Court and in this Court," &c.

**R. R. SIMPSON & LAWSON, W.S.**—**TAWSE & BONAR, W.S.**—*Agents.*

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Dick & Stevenson  
v. Wood-  
side Steel and  
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**DICK & STEVENSON, Pursuers (Respondents).**—*Balfour—Jameson.*  
**WOODSIDE STEEL AND IRON COMPANY, AND JOHN ALLAN AND JAMES ALLAN Junior, Defenders (Appellants).**—*D.-F. Mackintosh—Ure.*

*Contract—Executory Contract—Damages—Defence.*—An engineer undertook in February 1883 to erect an engine on the premises of a manufacturer for a price payable one-half when the principal parts were delivered, one-fourth on the engine being started, and the remaining one-fourth three months thereafter. On 3d December 1883 the principal parts were delivered, and the first instalment of the price was paid. The engine was started on 30th September 1886, prior to which time part of the second instalment had been paid.

In an action by the engineer for payment of the remainder of this instalment the manufacturer pleaded that he was not liable in the sum sued for in respect that the engine furnished was disconform to contract, and was worth less

than the engine contracted for to an extent exceeding the sum sued for. *Held* No. 50.  
 that the statement that the pursuer by supplying an inferior engine had not fulfilled his contract, and that the defender was in consequence entitled to an abatement of the price, was a relevant defence (seeing that the remedy of rejection was not available) to a demand for the whole price, but that as the abatement claimed was more than covered by the last instalment of the price it could not be sustained as an answer to the demand for payment of the second instalment.

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 Dick & Stevenson v. Woodside Steel and Iron Co.

*Res noviter*.—Observations on *res noviter*.

In February 1883 Dick & Stevenson, engineers, Airdrie, contracted to supply to the Woodside Steel and Iron Company a three cylinder engine with Stevenson's Patent Conical Reversing Rolling Mill Clutches. The contract, which was contained in letters of specification and acceptance, provided that the engine was to be of the best description in materials and workmanship, and to be erected at the Woodside Company's works at Coatbridge on a foundation to be supplied by them. The price, £2830, was to be "one-half payable when the principal parts of the materials of the engine and gearing are delivered at place of erection, one-fourth on the same being started, and the remaining one-fourth within three months thereafter." The date at which the engine was to be delivered was not stated.

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Dick & Stevenson undertook to uphold the machinery to be supplied for twelve months from the date of starting, and that the whole would be left by them in as good order at the end of twelve months from the date of starting as at first, except ordinary tear and wear.

The contractors proceeded to construct and fit up the engine. The principal parts of the engine and gearing were delivered at the place of erection prior to December 1883, and on 3d December 1883 the Woodside Company paid £1000, and on 16th May 1884 £400, to account of the half of the price payable when the principal parts were delivered, leaving a balance of £15 of that half still unpaid.

Work under the contract thereafter proceeded, and the engine and gearing were started on 30th September 1886, when one-fourth of the contract price, £707, 10s., became payable. On 25th January 1885 an interim payment of £250 had been made by the pursuers, leaving only £457, 10s. of the £707, 10s. payable on 30th September 1886.

In November 1886 Dick & Stevenson raised an action in the Sheriff Court at Airdrie against the Woodside Company, and John Allan and others, the individual partners thereof, for payment of £472, 10s., consisting of these two sums of £457, 10s. and £15.

They stated in their condescendence the facts above mentioned, which were admitted. They further stated that the remaining fourth of the price would fall due on 1st December 1886.

The defenders averred (Stat. 1) that "according to the representations of the pursuers, the engine and gearing in question should have been delivered to these defenders in the months of June and July 1883, and should have been started and ready for work by the end of July in that year. In the absence of such representations and assurances, the period between the date of the said contract and the end of July 1883 was a fair and reasonable time to enable the pursuers to make delivery and fit up the engine and gearing contracted for, and these defenders relied upon their so doing."

The defenders further averred that the pursuers did not begin to lay down the engine and gearing in the defenders' works till October 1883, and did not complete the delivery of the principal parts till the spring of 1884; further, that the engine and gearing were not according to contract,

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in respect that in addition to the six helical wheels with which the engine was to be supplied, the pursuers had supplied three bevel wheels, which increased the friction and tear and wear of the machine; further, that under the contract the engine was to have high-speed governors, and that the pursuers had supplied these but had found that they would not work, and had removed them, with the result that the defenders had been obliged to employ a man night and day to do the work which properly constructed high-speed governors would have done. "The engine and gearing are in these respects worth less by upwards of £472, 10s. than those contracted for." They (the defenders) further averred that they "have sustained loss and damage through the pursuers' delay in completing their contract to the amount of upwards of £4000, which sum these defenders claim to set off against the balance of the contract price."

The defenders pleaded;—(1) The engine and gearing in question not being yet completed in terms of the contract, the pursuers are not entitled to any further payments to account. (2) These defenders having sustained loss and damage through the pursuers' failure timeously to implement their contract, they are entitled to set off such loss and damage against the contract price. (3) The engine and gearing not being conform to contract, and the pursuers having refused or failed to complete the same, these defenders are entitled to deduct from the contract price the difference in value to them between the engine and gearing as delivered and said price.

The pursuers pleaded that the defences were irrelevant.

The Sheriff-substitute (Mair), on 16th December 1886, repelled the defences, and gave decree as concluded for, subject to a deduction of £13, 4s., which the pursuers admitted.

The defenders appealed to the Sheriff.

When the case was before the Sheriff the defenders obtained leave to lodge a condescendence of *res noviter*.

They lodged a condescendence, in which they averred, *inter alia*;—"On or about 19th May 1887, while the defenders were working the engines and gearing in question, they broke down." The parts of the machinery which were broken were then specified. "The said breakdown was the result of the original defect in the engines above stated, viz., that they would not work simultaneously, and of the inadequacy of the remedy for this defect attempted by the pursuers, and shewed that the defenders' objections to accept the engines . . . were well founded.

"On or about 29th August 1887 the collar on the main shaft of the engines . . . became loose. The defenders thereupon discovered that said collar had been shrunk on, whereas it ought to have been forged solid with the shaft, as the whole pressure of the friction clutch depended on the solidity of this collar.

"The defects narrated . . . were discovered, and could only be discovered, by the defenders after the machinery had been tested by work, and on the dates and in the manner above mentioned."

The Sheriff (Berry), on 7th March 1888, refused a proof of the condescendence of *res noviter*, and adhered to the interlocutor of the Sheriff-substitute.

The defenders appealed, and argued;—Both branches of the defence were relevant. The pursuers were not entitled to decree, because they had not fulfilled their part of the contract by reason of their great delay. The engine should have been ready in July 1883, for though no precise time was stipulated that was a reasonable time, as the defenders were ready to prove, and where parties had not stipulated a precise time for performance of an obligation the Court would hold that a reasonable time

was part of the bargain. But the engine had not been delivered as ready till September 1886. In the second place, the pursuers were in breach of contract in having failed to supply the machinery contracted for. The defenders had alleged in detail the points, viz., the bevel wheels and the defective governors, in consequence of which they averred that the engine and gearing were worth less by the whole sum sued for than those they had contracted for. The guarantee clause of the contract implied that the machine was to be complete and ready for work when it was started, and should be kept in good order. But the pursuers were suing for payment of the price without having kept it in good order.

Argued for the pursuers;—The defence was irrelevant. It was simply an attempt to retain the contract price till an illiquid claim for damages could be made liquid. On the question of alleged delay, the cases of *McBride*<sup>1</sup> and *Pegler*,<sup>2</sup> which decided that where no time is expressly mentioned within which work is to be completed a claim for damages on the ground that the work was not completed within a reasonable time cannot be pleaded *ope exceptionis*, were fatal to the defenders. As to the second ground of defence, that the defenders were entitled to an abatement of the price, it could not be sustained, for even assuming it to be good there remained due under the contract another instalment of £707, which exceeded the abatement claimed. The alleged *res noviter* was not properly *res noviter*. It consisted of allegations of events which were said to have happened after the action was raised, and ought not to have been added to the record.

At advising,—

LORD RUTHERFORD CLARK.—The contract does not specify any time within which the engine and gearing were to be delivered. It was therefore conceded by the defenders that they could not retain the instalment of the price sued for in this action against any loss which had been caused by reason of the delivery having been unduly delayed. They took this point to be settled by authority, and we need not further consider it.

But the defenders contended that the engine and gearing were not in various particulars conform to contract, and that they were in consequence of less value by “upwards of £472, 10s. than those contracted for.” The pursuers answered that this was an illiquid claim, which could not be set off against a liquid claim.

In my judgment, the plea maintained by the defenders is not properly a plea of compensation. It is based on the consideration that the article contracted for was not furnished, and that the price is not due. In a proper contract of sale the remedy of the buyer would be to reject. But this remedy is not applicable in the case of an executorial contract like the present. Inasmuch as the article cannot or need not be returned, the remedy must consist in a right to refuse to pay more than its true value. In other words the seller cannot claim the contract price, if the article furnished is not conform to contract, and the buyer must be entitled to deduct the sum which represents the difference between the value of the article contracted for and that actually furnished. The defence therefore is not a plea of compensation. If well founded, it proves that the price sued for is not due.

Nor do I think that the defenders’ claim for abatement can be met by the

<sup>1</sup> *McBride v. Hamilton*, June 11, 1875, 2 R. 775.

<sup>2</sup> *Pegler v. Northern Agricultural Implement Co.*, Feb. 2, 1877, 4 R. 435; cf. *Taylor v. Forbes*, Dec. 2, 1830, 9 Shaw, 113.



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plea that they have their proper remedy under that clause of the contract which provides that the pursuers shall uphold the machinery and make good defects for twelve months from the time of starting. This clause assumes that the contract engine and gearing have been furnished, and imposes on the pursuers the additional obligation of maintenance.

It seems to me therefore that the defenders have so far stated a relevant defence when they say that the article supplied was not according to contract and was of less value than the article contracted for by £472, 10s. They say "upwards" of that sum. But I cannot attach any meaning to that phrase, and for the purposes of this case I must disregard it.

The question now comes to be, whether in the face of that defence the pursuers are entitled to the decree for which they ask; and some important matters have to be considered under this head.

By the contract one-half of the price was to be payable when the principal parts of the materials of the engines and gearing were delivered, one-fourth on the same being started, and the remaining fourth within three months thereafter. The engines were started on 30th September 1886, and the sum sued for is the balance of the instalment which then became due—a portion of that instalment having, it appears, been previously paid. There remains due the fourth instalment, amounting to £707, 10s.

The instalment sued for was thus due at a fixed date, and should have been paid, unless there was a sufficient defence to the contrary. The only defence—which is in any way relevant—is, that the engine as furnished was of less value by £472, 10s. than the engine contracted for. I should have held this to be a relevant defence, to the effect that the defenders could not have been required to pay the whole contract price until their allegations had been inquired into, because, in my opinion, it means that the contract price is not due to the amount above stated. But I do not think that it has any further virtue. For it acknowledges that the contract price is due except to that extent, and considering that another instalment became due in the course of three months, which exceeded the sum which the defenders claim to have abated from the price, I think that the defence is not sufficient, and that the pursuers are entitled to decree. The last instalment more than covers the abatement which they claim.

I have hitherto considered the original defence only. But after the Sheriff-substitute had decided in favour of the pursuers, the defenders were allowed to put in a condescendence of *res noviter*.

I do not think that discoveries of defects after the instalment was payable form a relevant defence. On the record as it originally stood the pursuers were, in my opinion, entitled to decree. The engine had been started, and the instalment was then due. The only reason assigned against paying it was that an abatement was claimed. But, as has been seen, that abatement was claimed not against the instalment alone, but against the whole price, of which more than the abatement was shortly to become due. As that was, in my opinion, an insufficient defence, the defenders were bound to pay the sum sued for. I think that the additional condescendence should not have been allowed, nor is it relevant; for, in my opinion, the right of the pursuers to recover was to be determined by reference to the defences, which were stated and were stateable when the instalment became due. It is said that the defects in the engine were only discoverable after it had been some time in use. But that means nothing else than that the defenders could not assign other reasons for not paying the

instalment which had become due, and their delay in satisfying their obligation cannot I think place them in a better position. No. 50.

I think therefore that the pursuers are entitled to decree. But I decide nothing more than that they are entitled in the meantime to payment of the sum sued for. All claims on either side will be reserved, and if it be eventually found that the defenders are entitled to a larger abatement, the fact that they have paid the sum sued for will form no bar to the just settlement of the claims. The pursuers will be bound to repeat, if it be ascertained that they have received more than is justly due to them.

LORD YOUNG and LORD LEE concurred.

The LORD JUSTICE-CLERK not having heard the argument gave no opinion.

THIS interlocutor was pronounced:—"The Lords . . . dismiss the appeal; affirm the judgments of the Sheriff-substitute and Sheriff appealed against, reserving *quoad ultra* all pleas *hinc inde*: Of new ordain the defenders the Woodside Steel and Iron Company, and John Allan and James Allan junior, individual partners of that company, to make payment to the pursuers of the sum of £472, 10s., under deduction of £13, 4s., with the legal interest of £472, 10s. from 30th September 1886 till paid: Find the said defenders liable in expenses," &c.

J. & J. ROSS, W.S.—DOVE & LOCKHART, S.S.C.—Agents.

RACHEL TAWSE OR MORRISON, Pursuer (Appellant).—*Sol.-Gen. Darling*— No. 51.  
*Chisholm.*

HELEN STEELE OR TAWSE (James Tawse's Executrix), Defender  
(Respondent).—*Rhind—Baxter.*

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*Husband and Wife—Wife's separate estate—Earnings of wife in business carried on by her—Married Women's Property Act, 1877 (40 and 41 Vict. c. 29), sec. 3.*—The Married Women's Property Act, 1877, by section 3 excludes the *jus mariti* and right of administration of the husband from the wages and earnings of every married woman acquired by her after 1st January 1878, "in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name."

A wife living with her husband carried on in the house in which they lived the business of a washerwoman. She put her own and her husband's earnings, which were about equal in amount, into a common purse, from which the expenses of the household were defrayed, and she placed their savings from their joint earnings in deposit-receipts, repayable "to either of them and the survivor." The husband predeceased the wife. *Held (diss. Lord Young)* that one-half of the sums so deposited belonged to his widow in her own right, in virtue of the provisions of the Act.

*Husband and Wife—Aliment to widow out of husband's estate.*—A husband died, leaving a will by which he gave his widow a liferent of his whole estate, with power to appropriate such part of the capital as from time to time she should think necessary for her maintenance. Some months after the husband's death a child claimed legitim. *Held* that the widow was not entitled in the accounting for legitim to credit for aliment out of the estate from her husband's death till the demand for legitim was made.

JAMES TAWSE, bleacher, Downfield, near Dundee, died on 6th September 1886. He was survived by his second wife, Helen Steele or Tawse, and by one child, a daughter by his first marriage, Mrs Rachel Tawse or Morrison. 2D DIVISION  
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Tawse left a settlement, whereby he nominated his widow his execu-

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trix, and provided that she should have a liferent of his whole estate, and should also be entitled from time to time as she should think necessary to use and appropriate such parts of the capital of the trust-estate as she might require for her own personal use and maintenance. The residue after her death was to be divided into three shares, of which one was to belong to Mrs Morrison.

Prior to his death Tawse had resided in a house which belonged to Mrs Morrison, his daughter, and for which he paid her a rent of about £7 a-year. His widow continued to reside in it.

After the death of Tawse, Mrs Morrison raised the rent to £14.

In July 1887 Mrs Morrison brought an action of accounting against Mrs Tawse in the Sheriff Court at Dundee, and claiming her legitim.

The defender admitted the pursuer's right to legitim, and the questions in dispute related to the amount of the estate of the deceased, and to the credit the defender was entitled to receive for claims made by her in the accounting. She maintained that the estate embraced the half only, and not the whole of certain funds in bank said by the pursuer to belong to the estate, and she also put forward a claim to be alimented out of the estate for the period between the death of her husband and the raising of the action.

The following facts were proved: Tawse was married to the defender in 1868. Shortly thereafter he obtained a legacy of £40 from the estate of his first wife's father, and in February 1870 he received payment of £200 contained in a policy of insurance on the life of a son who died then. It was not proved that he had any means at the date of his marriage with the defender in 1868, and the defender led evidence to the effect that he had not. The defender had at the time of her marriage about £104.

The pursuer's house was repaired at considerable cost by the spouses after their marriage, and a washing-house was added to it. In consideration of these improvements no rent was charged for five years.

After the marriage the defender continued her business as a washer-woman. In her evidence she stated her earnings at 28s. to 30s. per week. Tawse himself continued his own trade, and earned from 20s. to 23s. per week till the beginning of 1886, the last year of his life, when his health failed. Mrs Tawse put into one purse her own and her husband's earnings, out of which their whole expenses, including those of the washing business, were defrayed. The savings of the spouses, together with their other funds, were for some time placed on deposit-receipt with the National Bank, payable "to either and the survivor." In 1881 they uplifted this money, which amounted to £400, and placed it with the Dundee Provident Property Investment Company, on a deposit-receipt repayable "to either or survivor." Thereafter they lodged their savings in two accounts with the Dundee Savings Bank. These accounts were both kept in their joint names, "to be repaid to either of them and the survivor." The amount in these accounts at the death of Tawse was, including interest to the date of the action, £261, 16s. 6d. The Investment Company went into liquidation in March 1884. Their claim against it amounted, with interest, to £414, 16s. 10d. They received a dividend of 2s. 6d. per pound, and a further dividend of 5s. per pound was believed to be recoverable, but had not yet been obtained at the date of this action.

The defender claimed credit, first, for one half the amount in the Savings Bank as being her own money, and maintained that the other half only belonged to the executry estate, and was subject to the pursuer's claim for legitim. She also claimed aliment against the estate for the period from the death of Tawse till the raising of the action—a period of forty-

five weeks. This claim at 12s. 6d. per week amounted to £28, 2s. 6d. No. 51.  
 She further maintained that one half only of what might be recovered from  
 the liquidator of the Investment Company belonged to the executry  
 estate, and that the other half was her own property.

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The defender pleaded;—3. The defender is, as well (1) in respect of the terms of and circumstances attending the lodgment of the foresaid sums in said banks and with the said Investment Company, as (2) under the Married Women's Property (Scotland) Act, 1877,\* entitled to at least one-half of the said sums in her own right; and that over and above her legal or conventional rights, and prior to any division for ascertaining the amount, if any, to which the pursuer, Rachel Tawse or Morrison, may be entitled as legitim.

The Sheriff-substitute (Campbell Smith), on 12th January 1888, found with regard to the "£261, 16s. 6d. due by the Dundee Savings Bank to James Tawse and Helen Steele, his wife, to be repaid to either of them and the survivor, that the defender is bound to give the estate credit for the whole of said sum, and not merely for the half of it, in respect of failure to prove that one-half of said sum had become her property by donation or otherwise, or even to prove that the deceased knew of the distinct terms of the receipt for the money taken by her from said bank, when she, as keeper of the household purse, deposited the money in bank: Finds, with regard to £362, 19s. 9d. of money due by the Dundee Provident Property Investment Company to the said deceased and his said wife, and payable to either or the survivor, that the defender has by facts and circumstances established her title to one-half of said debt—having proved more particularly that at the time of her marriage she was possessed of about £100; that she earned a considerable income by washing and dressing clothes; and that the deceased knew that her written title to said sum was a title joint with his own, and with such knowledge acquiesced in said title: Finds that the widow's claim for aliment falls to be disallowed to the extent of £25: . . . Finds that the estate realised by the defender amounts to £261, 16s. 6d., and that the amount of moneys disbursed by her, for which she is entitled to take credit, is £41, 6s. 11d.: That therefore the estate at present divisible into thirds is £220, 9s. 9d.: Decerns against the defender for one-third of said sum, being £73, 9s. 11d.: Further, finds the pursuer entitled to a sixth share of the debt due to the deceased and the defender by the Dundee Provident Property Investment Company, conform to acknowledgment dated 11th April 1881."†

\* The Married Women's Property Act, 1877 (40 and 41 Vict. cap. 29), which came into operation on 1st January 1878, enacts (sec. 3),—"The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of every married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, . . . and such wages, earnings, . . . and all investments thereof shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, . . . and investments thereof."

† "NOTE.— . . . I am not able to see my way to apply the Married Women's Property Act of 1877 to the earnings of a washerwoman who works her business in her husband's premises, burns his coals, and perhaps in her eagerness to earn money neglects to cook his dinner or make his bed. If the wife be free to choose her own occupation, and to keep all her own wages, I think the husband ought to have due warning of the kind of partnership in which he is involved, and ought to have an opportunity of expressing either

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On appeal; the Sheriff (Thomson), on 7th March 1888, recalled that interlocutor to the effect, *inter alia*, of sustaining the defender's claim for aliment to the amount of 7s. 6d. per week for forty-five weeks, and of finding that by virtue of the Married Women's Property Act, 1877, sec. 3, the *jus mariti* and right of administration of the defender's husband were excluded from the defender's earnings as a washerwoman from 1st January 1878, and appointed the defender to lodge a statement of what she maintained to be the amount of said earnings.

The defender lodged a note of her earnings, whereby she set forth that she had earned £400 between 1st January 1878 and 6th September 1886, the date of her husband's death. Deducting £100 for cost of gas, coals, &c. during that period, she claimed credit for £300.

After considering this statement and answers lodged by the pursuer, the Sheriff pronounced an interlocutor finding that the defender was entitled to credit, *inter alia* (1) for £175, "being the amount to which" she "was entitled as earnings as a washerwoman from 1st January 1878, exclusive of her husband's *jus mariti* and right of administration"; further (2) that she was entitled to credit for £16, 17s. 6d., being aliment at 7s. 6d. per week for the period from the death of her husband to the raising of the action; that the estate amounted to £261, 16s. 6d.; and that after deducting therefrom the various items falling to be credited to the defender, there remained for division a balance of £26, 12s. 1d., to one-third of which balance—£8, 17s. 4d.—the pursuer was entitled, and for which sum he gave decree.

The pursuer appealed, and argued;—The Married Women's Property Act, 1877, was only intended to apply to cases in which a wife carried on a separate business from her husband, and kept the funds earned in it separate from his funds. A wife might earn money and so have a separate right to it, but might then proceed to employ it for the common purposes of the household, and mix it with the husband's funds. That was to surrender the statutory protection by giving the husband power to treat the funds so earned as his own. That was what the defender had done. She had given her husband, with whom she was living in family, full power over her earnings, and they had been placed on deposit-receipts so expressed as to give him full power to uplift them and apply the proceeds as he pleased. If he had done so there would have been no claim for repetition on the defender's part.

The claim the defender made to be alimented out of the estate, including the legitim fund, could not in the circumstances be maintained. She was executrix, claiming under the settlement, and entitled only to what the settlement gave her after deducting legitim.

Argued for the defender;—The Married Women's Property Act gave a married woman in the defender's circumstances her earnings as her own property. It made no difference that the wife had after earning her separate estate joined her husband in depositing it in bank, and placing there money which she might have kept in her own hands. The joint investment only left the rights of the spouses as they originally stood.<sup>1</sup> The case on the other side was one of a transference of the defender's money to the husband. But even if that had been done as matter of

assent or dissent. At all events, if their interest be to be separated, their accounts ought to be kept separate. But in this particular household there were no separate accounts; there was not even a separate purse for husband and wife."

<sup>1</sup> Bank of Scotland v. Robertson, Jan. 12, 1870, 8 Macph. 391, 42 Scot. Jur. 180.

fact by donation, she could have revoked it even after his death.<sup>1</sup> The defender was entitled to aliment out of the estate of her husband as it stood at his death down to the period when the operation of his settlement was disturbed by the raising of the action for legitim, because aliment to the widow until her provisions by will or marriage-contract took effect was a debt of the husband.<sup>2</sup>

At advising,—

**LORD LEE**.—The question in this case is, what is the amount of the estate of the late James Tawse, for which the defender, as his widow and executrix, is accountable in a question with the pursuer, who claims her legitim?

Two points have been discussed under this appeal which affect that question—the first being whether the defender is entitled to distinguish and separate from her husband's estate the amount of her earnings as a washerwoman since 1st January 1878, when the Married Women's Property Act, 1877, came into operation; and the second being as to her claim to alimony out of her husband's estate up to the term after his death, which occurred on 6th September 1886.

The facts bearing upon the first point are as follows: After her marriage in 1868 to James Tawse, the defender, who was a washerwoman, continued to take in washing and to follow the occupation of a washerwoman. Her husband was a bleacher, earning from 18s. to 24s. a-week. She had brought her husband a little money and a part of it was spent in building a washing-house attached to the house in which they lived; and the evidence clearly shews that her husband allowed her to follow her occupation in this place, and thereby to gain earnings which are proved to have amounted to 24s. per week, and sometimes to as much as 28s. Her earnings in this way (after deducting expenses) appear to have been at least equal to those of her husband. She took charge of his earnings as well as her own, the balance, after paying what was required for the house, being lodged in bank in the joint names of the spouses, "payable to either and the survivor." In 1881 the money so deposited, along with a sum the husband had received under a policy of insurance upon the life of his son, was invested in a building society in the same terms. This investment proved unfortunate. The building society went into liquidation, and a dividend amounting to £51, 17s. is all that has been received upon the joint claim, leaving a balance unpaid of £362, 19s., which is supposed to be worth 5s. in the pound. The earnings subsequently to April 1881 were deposited in the Savings Bank in similar terms, the defender still taking charge of the money and keeping the books. The result has been that over and above the amount due by the building society there are two deposit-receipts, amounting in all, with interest, to £261, 16s. 6d., payable to either of the spouses and the survivor. This sum is the proceeds of the earnings of both of them. Assuming that the house expenses were paid equally out of the earnings of each (and there is no ground for supposing that the wife paid more than half) it is evident that at least one-half of the amount must have arisen from the defender's earnings. The question is, whether the amount of her earnings, so far as not expended, is her property by virtue of the Married Women's Property Act, 1877, and is separable by her

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<sup>1</sup> Fraser on Husband and Wife, vol. ii. p. 950; Laidlaw v. Laidlaw's Trustees, Dec. 16, 1882, 10 R. 374.

<sup>2</sup> Baronesse de Blonay v. Oswald's Representatives, July 17, 1863, 1 Macph. 1147.

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from the amount belonging to her husband's estate? The Sheriff-substitutor answered that question in the negative, holding apparently that the statute was inapplicable to the earnings of a wife unless kept separate. For he decided against the defender "in respect of failure to prove that one-half of said estate had become her property by donation or otherwise," adding in his note that if the interest of the spouses were to be separated their accounts ought to have been kept separate. The Sheriff took a different view, and sustained the defender's claim to the effect of separating her earnings from her husband's estate. My opinion agrees with that of the Sheriff. I think that the statute is not limited to cases where the wife's earnings are kept separate, and that these being protected from the operation of the statute may be claimed by her in so far as they can be traced and distinguished like any other separate estate belonging to a wife, from which the *jus mariti* is excluded.

There may be cases (like *Edward v. Baxter's Trustees*, 13 R. 1209, aff'd 13 R. 37, 13 App. Ca. 385) where a wife's separate estate, or the income derived from it, has been so dealt with as to raise a presumption that it has been applied to a purpose of the wife's or to which she was a party. But in the present case the first question is whether the statute applied to the defender's earnings to the effect of saving them from the *jus mariti*? Upon that question my opinion is that the statute was applicable. It applies to the earnings of any married woman "acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she was engaged." In this case the exclusion of the husband's right of administration was of no consequence, because according to the evidence the husband did not exercise his right of administration. The terms of the deposit-receipts applied to have been settled by the wife with his consent or approval.

The next question is whether the terms of the deposit-receipts imply a renunciation by the wife of her right to these earnings as her own separate estate? This question, I think, must be answered in the same way as if the estate in question had been a separate estate belonging to the wife in any other way; and I see no reason for ascribing to the terms of the deposit-receipts a different or higher effect as regards the wife's separate estate than such a deposit-receipt would imply as to the husband's estate. It does not imply either case donation either *de presenti* or *mortis causa*. In both cases it leaves it open to the proprietor to vindicate his or her separate right in so far as the subject of that right is traceable.

If the wife's separate income from her own earnings had been paid over to the husband, or placed to the credit of his bank account, a different question would have arisen. In such a case donation might be presumed. But even in that case the doctrine laid down in the House of Lords in *Edward v. Baxter's Trustees*, 13 App. Ca. 385, 15 R. (H. L.) 37, would have enabled the defender to reclaim her earnings so far as not consumed. The doctrine as stated in that case is this—"By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with the difference that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been bona fide consumed."

In the present case, however, there was nothing, in my opinion, from which a gift can be presumed, and I therefore think that the defender is entitled to have separate from her husband's estate the amount of her earnings included in the

deposit-receipts. Upon the evidence my opinion is, as I have already said, that the sum in these deposit-receipts must have consisted of her earnings to the extent of at least one-half—that is £130, 18s. With this variation in amount, I think that the Sheriff's interlocutor allowing a deduction on account of the defender's earnings ought to be affirmed.

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As to the defender's claim in name of alimony, my opinion is that it cannot be sustained. The case of *De Blonay v. Oswald*, 1 Macph. 1147, which was referred to in support of the claim, appears to me to be adverse to it in the case of a wife who takes her husband's estate under such a settlement as that which in this case has been executed in the defender's favour.

There was one point not argued which does not stand very clear upon the interlocutors of the Sheriffs. I refer to the debt due by the Dundee Investment Company. No part of it has been recovered or intromitted with as yet, but I think that the Sheriff-substitute's interlocutor goes too far in so far as it sustains the defender's claim to any part of the amount, excepting in so far as it consists of earnings subsequent to 1st January 1878. The £100 referred to by him, and all her earnings prior to 1st January 1878, in my opinion, must have fallen to the deceased *jure mariti*.

Unless the defender can identify some part of the balance due by the Investment Company as produced by her earnings subsequent to 1st January 1878, when the Married Women's Property Act, 1877, came into operation, I do not see that she can have any claim upon it as not falling into her husband's estate.

LORD RUTHERFURD CLARK concurred.

LORD YOUNG.—I have the misfortune to differ from my learned brethren. The action is an accounting by an only lawful child against her father's executrix, and for legitim. The pursuer would have been entitled if her father had left a widow but no will to two-thirds of his moveable estate. But as he has left a will, and she has repudiated it, her claim can only be for one-third, the widow taking the remaining two-thirds. The Sheriff by his judgment gives this only child as her legitim a sum of £8, which will be only slightly increased by the judgment your Lordships, who take a different view from him as to the widow's claim of aliment, are to pronounce. The facts of the case on which that judgment—singular in its money result—is to proceed are these. The pursuer's father married the defender—his second wife—in 1868. He was a bleacher, and she was a washerwoman. She, the defender, says, and I accept the statement, that when she married him in 1868 she had a fortune of £104. That passed to her husband *jure mariti*. So the man had some fortune. In 1870 he got £200 from an insurance on the life of his son, who died in that year. Again, in 1870, he got a legacy of £40. In all he starts in 1870 with a fortune of £344.

During the marriage, which was dissolved in 1886 by his death, he made £1 a-week, or a little more. His wife, the defender, had earnings too. What they were is matter of controversy. But the household was conducted on this footing, that the family lived in a house which belonged to the pursuer, she having succeeded to it from the first wife, her mother. Apparently she allowed her father and stepmother to have it at an easy rent; she explains that she did so in consideration of the repairs they made upon it, and the improve-



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ment effected by the building of the wash-house, and I accept her evidence, because I find it confirmed by this, that the rent was raised after her father died.

Now, the wife, the defender, was taking in washing, and the first question is, whether her earnings as a washerwoman fell under the Married Women's Property Act, 1877. I confess I am strongly inclined to be against the application of that Act (unless the parties acted on the footing that it was to be applicable to their arrangements) to a case in which a man allows his wife, living in family with him, to take in washing or sewing, or keep a shop in the house in which they live. I think it is for him to determine the footing on which that shall be done. I think the intention of the Married Women's Property Act was to prevent an ill-doing husband from interfering with the earnings of a well-doing industrious wife and taking them for his own purposes, as experience shewed had been often done. But the parties whose affairs are here in question I think shewed by their conduct that they were not acting on the footing of the wife carrying on a separate business and earning a separate estate protected from her husband. The case of a wife living in family with her husband, and earning money by charing or serving in a shop, or the like, is not *prima facie* a case for the application of the statute, unless, as was not the case here, the parties so act as to shew they intend such a case. Here there was a common fund, made up of what the spouses earned and what the husband succeeded to. This money was put in bank, in the joint names indeed, but under a destination which, according to the law of Scotland, would make the husband the proprietor. Of this common fund £400 was put out in a speculation in a building society. It was all dealt with as one fund. That £400 was lost by the failure of the building society in 1884—at least only a dividend will be recovered. But the rest of the common fund, amounting to £261, 16s. 6d., remained in bank when the marriage was dissolved by the death of the husband. Now, that money, the husband understood, he was dealing with by his will. He made his wife executrix, giving her the liferent of all, with power, if need be, to spend the capital, and on her death the money was to go to his children. Was that done on the footing that she was a creditor for £175, that he had in his possession as a borrower £175 of her money, and that his daughter, if she claimed her legal right, could only receive £8? I think he had no conception of such a thing, and neither, I am persuaded, had his widow. But her claim, if a debt, must be capable of being proved as such. It is no case of donation between husband and wife. It is a claim of debt, the same as if she were not the executrix of her supposed debtor. How would she have proposed to establish it? By parole evidence, and by saying that she carried on business in her husband's house as a washerwoman? Would she, by proof of the fact that she took in washing and got payment for it have been held to have established her claim to a debt of £175? I think that is out of the question. My opinion, then, is against the application of the statute to the present case, looking to the nature of the earnings and the conduct of the parties. The husband supplied the house accommodation which they enjoyed together, and bore the expenses of the establishment, and was liable for every farthing of the debts of the household, and when the wife is put to shew that she has a claim for £175 she fails. I cannot in these circumstances agree with a judgment which will give the only legitimate child of the deceased a sum of £8, and which, as I understand your Lordships' opinion, will give the widow £130 as debt due by the estate.

My conclusion is, that the deduction to be made from the £261 is £43, No. 51.  
 4s. 5d. Deducting that from £251, we have £218, a third of which is £72, which I should find to be the pursuer's legitim. In short, I concur substantially with the judgment of the Sheriff-substitute, while I have thought it right to make the observations I have now made as to the application of the statute to the circumstances, and as to the necessity of the wife, in the circumstances, establishing her claim as a creditor.

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The LORD JUSTICE-CLERK not having heard the argument gave no opinion.

THIS interlocutor was pronounced:—" . . . Recall the interlocutor of the Sheriff-substitute of 12th January 1888, and whole interlocutors subsequently pronounced in the inferior Court: Find that the defender's liability as executrix of the deceased James Tawse to account to the pursuer for her legitim out of the estate of the said James Tawse is not now disputed, and with regard to the amount produced by the defender, and the pursuer's objections thereto . . . Find (2) as to the balance due upon two accounts kept with the Dundee Savings Bank in name of the deceased and the defender 'to be repaid to either of them and the survivor,' that the same consisted to the extent of one-half, or £130, 18s. 3d., of earnings gained by the defender as a washer-woman subsequent to April 1881, and did not form part of the deceased's estate: (3) Find that no part of the balance due by the Dundee Provident Property Investment Company has been recovered or intromitted with by the defender, and that she was not in right of the same except in so far as she might have proved the same to have consisted of earnings by her as aforesaid subsequent to 1st January 1878, and find that she has not proved that any part of said balances was composed of such earnings; subject to these findings approve of the charge side of the account: Find that the defender, as executrix of her deceased husband, has no claim in name of alimony out of his estate; and therefore sustain the objection to the item of £28, 2s. 6d. . . . With these findings remit the case to the Sheriff, that effect may be given thereto, and decern."

D. MILNE, S.S.C.—MENZIES, BRUCE LOW, & THOMSON, W.S.—Agents.

WALTER KIRKWOOD AND ANOTHER (W. & J. Kirkwood's Trustees), Petitioners (Respondents).—*Mackay—H. Johnston.* No. 52.

MRS MARGARET FORBES OR LEITH, Appellant.—*Dundas.*

DR BRUCE ALLAN BREMNER, Appellant.—*Brodie Innes.*

Dec. 20, 1888.  
 Kirkwood's  
 Trustees v.  
 Leith and  
 Bremner.

*Burgh—Dean of Guild—Jurisdiction—Nuisance.*—In a petition to a Dean of Guild for a warrant for the erection of byres for thirty-two cows within burgh, certain neighbouring proprietors objected that the proposed buildings, if erected, would be a nuisance and injurious to health, as well as otherwise prejudicial. The Dean of Guild found that the answers raised questions which were outwith his jurisdiction, and sisted process to allow of an interdict being applied for. The respondents having failed to apply for interdict, the Dean of Guild granted the warrant craved. On appeal by the respondents, the Court *aided* process to enable them, if so advised, to apply for an interdict.

*Observations (per the Lord President) on the jurisdiction of the Dean of Guild in questions of nuisance.*

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Trustees v.  
Leith and  
Bremner.

1st Division.  
Dean of Guild  
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burgh.

M.

THIS was a petition which was presented in the Dean of Guild Court of Edinburgh under the following circumstances, as set forth in the report to the Dean's interlocutor:—"Messrs W. & J. Kirkwood, builders, Edinburgh, are proprietors of certain house property and ground known as Canaan Grove and Wood Grove, Eden Lane, Edinburgh, and having an extent of about two acres. Eden Lane, which is a *cul-de-sac*, runs down almost the entire west side of this property, and close to its southern extremity gives entrance to certain buildings which occupy the extreme south-west corner of the petitioners' property. These buildings are new and have been for many years, occupied as byres for the accommodation of twenty-four cows. In the wall which forms the southern extremity of the lane there is a private back entrance to Streatham House, the property of the respondent Dr Bremner. This lane also contains various villa residences. The southern boundary of the petitioners' property is a high wall, dividing it from the grounds of Canaan Lodge, the property of the respondent Mrs Leith.

"The petitioners crave warrant to erect byres for thirty-two cows, cart-shed, stable, storage, and other appropriate accommodation, on the south-east corner of their ground, and on their completion to remove the buildings hitherto used for a like purpose on the south-west corner of the property, with the exception of a timber erection.

"The respondents have lodged answers objecting to the erection of the byres. While Dr Bremner in particular objects to the effect on Eden Lane, and Mrs Leith avers that her house will be only thirty yards distant from a proposed manure pit in connection with the byre, in many particulars their objections are identical. They aver that the proposed erections will prejudice the amenity, the feuing value, and the salubrity of their respective properties. They further state that the erection of the byre will be a nuisance to the neighbourhood and injurious to health. They also found upon the following condition both in the petition and in the titles and in their own:—'Not to erect or allow to be erected on any part of the ground hereby feued any house or houses for the carrying on of trade or manufacture which may operate as a nuisance to the neighbouring feuars'; and upon the provisions of the Public Health (Scotland) Act, 1867, sec. 16 (c) (d) (e), which declare certain things to be nuisances."

The petitioners pleaded, *inter alia*;—(2) *Separatim*, The defences raise questions which are not within the jurisdiction of the Dean of Guild Court.

On 9th August 1888, the Dean of Guild pronounced this interlocutor:—"Finds that the answers of the respondents raise questions which are not within the jurisdiction of the Dean of Guild Court: Therefore the process to allow the respondents, or either of them, to apply for interdict against the erection of the proposed buildings, if so advised, reserves all questions of expenses, and decerns."\*

\* "NOTE.— . . . So far as the objections on the ground of nuisance are concerned, the Dean of Guild does not consider that the respondents' answers are well founded. If the erection of a byre is not prohibited, and is in law, it could not be prevented merely because it might prejudice the amenity of neighbouring properties.—*Barclay v. M'Ewen*, 7 R. 792.

"With regard to the other grounds of objection, the petitioners' pleadings raise questions which are not within the jurisdiction of the Dean of Guild Court, and in the circumstances of this case the Dean of Guild has sustained this plea.

"It was argued to the Dean of Guild that he had jurisdiction in the matter of nuisance, which was a part of the subject of neighbourhood, and that

On 25th October following this second interlocutor was pronounced :— **No. 52.**  
 "The respondents having failed to apply for interdict on the ground of

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thought that the proposed operations, in the use to be made of them, would prove a nuisance, he could stop them, or order them to proceed upon conditions. In support of this contention the respondents relied on a series of decisions beginning with *The Magistrates of Stirling v. the Sheriff*, M. 7584. In that case an inhabitant of Stirling raised the side wall of his house, whereby he interfered with a servitude acquired by his neighbour, who complained to the Sheriff. The Sheriff sustained his own jurisdiction, and the Magistrates successfully brought a declarator 'that by virtue of their erection the sole and only jurisdiction in all questions concerning building houses within burgh, taking down and rebuilding thereof, servitudes thereon, and marches and boundaries of the same, belonged to them excluding the Sheriff.' But in that case there was an allegation of direct fault in the structure of the building, and there was no question of the use to which the building was to be put. In *Fleming*, M. 13,159, the Dean of Guild, on the petition of a lower proprietor, forbade the future letting of an upper floor to a fencing-master, on the ground of nuisance arising from noise. In *Proprietors in Carrubber's Close v. Reoch*, February 26, 1762, M. 13,175, a wright's shop had been burned, and with it neighbouring houses in a crowded close. The wright proposed to rebuild as before. It was held that the shop was in the circumstances a public nuisance, as being liable to fire, and that the Dean of Guild must deal with it. In this case the question of nuisance was directly connected with questions involving the structure of the building in dispute. In *Buchanan*, M. 13,178, a Dean of Guild had ordered the removal of water-shades from the front of houses, on the ground that they encroached on the streets, deformed the same, and proved a nuisance to the general public. His proceedings were sustained. Analogous to these are the cases of *Vary v. Thomson*, M. App., *voce* Public Police, No. 4, and *Charity*, M. App., Public Police, No. 6. But all these cases were the subject of judicial consideration in *Donaldson v. Pattison*, Nov. 14, 1834, 13 S. 27, and that with a result hostile to the view contended for by the respondents. Donaldson was in the habit of raising goods by cranes to his upper storey from the pavement close to the front wall. Pattison, his next neighbour, obtained interdict from the Dean of Guild on the ground that the pavement was obstructed to his prejudice. It was held that the Dean of Guild could not competently entertain the petition, as the subject-matter of the nuisance was not of an architectural nature, and therefore did not fall within his province. Lord Mackenzie explains his reasons for considering that the Dean of Guild's jurisdiction was excluded, and after examination of the cases cited above, he refused to accept the plea that the Dean of Guild could consider not only the structure of a building, but also the use of it, if that was illegal. In the case of *Fleming*, his Lordship noted that the point of jurisdiction was never raised; while in the other cases not only was illegal use complained of, but also illegal construction of a building.

"So far as the Dean of Guild is aware, there is no other case where the point now under consideration has been the subject of direct decision, but there are more recent cases where important statements have been made as to the law on this head. In *Colville v. Carrick*, 10 R. 1241, warrant was craved for the erection of a hall behind a house in a street. The house had been used as a school for many years, and the hall was intended as an adjunct thereof. The titles allowed the feuars to build at the back such offices as they might consider necessary for additional convenience, but forbade shops, warehouses, or trading places. The Dean of Guild refused the petition. It was held that the hall was an office necessary to the petitioner's convenience. In the course of his opinion the Lord Justice-Clerk said,—'If the only question is as to a right to use the proposed building in a particular way, I greatly doubt whether the Dean of Guild has any authority to deal with that matter.' Lord Young, *inter alia*, said,—'I am clearly of opinion that the Dean of Guild has nothing to do with the use to which buildings are to be put.'

"The case of *Manson v. Forrest*, 14 R. 802, presents many analogous features

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nuisance, on the motion of the petitioners recalls the *sist*: Finds that the proposed operations are confined to the petitioners' own property, and can be executed without danger: Finds that the proposed premises are structurally of a satisfactory nature: Finds that the objections of the respondents on the ground of amenity are irrelevant, for the reasons explained in the note to the interlocutor of 9th August last: Therefore repels the pleas in law for the respondents; grants warrant to the petitioners in terms of the prayer of the petition and of the plans therewith produced," &c.

The respondents Mrs Leith and Dr Bremner appealed to the Court of Session.

to the present, but it does not throw much additional light upon the question of jurisdiction. In that case the erection of a byre was objected to as a nuisance, but interdict was refused because the petitioner undertook so to manage his business as to prevent the possibility of nuisance. The question of jurisdiction was argued to the Court at an early stage of the case, and the rubric of the case certainly asserts that the Court doubted the Dean of Guild's jurisdiction to entertain this question, but there is no expression of opinion on this point. It is the fact, however, that process was *sisted* by the Court on the motion of the respondents, who sought to uphold the Dean of Guild's jurisdiction.

"The more recent case of *Robertson v. Thomas*, 14 R. 822, is more in point. A petitioner proposed to make a large increase of a stable which stood in the centre of a thickly populated square of houses. It was chiefly objected that this would result in nuisance from smell and noise, and in an increased danger of fire. The Dean of Guild allowed a proof in order to ascertain whether the matters embraced in these objections, when established, would or would not be of a character with which he could competently deal. The petitioner appealed on the ground, *inter alia*, that the Dean of Guild had no jurisdiction as to the use of a building or as to a mere question of nuisance. But the Court (Lord Rutherford Clark *diss.*) refused the appeal, on the ground that it was expedient that the facts should be ascertained before determining whether the subject-matter of the objections was within the Dean of Guild's jurisdiction.

"In this case the Court practically reserved all questions of competency, and it appears to the Dean of Guild that this decision is no qualification of the doctrine that he cannot competently consider a simple question of nuisance, or a question as to the use to which a building is to be put. The whole object of the inquiry in that case was to ascertain whether the facts were such that the Dean of Guild could deal with the objections raised. The Lord Justice-Clerk, *inter alia*, said:—'I am clearly of opinion that there are cases of nuisance and cases as to the use of buildings which cannot come under the jurisdiction of the Dean of Guild, because they do not involve questions of the character for which he is the proper judge, but that, on the other hand, it is no answer to say what the appellant says here, if the nuisance is connected with a structural alteration of the building itself, and the use is the use of that building.'

"In the present case the respondents' contention amounts to this, that the Dean of Guild has jurisdiction where the use of a building would naturally, if not necessarily, occasion nuisance. The Dean of Guild does not concur in this view. It appears to the Dean of Guild that he has only authority in the matter of nuisance, when, by the circumstances of the particular case, that matter is connected with questions involving the structural arrangements of the building for which warrant is craved. He thinks that these elements do not appear in the present case.

"The Dean of Guild ought to add that after visiting the premises, and after full consideration of the plans, he is of opinion that the petitioners' proposed operations are confined to their own property, and are structurally of a satisfactory nature.

"The lane, which gives access to various properties, is a *cul-de-sac*. It is only twelve feet wide, and thus too narrow to admit of two carts or cabs passing each other in it. The cartage for byres for thirty-two cows will be considerable, and will obstruct ordinary traffic."

The Court heard counsel for the respondents, who contended (1) that the Dean of Guild had jurisdiction to entertain the question of nuisance; and (2) that in point of fact the proposed buildings would constitute a nuisance. No. 52.  
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The petitioners' counsel were not called on.

**LORD PRESIDENT.**—I think that in this case we ought to follow the same course as was taken in the case of *Manson*, 14 R. 802. I am not disposed to lay down any very stringent or definite rule as to how far the Dean of Guild is entitled in a question of lining to entertain an objection such as that which is here taken to the effect that the proposed erections constitute a nuisance. I can understand that in such cases as those to which Mr Innes has referred, where certain kinds of works have been ticketed by law as nuisances, the Dean of Guild may refuse a lining, because the law holds that they cannot be carried on without constituting a nuisance. If, for instance, it was proposed to set up a blubber or a glue work in one of the divisions of Princes Street, the Dean of Guild might refuse a lining because the structure which it was proposed to erect was adapted to the purposes of an unlawful trade, and to such purposes only.

But in regard to other cases which have been mentioned, I confess I am not disposed to do anything which would lead to an extension of the jurisdiction of the Dean of Guild. Questions of nuisance are often of very great delicacy, and raise points of law which require the intervention of a higher Court than that of the Dean of Guild. Such questions are among the enumerated cases which are sent to trial by jury, shewing plainly the intention of the Legislature that being of such importance they ought to be brought before the highest tribunal only. I think that is a very sound principle, and for these reasons, while I am not disposed to do or say anything which would appear to extend the jurisdiction of the Dean of Guild, I am not disposed to attempt to define the precise limits of that jurisdiction. That is often a very difficult matter, and its limits will in almost all cases depend upon circumstances. But apart from the ground of incompetency, I have no doubt that expediency requires that a question of nuisance should be tried elsewhere than in the Dean of Guild Court. I therefore think we ought to sist this process in order to enable the appellants to bring an interdict against the erection of these buildings.

**LORD MURR, LORD SHAND, and LORD ADAM** concurred.

**THE COURT** pronounced this interlocutor:—"Sist process, to enable the appellants, if so advised, on or before the box-day in the ensuing recess, to apply for an interdict against the erection of the proposed buildings, reserving all questions of expenses."

**MENZIES, COVENTRY, & BLACK, W.S.**—**DUNDAS & WILSON, C.S.**—**RICHARDSON & JOHNSTON, W.S.**—Agents.

**CATHERINE GALLOWAY OR CUTHBERT, Pursuer (Appellant).**—*Gloag—Ure.* No. 53.

**JOHN GALLOWAY WHITTON AND OTHERS, Defenders (Respondents).**

—*Law.*

**Property—Common interest—Mutual wall.**—The proprietor of two houses separated by a wall which formed the end wall of one house and the side wall of the other disposed by his settlement the two houses, one to each of his two daughters, describing each house as bounded by the other. In a question between one of the daughters, who claimed exclusive right to the wall, and the heirs of the other daughter, held that the wall was mutual. Dec. 20, 1888.  
Cuthbert v.  
Whitton.



No. 53.

Dec. 20, 1888.  
Cuthbert v.  
Whitton.

2D DIVISION.  
Sheriff of For-  
farshire.  
M.

JOHN GALLOWAY, plumber in Arbroath, died in 1857. He was proprietor of two houses there, which were divided by a wall, which formed the side of one of the houses and the back of the other house. By his disposition and settlement he conveyed to his daughter Catherine Galloway (Mrs Cuthbert) one of these houses which fronted the High Street and which was described as bounded by that street on the west, "and the tenement hereinafter disposed to Ann Galloway, my daughter, on the east,"—that is, by the other of the two houses.

By a subsequent clause of the settlement Galloway disposed to his daughter Ann Galloway (Mrs Whitton) the other house, which fronted Allan Street, and which was described as bounded "by that tenement hereinbefore disposed, to Catherine Galloway, on the west."

The two daughters thereafter occupied the houses conveyed to them under the settlement as separate subjects.

In consequence of certain disputes between them as to the wall separating the houses, Mrs Cuthbert raised in March 1888, in the Sheriff Court at Forfar, an action against John Galloway Whitton and other representatives of Mrs Whitton, concluding to have it found, *inter alia*, "that the wall dividing the property of the pursuer from the property of the defenders, situated in Allan Street, Arbroath, is a mutual wall."

The defenders denied that the wall was mutual.

The Sheriff-substitute (Robertson), on 13th June 1888, allowed the action and thereafter found "that the pursuer has failed to shew that the wall in dispute is mutual," and assoilzied the defenders.

On appeal, the Sheriff (Thomson), on 20th June, affirmed the interlocutor of the Sheriff-substitute.\*

The pursuer appealed, and argued;—The fact that the wall had been common to the two houses when in possession of the common author was conclusive in her favour. No proof should have been allowed, the disposition of the common author being sufficient for the decision of the case. There could be no question of servitude, since the two subjects formerly belonged to the common author.

The defenders argued that the wall was exclusively theirs, subject to servitude of support in favour of the pursuer's house. Further, that the pursuer had an interest to maintain their exclusive property in it, for if it were mutual the pursuer might propose to introduce vents into it, and so into the defenders' house.

LORD JUSTICE-CLERK.—These sisters have between their houses a wall about 15 inches in thickness, which is a sustaining wall of both houses. The father owned the two houses. One of them was built with its end against the side of the other. He left by his settlement the one house to the daughter and the other to the other, without so expressing his deed as to the wall to either. The question is whether each daughter has a common right in the wall. It is not in the strict sense of the words a mutual gable, but nothing turns on that. The Sheriff-substitute has gone into a discussion of the law of mutual gables, and the Sheriff has observed that he is "unable to find any of the usual features or marks which are looked for in a mutual gable. Now, it seems to me that that is scarcely the way to deal with the case.

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houses belonged to one man. There could be no right of servitude in the one property over the other while they were both one man's property, and so far as appears they were never in separate hands till he gave one of them to each of his two daughters. I think that when he did so he gave an equal right to each in what was necessary to both. It is said that there may be danger to one house from a vent being put into this wall by the owner of the other. If the mutual wall is about to be so treated, the question of whether the operation is dangerous will be one for the Dean of Guild Court at the time, on the footing that it is a mutual wall.

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Dec. 20, 1888.  
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**LORD YOUNG.**—I am of the same opinion. The case as it occurs to me is simple. The father, the proprietor of houses which adjoined in the sense of having a wall between them of which the one house used one side and the other house the other side, gave by his will one house to each of his two daughters. He describes each as bounded by the other, the conveyances being in the same terms. The question is to whom the wall between them, used by each, belongs. There is no reason for including the wall in the property of one daughter and excluding it from that of the other. It is said, but it is nothing to the purpose, that one house was built before the other. That might have been material if there had been two separate feudal properties, with a division in a certain line between them, but so far as we know, they were never separate properties before the father of the parties here divided them. He conveyed them, then, one to each daughter, by identical conveyances. I think that is an end of the case. There was no use for leading proof, as was done in the Sheriff Court. I think that the pursuer is entitled to declarator that the wall is mutual.

**LORD RUTHERFURD CLARK** concurred.

**LORD LEE.**—I also concur. I agree with Lord Young in thinking that the question depends on the interpretation of the settlement of the common author, and that proof was unnecessary.

This interlocutor was pronounced:—"The Lords . . . recall the interlocutor of the Sheriff-substitute of 13th June 1888 and the interlocutor of the Sheriff of 20th June following: Find and declare that the wall dividing the property of the pursuer from the property of the defenders, situated in Allan Street, Arbroath, is a mutual wall: *Quoad ultra* assoilzie the defenders from the conclusions of the action: Find no expenses due to or by either party."

WEBSTER, WILL, & RITCHIE, S.S.C.—DUNCAN SMITH & M'LAREN, S.S.C.—Agents.

**ALEXANDER PHILIP**, Objector (Appellant).—*C. J. Guthrie*.  
**ALEXANDER ROXBURGH**, Respondent.—*R. V. Campbell*.

No. 54.

Dec. 21, 1888.  
Philip v. Roxburgh.

*Election Law—County Franchise—Inhabitant-occupier—Service Franchise—Dwelling-house*—Representation of the People Act, 1884 (48 and 49 Vict. c. 3, sec. 3 and sec. 7, subsec. 4).—The manager of a farm, of which his mother was tenant, had the exclusive use and occupation of a bedroom in the farm-house, by virtue of his employment. His mother and sisters also resided in the farm-house, and he took his meals along with them in another room in the house.



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ALEXANDER PHILIP, Objector (Appellant).—*C. J. Guthrie.*  
ALEXANDER ROXBURGH, Respondent.—*R. V. Campbell.*

No. 54.

Dec. 21, 1888.  
Philip v.  
Roxburgh.

*Election Law—County Franchise—Inhabitant-occupier—Service Franchise—  
"Dwelling-house"—Representation of the People Act, 1884 (48 and 49 Vict.  
c. 3), sec. 3 and sec. 7, subsec. 4.*—The manager of a farm, of which his mother was tenant, had the exclusive use and occupation of a bedroom in the farm-house, by virtue of his employment. His mother and sisters also resided in the farm-house, and he took his meals along with them in another room in the house.

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*Held* that the whole farm-house was inhabited by the person under whom he served, and therefore that he was not entitled to be registered as an "inhabitant-occupier of a dwelling-house" in respect of his occupancy of the bedroom.

ALEXANDER ROXBURGH, farm-manager of the farm of Thorneylee, Selkirkshire, of which his mother was tenant under a lease from Lady Reay, claimed to have his name entered in the register of voters for the county of Selkirk. The franchise claimed was that known as the "service franchise," introduced by the 3d section of the Representation of the People Act, 1884.\*

Alexander Philip, solicitor, Peebles, objected to the claim on the ground that on a sound construction of the Act, as applied to the facts of the case, the "dwelling-house" inhabited by the claimant was also inhabited by the person under whom he served, viz., his mother, and that therefore he was not entitled to be entered on the roll.

The Sheriff (Jameson) admitted the claim, on the ground that by subsection 4 of section 7 of the Act the expression "dwelling-house" is defined to mean "any house or part of a house occupied as a separate dwelling," that the said room of which Roxburgh had the exclusive use fell within the definition, and that the room was not inhabited by the person by whom Roxburgh was employed.

Philip craved a case, which was accordingly stated by the Sheriff.

These facts were set forth:—"Roxburgh inhabits, and has the exclusive use and occupation of a bedroom in the farm-house of Thorneylee, by virtue of his employment as farm-manager for his mother. His mother and sisters also reside in the farm-house, and Roxburgh takes his meals along with them in another room of the farm-house. He has occupied the bedroom for the requisite length of time to entitle him to be put on the roll of voters, if his qualification is otherwise sufficient."

The question of law was,—“Whether in respect of the foreshaid facts the said Alexander Roxburgh is entitled to be entered on the roll in respect of the qualification set forth in the 3d section of the Act 48 and 49 Vict. cap. 3?”

Argued for the objector;—The claimant was not an "inhabitant-occupier" in the sense of the Act, for the franchise intended by the Act was limited to cases where a "house or part of a house was occupied as a separate dwelling-house," and was not inhabited by the person under whom he served. It was meant to apply to cases where a man lived in a one-roomed house, complete in itself, or occupied the whole house. What was in the view of the Legislature was that a man who occupied the same residence as his employer might be subject to that employer's influence. In *Stribbling v. Halse*<sup>1</sup> the franchise was given to Marshall & Snellgrove's shopmen, who lived on the premises, and were not interfered with by their employer. In *Ballingall v. Menzies*<sup>2</sup> it was given to a person who was looked upon as an independent clerk in the employment of a hydro-pathic company. In another case it was given to a coffee-house keeper.<sup>3</sup> This was, however, clearly a case outside the statute. The claimant simply occupied a bedroom, while his employer resided in another part of the house.

\* 48 and 49 Vict. c. 3, sec. 3.—“Where any man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant.”

<sup>1</sup> Nov. 2, 1885, L. R., 16 Q. B. Div. 246.

<sup>2</sup> Nov. 26, 1886, 14 R. 127.

<sup>3</sup> *M'Lean v. Pritchard*, Nov. 29, 1887, L. R., 20 Q. B. Div. 285.

Argued for the respondent;—His qualification was his exclusive right by virtue of his contract to occupy a particular room in the house. That room was a dwelling-house in the sense of the Act. It was not occupied by the person under whom he served. To argue that his qualification was destroyed by the occupation by his mother of the rest of the house, was to give two meanings to "dwelling-house" in the same clause, which was illegitimate. The case of *Ballingall* was directly in point, and only differed from the present in the fact that the employer there was a company.

At advising,—

**LORD LEE.**—My opinion on the facts stated is, that the claimant's mother (who is tenant and occupant of the farm) inhabits the whole farm-house, and that therefore the claimant's occupancy of a bedroom in that house by virtue of his service is not sufficient under clause 3d of the Act of 1884 to qualify him as an inhabitant-occupier of a dwelling-house in respect of that room. There is some difficulty in reading the clause along with the interpretation clause—a difficulty that was avoided in the Act of 1868 by the condition of separate rating. But I think that that difficulty is solved by observing that a man cannot (under the terms of the clause) be said to inhabit a dwelling-house by virtue of service if such dwelling-house, either as a whole or as part of a larger dwelling-house, is *de facto* inhabited by the person under whom he serves. This is the view which appears to have been taken in the case of *Stribbling*, L. R., 16 Q. B. D. 346.

**LORD KINNEAR** and **LORD MURE** concurred.

THE COURT sustained the appeal, and recalled the judgment of the Sheriff.

PHILIP, LAING, & Co., S.S.C.—THOMAS DALGLEISH, S.S.C.—Agents.

**HUGH WATT**, Objector (Appellant).—*Maconochie*.  
**JOHN M'GUIRE**, Respondent.—*Patten*.

No. 55.

*Election Law—County Franchise—"Inhabitant-occupier"—Imprisonment during a portion of the qualifying period—Constructive residence—Representation of the People Act, 1884 (48 Vict. c. 3), secs. 2 and 7 (4)—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 3.—Held that where a man occupied a dwelling-house as the ordinary habitation of himself and his family during the qualifying period, his compulsory absence in prison during a portion of that period did not interrupt the continuity of his inhabitancy, to the effect of preventing his acquiring a qualification to vote as an "inhabitant-occupier" in the sense of the Representation of the People Acts, 1868 and 1884.*

Dec. 21, 1888.  
Watt v. M'Guire.

**JOHN M'GUIRE** was entered on the roll of voters in the county of Mid-Lothian as tenant at a rental of £5 of a house in Slateford in the parish of Colinton from 31st July 1887 to 31st July 1888.

**Hugh Watt** objected, on the ground that **M'Guire** had been convicted of an assault on 23d April 1888, and in respect of that conviction had suffered imprisonment in the prison of Edinburgh for four calendar months from that date. **Watt** therefore maintained that **M'Guire** was not personally resident at his house during the four months, and was therefore not entitled to be registered as an "inhabitant-occupier" in the sense of the provisions

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No. 55. of section 3 of the Representation of the People (Scotland) Act, 1868,\* and sections 2 and 7 (4) of the Representation of the People Act, 1884.†

Dec. 21, 1888.  
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The Sheriff (Crichton) having repelled the objection, Watt craved a case, in which the above facts were set forth. It was further admitted at the bar that while M'Guire was in prison his wife and family continued to reside in the house, which contained his furniture, and that on the expiration of the term of imprisonment he had returned and had since resided there.

The question stated for the opinion of the Court was,—“Whether John M'Guire, having been imprisoned in the prison of Edinburgh for the period from 23d April 1888 to 23d August 1888, is entitled to be retained on the roll in the above enrolment?”

Argued for the appellant;—(1) The question to be decided was whether the respondent had been for the requisite period “an inhabitant-occupier of a dwelling-house,” when, in point of fact, he had been absent from the house, without the power of returning to it, during a large portion of the qualifying time. The residence was interrupted by such absence. It was admitted that a temporary absence, whether on pleasure, or for the health of the voter or any member of his family, would not interrupt residence in the sense of the statutes,<sup>1</sup> but the voluntary nature of the absence, and the power of return at will, had been recognised in Scotland as the test on the matter.<sup>2</sup> It had been expressly decided in England in the most authoritative way that temporary absence during the qualifying period was fatal to the vote, if the voter had voluntarily,—e.g., by committing a crime for which he was subsequently put in prison,—put it out of his own power to return during the term of his absence. This had been decided both as regarded cases of imprisonment<sup>3</sup> and the absence of soldiers on duty even for so short a time as twenty-one days.<sup>4</sup> These last cases arose in connection with the service franchise, and *Powell v. Guest* under the Reform Act of 1832 (where the words to be construed were practically the same as those in the section here under consideration), but the principle of *Powell v. Guest* had been declared to be applicable, and was given effect to in cases which rose under section 3 of the Representation of the People (England) Act, 1867 (30 and 31 Vict. c. 102), where the words to be construed were precisely the same as here, viz., “inhabitant-occupier.”<sup>5</sup>

\* 31 and 32 Vict. c. 48, sec. 3,—“Every man shall . . . be entitled to be registered as a voter . . . who . . . (1) is of full age, and not subject to any legal incapacity, and (2) is and has been for a period of not less than twelve calendar months next preceding the last day of July an inhabitant-occupier as owner or tenant of any dwelling-house within the burgh.”

† 48 Vict. c. 3, sec. 7 (4),—“The expression ‘a household qualification’ means, as respects Scotland, the qualification enacted by the 3d section of the Representation of the People (Scotland) Act, 1868, and the enactments amending or affecting the same, and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland, and for the purpose of the said section and enactments the expression ‘dwelling-house’ in Scotland means any house or part of a house occupied as a separate dwelling

<sup>1</sup> *Stewart v. Doull*, Dec. 19, 1868, 7 Macph. 330, 41 Scot. Jur. 193.

<sup>2</sup> *Manson v. Sinclair*, Dec. 19, 1868, 7 Macph. 329, 41 Scot. Jur. 193; *Nicholson*, 1, p. 112, and 2, p. 8; *Cay*, 559, *et seq.*

<sup>3</sup> *Powell v. Guest*, Nov. 22, 1864, 18 C. B. (N.S.), 72, 34 L. J., C. P. 69.

<sup>4</sup> *Ford v. Hart*, Nov. 21, 1873, L. R., 9 C. P. 273; *Atkinson v. Collard*, *Ford v. Barnes*, and *Ford v. Elmsley*, Nov. 5, 1885, L. R., 16 Q. B. D. 254, *et seq.*; *Spittal v. Brook*, Dec. 4, 1886, L. R., 18 Q. B. D. 426.

<sup>5</sup> *Tanner v. Castor*, and *Banks v. Mansell*, Nov. 30, 1885, 55 L. J., Q. B. D. 27, see *Cave*, J., p. 30.

If the Sheriff's decision were to be upheld it would come to this, that soldiers and criminals would be in a worse position with regard to the franchise in England than they were in Scotland. Where was the line to be drawn with regard to the length of the time during which the absence must continue in order to be fatal to the vote? Could a soldier be away on duty, or a criminal be shut up in jail during the whole of the qualifying period, and yet be held duly qualified? (2) With regard to the analogy of constructive residence within the meaning of the poor-law, it was admitted that if the poor-law cases were to rule the present case, the Sheriff's judgment must be affirmed.<sup>1</sup> But it was submitted that there was no analogy. The Poor-Law Act proceeded on a recognition of the fact that every person, not able-bodied, was entitled to be kept from starvation by the State, and therefore it came to be a question between third parties as to what parish was bound to pay for a pauper's maintenance; but the enfranchising Acts conferred a favour—the right to vote—on persons who had fulfilled certain conditions, and the question as to whether a person had done so was personal to himself. At all events, if the analogy were to be recognised at all, it must be pushed as far as it would go, viz., to this, that residence once acquired may be entirely constructive,<sup>2</sup> so that a man might be sent to penal servitude for five years, and yet, if he had once been qualified to vote on a house, and his wife and family continued to reside there during his absence, the assessor could not strike him out of the list, and he could vote when he came out of prison. (3) No assistance could be got from cases arising under section 6 of the Act of 1868, which was an entirely different franchise, and had nothing to do with inhabitancy, or, in other words, residence. All that was there required was occupancy of "lands and heritages," which could of course be by servants or by the tenant's family; e.g., in a case where a man had two farms in different counties, he could personally occupy one and constructively occupy the other.

Argued for the respondent;—(1) The qualification was to be found in sections 2 and 7 (4) of the Reform Act, 1832, which imported section 3 of the Representation of the People Act, 1832. What was required by these sections was, that the respondent should have been "for a period of not less than twelve calendar months next preceding the last day of July an inhabitant-occupier as owner or tenant" of his dwelling-house. The terms of that qualification fell to be contrasted with the terms of the qualification contained in the 11th section of the Reform Act of 1832 (2 and 3 Will. IV. cap. 65), which required that the claimant should not be entitled to be registered, "unless he shall have resided for six calendar months next previous to the last day of July, within such city, burgh, or town, or within seven statute miles of some part thereof." The words "occupancy" and "residence" fell therefore to be contrasted with one another, and the decisions upon the earlier statute were not in point here. The decisions upon the meaning of the term "actual personal occupancy," required by the 6th section of the Representation of the People Act, 1832, were more appropriate to the present case.<sup>3</sup> The English decisions which had been founded upon on the other side were all under the Reform Act of 1832, and upon a construction of the provision in that Act which required residence for six months prior to the last day of July. In the case

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<sup>1</sup> *Roger v. Maconochie*, July 5, 1854, 16 D. 1005, 26 Scot. Jur. 549; *Hay v. Croll, &c.*, Feb. 5, 1858, 20 D. 507, 30 Scot. Jur. 272; *Beattie v. Leighton and Mitchell*, Feb. 20, 1863, 1 Macph. 434, 35 Scot. Jur. 260.

<sup>2</sup> *Deas v. Nixon*, June 17, 1884, 11 R. 945.

<sup>3</sup> *Johnston v. Buchanan*, Nov. 6, 1879, 7 R. 7; *Lunan v. Allan*, Nov. 13, 1880, 8 R. 13.

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of *Powell*,<sup>1</sup> special stress was laid upon the fact that the claimant had been in prison for a great portion of these six months. *Ford's* case<sup>2</sup> was under the same statute. The cases of *Atkinson v. Collard, &c.*, and of *Spittal v. Brook*,<sup>3</sup> were all cases under the service franchise, and could not be said to be authorities in the present question. The cases of *Tanner* and *Banks*<sup>4</sup> raised the question of the right of undergraduates at Oxford and Cambridge to vote, and, as to them, it must be borne in mind that there the claimants could only be said to be inhabitant-occupiers for six months in the year, while for the other six they lived necessarily elsewhere. In order to sustain the objection here, the argument must be pushed to this length, that if a man were confined in a police cell for a single night he was thereby disqualified, for the principle on which the disqualification was said to rest was involuntary absence on the part of a person *sui juris*. And it was further to be observed that, looking to the opinions of the English Judges in *Powell v. Guest*, if a sentence of imprisonment were accompanied by the option of a fine, no disqualification was involved. That shewed the extravagance of the proposition which was maintained upon the other side, and even on the assumption that these decisions could be looked at as authorities in England upon the interpretation of the term "inhabitant-occupier," which they could not be, for they had proceeded more or less upon the case of *Powell v. Guest*, from which they were clearly distinguishable, still they ought not to be followed in Scotland. What must be affirmed, if the appellant was to succeed, was (1) that the respondent had had a residence in the prison during the time he was there, and (2) that he had no *animus revertendi*. If imprisonment were to be held to be a disqualification, one would naturally have expected to have found it included under the head of statutory disqualifications applicable to minors, fatuous or insane persons, aliens, and such like. It implied such an incapacity as one would have expected the Legislature to have provided for directly; and the Legislature not having so provided, it was not readily to be implied. (2) An analogy, which was quite in point, was to be found in the Scottish poor-law cases, where it had been conclusively settled that imprisonment did not operate an interruption to continuous residence.<sup>5</sup> There was also this consideration, that by the Act 41 and 42 Vict. cap. 3, the owner was now entitled to let the qualifying subjects for four months without it interrupting the period of residence.

At advising,—

LORD MURE.—This case relates to a person who is enrolled as tenant of a house at Slateford at a rental of £5 a-year, and it is objected to his remaining on the roll that he was in prison for assault several months in the year during which he required to occupy that house in order to enable him to retain his qualification.

The facts on which the question depends are clearly and shortly stated in the case, with this important additional explanation, which was agreed on by the parties at the bar, that during the period the respondent was imprisoned his

<sup>1</sup> *Powell v. Guest*, 34 L. J., C. P. 69.

<sup>2</sup> *Ford v. Hart*, L. R., 9 C. P. 273.

<sup>3</sup> *Atkinson v. Collard, &c.*, L. R., 16 Q. B. D. 254; *Spittal v. Brook*, L. R., 18 Q. B. D. 426.

<sup>4</sup> 55 L. J., Q. B. 57.

<sup>5</sup> *Roger v. Maconochie*, 16 D. 1005; *Deas v. Nixon*, 11 R. 945; *Manson v. Sinclair*, 7 Macph. 329.

wife and family continued to reside in the house of which he was tenant, and that on the expiry of his imprisonment he returned to his family at Slateford, and has since then resided with them there. The Sheriff has repelled the objection, and the question thus raised for decision is, whether in the circumstances stated the fact of the respondent having been so imprisoned destroyed his qualification. No. 55.  
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The case therefore raises one of those questions of constructive residence which have been so frequently considered and decided under the operation of the 76th section of the Poor-Law Act of 1845, and with reference also to the "personal occupancy" clauses of the Reform Act of 1832, and of the Representation of the People (Scotland) Acts of 1868 and 1884. It is unnecessary to refer to these cases in detail, for the result of the leading decisions as the law now stands cannot, I think, be doubted, and appears to me to be this, that when a party is temporarily absent from the house in which he is in use to reside, in the pursuit of his business or ordinary calling, or even in search of work, or through any other necessary cause, but with the intention of returning to that house as soon as he conveniently can, such temporary absence is not sufficient in law to break the continuity of his residence either under the "continuous residence" provisions of the 76th section of the Poor-Law Act, or under the "personal occupancy" clauses of the Acts which regulate the qualification of voters. In cases of both descriptions the party who has been temporarily absent will be held to have been resident constructively for the requisite period in the house occupied during his absence by his family or by his servants as the case may be.

Now, I did not understand it to be maintained on the part of the appellant that if during the four months' absence the respondent had been engaged in some work which required him to reside for a time in the locality where he was employed, his absence could have been held to affect the continuity of his residence at Slateford, and so to destroy his qualification. But it was contended that as his absence was compulsory, and brought about by his imprisonment for a criminal offence, this absence must be deducted from the period of his occupancy. No decision in this country was referred to in support of this proposition, and I am not aware that any such decision was ever pronounced. But a decision to a directly contrary effect was pronounced in the case of *Roger*, July 5, 1854, 16 D. 1005, in which it was held that absence under two consecutive imprisonments of considerable duration, the one for assault and the other for desertion when serving in the militia, did not break the continuity of a party's residence under section 76 of the Poor-Law Act. This, in the view I take of it, was a very important decision, and has, I believe, been considered to regulate the rules of the law of Scotland on constructive residence ever since its date, not only in questions of continuous residence under the Poor-Law Act, but also in questions of occupancy when dealing with the franchise.

In that decision there was no indication of any difference of opinion among the Judges who were called upon to deal with it. It originated in the Sheriff Court, where the Sheriff-substitute held that the continuity of the residence was not interrupted. His interlocutor was adhered to by the Sheriff, who laid it down distinctly that compulsory absence in respect of imprisonment could not be regarded as an interruption of the residence. Upon an advocacy, the reasons of advocacy were repelled by the Lord Ordinary, whose judgment upon the matter now in question was unanimously affirmed by the First Divi-



No. 55. sion of the Court, whose views were shortly expressed by the Lord President (Colonsay), in delivering the opinion of the Court.  
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Such being the character of the decision, it is plainly a binding authority in all poor-law cases, and I can see no reason why it should not be acted upon in questions of the present description. For it appears to me to lay down the rules of the law of Scotland which are to be applied in dealing with the clauses of any Act of Parliament relative to residence or occupancy which require or admit of the application of the doctrine of constructive residence as that doctrine is known in Scotland, and they are, I conceive, specially applicable in cases under the Registration of Voters Acts, in which, as Lord Benholme remarked in the case of *Manson*, 7 Macph. 329, to which we were referred during the discussion, this Court is in use to "receive assistance from the analogy of poor-law decisions." I am of opinion, therefore, that this appeal should be dismissed.

We have been referred to cases in the law of England on the subject, which I do not think it necessary to examine in detail, as our own law relative to constructive residence or constructive occupation is, in my opinion, very clear and distinct. The only one of these cases which related to the effect of absence during imprisonment was that of *Powell v. Guest*, 18 C. B. (N. S.) 72. But that decision, as I understand it, seems to have proceeded to some extent on the circumstance that there was no Act of Parliament which provided that in such questions time spent in prison was not to be deducted. In the view, however, which has been taken on questions of constructive residence in Scotland it has never been held to be necessary that there should be some express provision in an Act in order to authorise the Court to lay down the rules they have done. They seem, on the contrary, to have considered themselves entitled to construe the provisions of the Acts in order to ascertain whether on a fair construction those provisions admitted of the rule being applied in the case where a party during a temporary absence from his home left his family there till his return. So construing the Acts, the conclusion they came to was that the absent party was to be considered as being constructively resident in the house where he had left his family, which was in reality his home, and that the rule applied in cases of compulsory as well as of voluntary absence, and in the result of those decisions I entirely concur.

The other cases were those of officers and soldiers absent on duty with their regiments, and in most of these the English Courts seem latterly to have come to the conclusion that parties so absent were disqualified. Those decisions have, however, no direct bearing, I think, on the present question, and I shall abstain from giving any opinion upon the important questions thus raised, as we may hereafter be called upon to decide them. At present I have only to say that when that time comes it will, I conceive, be necessary to examine other decisions given in England on similar questions, and more particularly the case of *Mitchell*, 10 East, 511, in which Lord Ellenborough, with the concurrence of the other Judges of the Queen's Bench of that day, appears to have taken a quite different view of the meaning of the word "inhabitant-occupier" from that laid down in the cases to which we have been referred.

LORD LEE.—The question in this case is whether the name of John M'Guire, a voter on the roll for the county of Midlothian, ought to be struck off in respect of his having been for four months prior to 23d August 1888 confined in the prison of Edinburgh under a sentence of imprisonment for assault.

His qualification, if not destroyed by such imprisonment, is the household qualification provided by clause 2d of the Representation of the People Act, 1884—that is to say, the same qualification (apart from condition of rating) as was provided in regard to burghs by the 3d section of the Representation of the People (Scotland) Act, 1868, which conferred the franchise upon every man who, when the Sheriff proceeds to consider his right to be inserted or retained on the register of voters, is of full age and not subject to any legal incapacity, and is and has been for a period of not less than twelve calendar months next preceding the last day of July an “inhabitant-occupier” as owner or tenant of any dwelling-house.

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There is no allegation of legal incapacity.

It is not disputed that when the Sheriff proceeded to consider his right to be retained in the register M'Guire was an inhabitant-occupier as tenant of the dwelling-house mentioned in the case. Nor is it disputed that during the whole period of twelve months preceding the last day of July he was possessed of such a qualification unless his confinement in the prison between the 23d April and 31st July prevented the retention of it.

It was admitted at the bar (though it is not stated in the case) that M'Guire occupied his house as tenant for the whole period. For it was explained that while he was in prison his wife and family continued to reside in the house, and that it was occupied by his furniture. But it was argued that he was not an inhabitant-occupier because he did not, and could not, personally reside in it during the period of his imprisonment.

I did not understand it to be contended that constant personal residence was required, but it was argued that there must be throughout the whole twelve months residence on the part of the voter, either actual or constructive, and that there could be no constructive residence in a house which the voter was not free to inhabit.

This argument upon the necessity of continuous residence, and the impossibility of allowing constructive residence where the power to reside and the fact of residence were both wanting for three months, was supported by reference to a series of English decisions, commencing with *Powell v. Guest* (18 Scott's Rep., C. B. (N. S.) 72).

I think it would be unsafe to apply these decisions to the household qualifications conferred upon inhabitant-occupiers by the Representation of the People (Scotland) Act, 1868.

They turned upon a construction of the condition of residence attached to the occupation franchise in boroughs under the Reform Act of 1832; and it appears from the judgment in *Ford v. Hart* (L. R., 9 C. P. 273) that there was thought to be a material distinction between inhabitancy and residence. It was by taking that distinction that the judgment in *Mitchell's* case (10 East's Reports, 511) was got over. I do not presume to criticise any of these judgments. I assume that they are all in accordance with the English law. But the case of *Mitchell* seems to be the most applicable to the present case.

The question then is, whether an interruption of the voter's personal residence in the house of which he is admittedly the occupant by reason of imprisonment for three months in the twelve is inconsistent with his being regarded as an inhabitant-occupier within the meaning of the statute?

I put aside the cause of his imprisonment, because it is not said, and cannot be said, that conviction of crime affects the franchise in this case. It is the

No. 55. fact of absence without the power of returning that is founded on. The question then comes to be, whether absence from home by reason of detention in prison for a portion of the year extending to three or four months is fatal to inhabitancy. It is said that such absence must be fatal unless it was terminable at the pleasure of the voter as well as temporary in its character.

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This objection, if well founded, appears to me to reach far beyond cases of temporary imprisonment. I quite understand that a man could not be said to be qualified as an inhabitant-occupier of a dwelling-house if he had not inhabited that dwelling-house at all during the period required for a qualification. But there are very many cases in which the inhabitant-occupier of a dwelling-house may be absent from home for considerable periods of each year without the power or liberty of returning when he pleases. The case of a man who joins the militia during the year, and goes out for eight weeks' training, is an example of that. It occurs to me as strange that if such an objection be tenable it should not have been raised and sustained and applied in practice during the years which intervened between the Act of 1868 (when the household qualification was introduced in burghs) and the Act of 1884. During that period the qualifications were closely scrutinised, and not less keenly contested than they appear to be now, and my experience as a Sheriff in the revisal of the registers for the burghs of Stirling, Dumbarton, and Perth, is that such an objection was unheard of where the voter's occupancy was clear and the dwelling-house in question was his only or ordinary habitation during the twelve months. The case of *Manson*, 7 Macph. 329, was the case of a man who had voluntarily abandoned his dwelling-house in order to take employment elsewhere. It decided no such question as is raised here.

I regard the objection, therefore, as one which cannot be sustained without introducing a new principle in the administration of these enfranchising statutes, and my opinion is that it is not well founded. I think that if a man is *bona fide* the occupier of a dwelling-house, and if that dwelling-house is, as in this case it was, his ordinary and proper habitation during the twelve months required by the statute, his temporary absence during a portion of the twelve months, caused by confinement either in a prison or in a hospital for infectious diseases, does not prevent him acquiring a qualification as an inhabitant-occupier. The continuity of his residence or inhabitancy does not appear to me to be affected by such compulsory absence during a portion of the period of twelve months. Upon this point I think that the case of *Roger*, 16 D. 1005, has a distinct bearing.

I concur therefore in thinking that the determination of the Sheriff in this case was right.

LORD KINNEAR.—I have come to the same conclusion as your Lordship. But the ground on which I prefer to rest my judgment is that the Representation of the People Act, 1868, does not require continued residence for any specified period as a qualification for voting, and therefore I do not find it necessary to consider whether imprisonment for the period of four months out of twelve would break the continuity of residence if that had been, which I think it is not, one of the conditions which the statute provides for the qualification of a voter. What we have to consider is whether this voter is or is not what is ordinarily meant by an inhabitant-occupier, and for the reasons given by Lord Lee, apart from his observations on the Poor-Law Amendment Act, I think that

**McGuire** is an inhabitant-occupier of the house in question. I do not think that in coming to that conclusion we are doing anything at all different from what has been done by the English Courts in any of the cases cited to us. I think that the decisions of the English Court upon the construction of the Statute of 1884 should be received with great respect, and if on the construction of that statute we had found they had come to a decision different from that at which we were inclined to arrive, that would have given me great difficulty. But I do not find that any of the decisions of the English Court are inconsistent with the judgment which your Lordships propose.

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THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff.

J. & F. ANDERSON, W.S.—J. & A. PRIDDIE & IVORY, W.S.—Agents.

JOHN MATTHEW KLENCK, Petitioner.—*D.-F. Mackintosh—J. C. Lorimer.* No. 56.  
EAST INDIA COMPANY FOR EXPLORATION AND MINING, LIMITED,  
Respondents.—*Murray—Ure.*

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for Explora-  
tion and Min-  
ing, Limited.

*Company—Shares—Issue at a discount—Memorandum of Association—Illegal provision—Companies Acts, 1862 (25 and 26 Vict. c. 89), and 1867 (30 and 31 Vict. c. 131)—Companies Clauses Act, 1845 (8 and 9 Vict. c. 17)—Companies Clauses Consolidation Act, 1863 (26 and 27 Vict. c. 118).—Held that it is ultra vires of a company registered under the Companies Acts to issue its shares at a discount.*

The memorandum and articles of association of a company registered under the Companies Acts contained provisions to the effect that the company might issue its shares "at par, or at a discount, or at a premium." A person to whom new shares had been allotted at a discount presented a petition to the Court for rectification of the register of the company by the deletion of his name therefrom, and for an order on the company for repayment of the amount paid by him on his shares. The Court granted the prayer of the petition on the ground that the provision in the memorandum of association with regard to the issue of shares at a discount was illegal, and that such issue of shares was *ultra vires* of the company under the provisions of the Companies Acts, 1862 and 1867.

*Observations on Trevor v. Whitworth, 1887, L. R., 12 App. Cas. 409, and on Almda and Territo Company, 1888, L. R., 38 Chan. Div. 415.*

*Observations (per Lord Shand) on the power of companies which have adopted the Companies Clauses Act, 1845, to issue shares at a discount.*

On 31st May 1888 John Matthew Klenck presented a petition to the 1st Division of the Court of Session against the East India Company for Exploration and Mining, Limited, in which he prayed the Court to ordain that "the register of said company be rectified by deleting therefrom the entry of the petitioner's name, as holder of the 300 shares of the capital stock of the said company (part of the shares issued in July 1887) standing in his name in the said register; and to direct that due notice of such rectification be given to the Registrar of Joint Stock Companies in Scotland; and further, to interdict and prohibit the said company from making or enforcing any call or calls upon the petitioner in respect of the said shares, or from charging him for any alleged price in respect thereof, or from in any way holding or treating him as a shareholder of the said company in respect of the said 300 shares; and further, to decern and ordain the said company to make payment to the petitioner of the sum of £15, paid by him in respect of said shares, with interest thereon at the rate of five per centum per annum from the 25th day of July 1887."

B.

The following statements were set forth in the petition:—The East

No. 56. India Company for Exploration and Mining, Limited, with its registered office at 146 Buchanan Street, Glasgow, was formed in 1881. The capital of the company was £100,000 in 100,000 shares of £1 each, of which 99,900 were taken up.

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By special resolution, passed on 6th January 1886 and confirmed on 5th February 1886, it was resolved that the capital of the company should be increased from £100,000, divided into 100,000 shares of £1 each, to £300,000, divided into 300,000 shares of £1 each. That resolution was registered on 16th May 1886.

By special resolution, passed on 13th June 1887 and confirmed on 30th June 1887, and registered 8th July 1887, it was resolved, *inter alia*, "(1) That the directors be, and they are hereby authorised to issue 150,000 shares of £1 each, *quoad* 123,270 shares at a discount of not more than 12s. 6d. per share. (2) That 99,900 only of these shares be offered to the shareholders, being in the proportion of one share for each one of their present holdings. (3) That the directors be, and they are hereby authorised to arrange for discharge or payment of the debenture debt of £9900 by the issue of not more than 26,730 fully paid-up shares in connection therewith. (4) That the directors be, and they are hereby authorised to make such arrangements with third parties as they see fit for the subscription of shares."

In pursuance of that resolution, the company caused a prospectus to be issued, offering the 123,270 shares at a discount of 12s. 6d. per share, and John Matthew Klenck, then a shareholder of the company, on 24th July 1887, addressed to the directors letters of application for 300 shares, and at the same time sent them the sum of £15, being 1s. per share thereon, and, on or about 26th August 1887, he received notice that the shares had been allotted to him, and he was entered in the company's register as holder of the said 300 shares.

The petitioner further averred,—“Said application [for shares] was made by the petitioner, and was accepted by the company, on the condition that on each share 12s. 6d. was to be credited as paid up, and that each share was to be subject only to a liability of 7s. 6d. thereon.

“That said issue of shares at 12s. 6d. discount per share is *ultra vires* of said company, and that consequently the allotment of said shares to the petitioner and the entry of his name on the register were also *ultra vires* and illegal. The petitioner has since applied to the company to have his name removed from the register, and for repayment of the £15 paid by him in respect of said shares, but the company has refused to comply with his request.”

The petition was presented in terms of secs. 35 and 36 of the Companies Act, 1862 (25 and 26 Vict. c. 89).

The respondents answered;—“Admitted that the special resolutions were passed and registered as stated. Explained that, by the memorandum of association and also by the articles of association, the company has power to issue shares at a discount.

“Admitted that the petitioner, on 24th July 1887, applied for 300 shares and paid £15, and received notice that said shares had been allotted to him, and that he is on the register as the holder thereof, all as stated.

“Admitted that the company refuse to remove the petitioner's name from the register.

“It is denied that the issue of shares at a discount, and the allotment to the petitioner, and the entry of his name on the register were illegal. The said shares were issued in terms of the memorandum and articles of association, and of an agreement between the company and Mr James

Napier and the Goldfields Prospecting Company, Limited, dated 24th and 27th May 1887, and of said resolutions. The petitioner and the other shareholders further agreed with the company that the said shares should be so issued; and the agreement to this effect, dated 25th October 1887, was duly registered in terms of the Companies Act, 1867, section 25, before the shares were issued. Numerous obligations have been incurred by the company on the faith of the petitioner and the other persons in the same position being shareholders. Both the company and the creditors relied on the petitioner and the said other persons being shareholders. The petitioner applied for and accepted the shares in question in full knowledge of the terms of the memorandum and articles of association."\*

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Argued for the petitioner;—It was illegal for a company registered under the Companies Act to issue their shares at a discount, and if it were stipulated that the company should have power to do so in their memorandum or articles of association, the stipulation was of no avail.<sup>1</sup> To allow a company to issue their shares at a discount would be to set at naught the whole scheme of the Companies Acts, which proceeded on the ground that shareholders should be liable for the company's debts up to the total amount of the shares held by them individually, i.e., in this case up to £1. Here, however, the condition on which the petitioner was allotted shares was that each share allotted to him should only be subject to a liability of 7s. 6d., 12s. 6d. being credited on each share as having been paid up. The public were entitled to rely on the credit of each shareholder up to the full amount of £1 per share. Every member of the public in dealing with the company was entitled to assume, notwithstanding anything he found on the register, that the whole subscribed capital was in the company's coffers, either in money or money's worth, except in so far as it appeared that it had been reduced by legitimate use. The case was on all-fours with the *Almada* case (L. R., 38 Chanc. Div. 415), with this exception, that there there was no power taken by the company in their memorandum of association to issue shares at a discount. That was, however, an illegal stipulation, as it was inconsistent with the provision of sec. 8 of the Companies Act, 1862,† viz., that the memorandum should set forth the amount of the capital of the company, divided into shares of a certain fixed amount. In the case of *Trevor v.*

\* The memorandum of association contained the following clause:—"The objects for which the company is established are . . . P. From time to time to make the shares of capital, original, increased, or reduced, or any part thereof, ordinary or preferred, or guaranteed or deferred shares, and to convert the same into shares of different nominal amount, . . . and to issue all or any of such shares at par or at a discount, or at a premium, or as paid up or as partly paid up."

Article 8 of the articles of association provided,—“The company may from time to time by special resolution increase the capital by the creation of new shares.”

Article 9.—“Such increased capital may be issued as ordinary shares or preferred or guaranteed or deferred shares, or partly by one of these modes and partly by another or others, and may be issued at par, or at a discount, or at a premium . . .”

<sup>1</sup> *Almada and Territo Co.*, 1888, L. R., 38 Chanc. Div. 415; *Trevor v. Whitworth*, 1887, L. R., 12 App. Cas. 409; *In re Financial Corporation*, 1867, L. R. 2 Chanc. App. 714—see Lord Cairns, pp. 732, 733; *Ashbury Railway Carriage Co. v. Riche*, 1875, L. R., 7 Eng. and Ir. App. 653—Lord Cairns, at p. 672; *Railways Timetables Publishing Co.*, Dec. 7, 1888, Weekly Notes, 239.

† The sections of the various Acts referred to are quoted in the opinions of the Lord President and Lord Shand.

No. 56. *Whitworth* (L. R., 12 App. Cas. 409), it was expressly stated by Lord Macnaghten that such a power, when found in a memorandum of association, would be null and void. The principle on which *Trevor v. Whitworth* was decided by the House of Lords (where the legality of a company buying and continuing to hold its own shares was in question) ought to be applied here, namely, that in either case the memorandum would not shew the public what was the amount of the capital of the company. Both operations had the effect of reducing the apparent amount of the company's capital. With regard to the argument maintained on the Companies Clauses Act, 1845, assuming that under sec. 63 (quoted by Lord Shand) the company had power in issuing new shares to issue them "on such terms as the company shall think fit," *e.g.*, at a discount, that power was not carried on into the Companies Acts of 1862 and 1867, but, on the contrary, was directly in contrast with the words of secs. 7 and 8 of the Act of 1862, which provided that the amount of the capital of the company, divided into shares of a fixed amount, should be set forth in the memorandum. Sec. 25 of the Act of 1862\* had nothing to do with the issue of shares at a discount, but merely recognised that shares might be bought for money's worth, and not only for hard cash.

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Argued for the respondents;—The memorandum and articles of association gave the company power to issue shares at a discount. These documents were open to the inspection of anyone who dealt with the company. The liability of the shareholders to the company was fixed by the terms of the memorandum and articles, and they were also the measure of liability to creditors.<sup>1</sup> There was nothing illegal in the company taking the power of issuing shares at a discount in their memorandum. Such issue of shares was directly recognised in section 25 of the Act of 1862.<sup>2</sup> If, when money's worth was taken for shares, there were other shares in the market at a discount, the purchaser would never give full money's worth in goods, and yet it had been decided that an inquiry into the question whether full money's worth had been given would not be allowed by the Court.<sup>3</sup> In this case the petitioner had given an amount of money which the company had agreed to accept as fair value for the £1 shares, just as in *Pell's* case the company contracted to take certain property as equivalent to the value. The contract being registered, the Court would not inquire into the question whether the consideration given was full value for the share<sup>4</sup> unless the transaction were attacked on the ground of fraud.<sup>5</sup> By the Companies Clauses Act, 1845 (8 and 9 Vict. c. 17), power to railway companies, &c. to issue shares at a discount was clearly given.† Under sec. 63 of that Act when a company augmented its capital, and its

\* Sec. 25 of the Companies Act, 1862, provides that the register of the company shall contain "in the case of a company having a capital divided into shares" "a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member."

<sup>1</sup> *Waterhouse v. Jamieson*, March 13, 1868, 6 Macph. 591, 40 Scot. Jur. 306, affd. May 24, 1870, 8 Macph. (H. L.) 88, 42 Scot. Jur. 466.

<sup>2</sup> *Ince Hall Rolling Mills Co.*, 1882, L. R., 23 Chanc. Div. 542.

<sup>3</sup> *Palmer's Company Precedents*, p. 39; *Pell's case*, 1869, L. R., 8 Eq. 222, rev. 1869, L. R., 5 Chanc. App. 11; *Anderson's case*, 1876, L. R., 7 Chanc. Div. 75; *Buckley*, p. 525.

<sup>4</sup> *Burkinshaw v. Nicolls*, 1878, L. R., 3 App. Cas. 1004—see Lord Blackburn, p. 1025.

<sup>5</sup> *Pell's case*, *supra*; *Anderson's case*, *supra*.

† The sections of this Act which were cited are given in Lord Shand's opinion.

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shares were not at the time at a premium, the new shares might be issued "of such amount, and in such manner, and on such terms as the company shall think fit." The objects of that Act were very similar to those of the Companies Acts, and unless anything directly contrary to that section could be found in the Companies Acts, the spirit of the Companies Clauses Act should be read into the later statutes. Now, nothing directly contradictory could be found in those Acts; on the contrary, section 25 of the Act of 1862 seemed to favour this view. In Table A annexed to the Act of 1862 words very similar to the words of section 63 of the Companies Clauses Act occurred. In section 27 of Table A it was provided that where a company was increasing its capital, and existing members of the company declined to take up the new shares, after a certain time the new shares might be disposed of by the directors "in such manner as they think most beneficial to the company." There was no reason why a more restricted meaning should be put on the words "in such manner" in that schedule, than on the words "in such manner, and on such terms" in the Act of 1845. In the *Almada* case the attention of the Court was not called to the 25th section of the Act of 1862, or to section 27 of Table A appended to that Act. The fact that here the memorandum and articles of association contained a power to issue shares at a discount was a further and very important element of difference between that case and the present.

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At advising,—

Lord President.—This is a summary petition presented under the authority of the 35th section of the Companies Act of 1862 against a company called the East India Company for Exploration and Mining, Limited, which has its registered office in Glasgow, and the registered capital of which was 100,000 shares of £1 each. The company resolved in the year 1886 to increase its capital from £100,000 divided into 100,000 shares of £1 each, to £300,000 divided into 300,000 shares of £1 each. That was simply an increase of capital exactly upon the same terms and footing as the original capital of the company, and is quite unobjectionable. But there followed upon that in the next year, 1887, a special resolution of the company, by which it was resolved "that the directors be and they are hereby authorised to issue 150,000 shares of £1 each upon 123,270 shares at a discount of not more than 12s. 6d. per share"; and that was followed by certain other resolutions as to the proportions in which these new shares were to be offered to the existing partners of the company. Now, in pursuance of that resolution the company caused a prospectus to be issued offering these shares, 123,000 odds, at a discount of 12s. 6d.; and the petitioner applied for 300 of these shares and had them allotted to him, and he was entered in the company's books as the holder of 300 shares accordingly, upon the footing and condition, although that was not expressed in the register, that he was to be credited with 12s. 6d. per share as paid up, and consequently that each share held by him was to be subject only to a liability of 7s. 6d.

The petitioner maintains that the issue of the shares at a discount is *ultra vires* of the company and void, and consequently that the allotment of shares to him was also *ultra vires* of the company, and that he is entitled to have his name removed from the register, and to have the money which he paid for these shares, which amounted only to £15, repaid to him. The answer that is made on the part of the company is, in the first place, that the issue of these shares was perfectly legal and within the competency of the company, and secondly, that the petitioner having applied for and accepted the shares in the full knowledge of



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The question whether this resolution of the company was illegal, and whether the issuing of the shares at a discount was *ultra vires* and therefore void, is a question of very great importance, and depends, I think, truly upon the clauses of the Companies Acts, particularly upon the clauses of the Act of 1862. The 7th section of that statute prescribes the mode in which the liability of members of a company may be limited, and it must be observed that the limitation of liability is a statutory privilege purely. There is no such thing as limited liability at common law, and therefore no company can have limited liability that does not comply with the conditions upon which that privilege is granted. The 7th section is in these terms—"The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." The latter is what is called limitation by guarantee, with which we have nothing to do in the present case. The limitation that we are dealing with here is a limitation which is "to the amount, if any, unpaid on the shares respectively held" by the members. The 8th section provides that "where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things"—the name of the proposed company, with the addition of the word "Limited" as the last word in such name; the place where the registered office of the company is to be situated; "the objects for which the proposed company is to be established; a declaration that the liability of the members is limited"; and lastly, "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." Now, I do not think there can be said to be any ambiguity in these two clauses. The limitation is to the amount unpaid on the shares. Nobody can have a greater amount of limitation of liability than is prescribed here; and the limitation is this, that he shall not be called upon to pay more than remains unpaid upon the amount of his shares. Supposing the share to be £1, he never can be called upon for more than £1 for each share, and if any portion of that £1 has been paid, then his liability is limited to what remains unpaid. But that his liability extends to every shilling that remains unpaid is clear. In connection with this it is also necessary to consider the 12th section of the same statute, which provides that "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association."

Now, keeping in view that the leading condition of the memorandum of association is to be in all cases that the liability of members is limited to the unpaid portion of the shares which they have taken, and is not and cannot

be extended further, it appears to me that sec. 12 affords an additional confirmation of the importance attached to the rule established by sections 7 and 8, because, with the exceptions enumerated in section 12, no alteration can be made by the company on the conditions contained in the memorandum of association. Now, the conditions contained in the memorandum of association are that the capital shall be divided into shares of a certain fixed amount, and that the liability of members shall extend to the whole amount of these unpaid shares, and no further.

The 25th section of the Act of 1867 was also referred to in argument, and quite properly, because it must be construed also in connection with the sections of the Act of 1862 that I have read. It provides that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." The evil which this enactment was intended to remedy was very well known. There were a number of transactions of rather a doubtful kind entered into between persons contracting with the company for works and the like, by providing that they should be paid by giving them fully paid-up shares, or shares held to be fully paid-up, and the like, and to check these irregular transactions this section provided for payment of the shares in cash only, unless it shall have been otherwise determined by a contract made in writing before the issue of the shares—that is to say, the contract made in writing must specify and publish the consideration which the company takes in place of cash for the shares. So that that section I think does not at all advance the argument in support of the issue of shares at a discount, because the issue of shares at a discount involves this, that whereas the share capital of the company is all divided into £1 shares, that being in this case the "certain fixed amount" prescribed in section 8 of the Act of 1862, in point of fact the company has given a discharge to those who took the shares at a discount of a considerable portion of that which *ex facie* of the share they are bound to pay. That seems to me to be exactly the same thing in principle as the company buying its own shares. It is just a diminution of the apparent capital of the company. In the one case—the case of purchasing its own shares, and holding them without re-issue—the company just returns to the shareholder the whole or a portion of the capital which he has paid; and in the other, instead of returning a portion of the capital which he has paid, they fail to lay him under an obligation to pay up the unpaid portion of the shares, or rather they grant him a discharge of it, without consideration, to a certain amount. In short, both cases violate the principle of the statute exactly in the same way. The memorandum sets out—and is bound to set out—the precise amount of the capital of the company divided into shares of a certain fixed amount, and the effect of that is to shew to the public and the creditors dealing with the company, what is the amount of the fixed capital upon which they are entitled to rely in so dealing with the company. But if by either of the means that I have suggested—either the purchase by the company of its own shares, or the issuing of shares at a discount—the public and the creditors are misled entirely, then the memorandum is set at naught, and the provision of the memorandum is for all the purposes for which it was intended practically useless. These are the grounds upon which it appears to me that the issue of shares at a discount cannot possibly be maintained to be legal.

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This is the first time that the question has occurred for decision in this Court, but there have been some cases in the English Courts upon the subject, and there has been apparently a good deal of variance of opinion among the English Judges. However, there was a case cited to us in which the Court of Appeal in England seems to have come to a unanimous decision, precisely to the effect that I have now indicated, and it is very satisfactory, especially after the apparent differences of opinion that existed among the English Judges, to find at least something like an authoritative judgment upon the question. I shall only say that the case of the *Almada Company* (L. R., 38 Chan. Div. 415) appears to me to be upon all-fours with the present. It is very difficult to conceive two cases more nearly the same. I forbear from quoting the judgments of the learned Judges in that case, because your Lordships have them before you, but I am happy to be able to say that I concur not only in the judgment at which the Court of Appeal arrived, but in the reasons which are given by the learned Judges for their opinions. But there is another and perhaps still more authoritative guide which we have in the present case, and that is the judgment of the House of Lords in the case of *Trevor v. Whitworth* (L. R., 12 App. Cas. 409). That was a case where the company had purchased up its own shares and held them without re-issue, and the House of Lords found that that was an entirely illegal and void transaction, and must be set aside upon the ground which I have already indicated as being the ground of judgment in the present case, that this was just a defeating of the object of the memorandum of association in that part of it where it is required to set out the precise amount in money of the capital of the company divided into a certain number of shares of a certain fixed amount. The two cases—the case of the purchase of shares by the company, and the case of issuing shares at a discount—I think depend entirely upon the same principle.

There is just one other point to which it is necessary to advert in disposing of this petition. It is maintained upon the part of the respondents that they are entitled to issue shares at a discount, because they have a power to do so within the memorandum of association itself, whereas in the cases that have been decided, both in the *Almada* case and in the case of *Trevor v. Whitworth*, the power was not in the memorandum of association, but in the articles of association. I do not think that that makes any difference in the case at all, because if the power to issue shares at a discount be inconsistent with setting forth the precise amount of the capital of the company, divided into a certain number of shares of fixed amount, then that is to superadd to the memorandum of association something that takes away its value, or rather something that utterly contradicts its most important provision. The point was dealt with, and very ably dealt with, by Lord Macnaghten in the case of *Trevor v. Whitworth*, and as expressing my own views of the question, although it did not actually arise for decision in *Trevor v. Whitworth*, I am prepared to adopt Lord Macnaghten's views as there expressed. He says,—“It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company it would necessarily be void”; and further on he says,—“It seems to me that one way of trying whether it is permissible or not would be to read it,”—that is, the power—“into the memorandum in connection with the condition which states what the capital is to be”; and then he puts it in this form,—“The condition would then run thus—‘The capital of the company is £150,000, in 15,000 shares of £10 each, but the

board may buy back shares whenever they think it desirable for the purposes of the company to do so.' It seems to me that a condition so qualified would be repugnant and contradictory to itself. At anyrate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form." I cannot better express my own opinion than in the words there used by the noble and learned Lord. I think that if you add to the memorandum of association anything that derogates from or annuls one of its statutory requisites, that must necessarily be an illegal condition. Upon these grounds I am for granting the prayer of this petition, removing the petitioner's name from the register of shareholders, and ordering the company, as I think we may by the 35th section, to repay the £15.

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LORD MURE.—I entirely agree in the grounds on which your Lordship has so very clearly based your judgment in this most important case, and I have nothing to add.

LORD SHAND.—I am entirely of the same opinion, and I adopt your Lordship's judgment upon all the points with which it has dealt.

I consider that this case is really decided by the case of *Trevor v. Whitworth*. Looking at the question which was there settled, and the grounds of the decision, I think we have practically the same question raised in this case. In *Trevor v. Whitworth* the company had bought back a number of its own shares, and in that way the capital was diminished. The Court held that that was illegal and *ultra vires*, because the company had no power to diminish the capital, which was specified in the memorandum. It appears to me that what was done here, although not done in the same way, has precisely the same effect. The Court in *Trevor v. Whitworth* expressed a strong view that the creditors were entitled to look to the capital as it was defined in the memorandum, and that the shareholders and directors of the company could not, unless under special conditions, and with the sanction of the Court under the Statute of 1867, reduce that capital by any process, and of course buying back their shares was practically reducing their capital. Now, can it possibly be said that if £1 shares are issued at a discount of 12s. 6d. that is not reducing the capital? In the one case the capital is paid back; in the other the obligation of the shareholder to pay his share of capital is discharged. The operation in the one case has precisely the same effect as in the other, although it is done in a different form, and therefore I hold the case of *Trevor v. Whitworth* to be decisive of this case, except on the point to which your Lordship last alluded, that here the power to issue shares at a discount is contained in the memorandum, but on that matter also I agree with your Lordship. A power to issue shares contrary to the express provisions of the statute cannot be given by a provision in the memorandum.

Counsel for the respondents maintained an argument upon the Companies Clauses Acts, and as to what could be done with reference to the issue of a railway company's stock at a discount, and it is right to notice the argument that was so presented. It was maintained with reference to the provisions of these statutes, in the first place, that it was obvious that the Legislature did not consider that it was in all cases an illegal proceeding to issue shares at a discount; and, in the second place, that if we applied the analogy of these statutes to the present case, it would be found with reference to issuing shares at a discount that a company under the Companies Acts really had that power. It was said

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that that power would be found to exist in the case of railway and other companies which come under the Companies Clauses Acts, and that the statutes with which we have here to deal are substantially the same.

Now, it appears to me that the argument succeeded so far. I think Mr Murray was able to shew us—at least he satisfied me—that in the case of companies which come into operation under the Companies Clauses Acts of 1845 and subsequent statutes there is power to issue shares at a discount, subject to certain conditions and restrictions. But I think the argument entirely fails to shew that the clauses which allow of that power in the case of railway companies, and other companies adopting the Companies Clauses Acts, are at all the same either in terms or in effect as the clauses which we have to deal with in the Companies Acts of 1862 and 1867. In the Companies Clauses Act of 1845, section 6 provides that “the capital of the company shall be divided into shares of a prescribed number and amount, and such shares shall be numbered in arithmetical progression,” and section 38 contains this provision as to the liability of shareholders, that “if any legal diligence or execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy under such diligence or execution, then such diligence or execution may be used against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; and for the purpose of ascertaining the names of the shareholders” access shall be given to the register. Now, if these had been the only provisions in that statute affecting a question of this kind, it appears to me that the result would have been precisely the same as under the Acts we are dealing with. There would have been limited liability, but I think there would have been no power to the company to purchase its own shares or to issue shares at a discount. But we were referred to the special provision touching this matter contained in section 63 of the Companies Clauses Act of 1845, which deals with unissued capital authorised to be issued by the conversion of the power to borrow money into a power to issue capital stock. Section 61 provides—“If at the time of any such augmentation of capital taking place by the creation of new shares, the then existing shares be at a premium or of greater actual value than the nominal value thereof, then, unless it be otherwise provided by the special Act, the sum so to be raised shall be divided into shares of such amount as will conveniently allow the same to be apportioned among the then shareholders in proportion to the existing shares held by them respectively,” and they are to be offered to existing shareholders accordingly. But section 63 provides that “if at the time of such augmentation of capital taking place the existing shares be not at a premium, then such new shares may be of such amount, and may be issued in such manner and on such terms as the company shall think fit.” Now, I am disposed to hold, and I think the subsequent course of legislation shews, that by that clause with its wide powers having reference to augmentation of capital where the existing shares are not at a premium the new shares may be issued at a discount. But that is, I think, because of the very special terms of this particular clause, which provides that the shares may be issued “on such terms as the company shall think fit.” The power of issuing the shares on such terms does, I think, include the power to issue shares at a discount, and subsequent legislation on the subject shews that the Legislature had taken that view of the section, because in the Act of 26 and 27 Vict. c. 118, sec. 21, which follows on a number of sections providing for the issuing of new shares,

and new stock in the case of a railway company, provides that, subject to the foregoing provisions, the company "may from time to time dispose of new shares and new stock at such times to such persons on such terms and conditions, and in such manner as the directors think advantageous to the company," but it goes on to enact—"But so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof." This clause, it may be observed, directly prohibits the issuing of shares at a discount, and accordingly if the enactments had stood there, in the case of railway companies that could not have been done.

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But by two subsequent statutes, the latter being the Act 32 and 33 Vict. c. 48, sec. 5, it was provided, with reference to the section which I have now read,—"Section 21 of the Companies Clauses Act of 1863 shall, with respect to any company to which it is applicable under the provisions of this or any other Act, be read to have effect as if the following words—that is to say, 'but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof,' had not been inserted in that section." So that the prohibition to issue shares at a discount was removed by the Legislature, and apparently in certain limited cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.

But while the argument goes this length, I do not think it goes a step further. The mode in which that authority is given in certain limited cases is by the provision of the statute that the directors may issue the shares on such terms as they think fit. There is nothing of that kind in the Companies Acts of 1862 and 1867. The only reference to which counsel for the respondents could appeal upon this matter is contained in Table A relating to the articles of association, which may be adopted by any company. Table A, sec. 27, provides that "subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offers shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company." Now, the distinction between the two classes of cases is two-fold. In the first place, the Companies Clauses Act of 1845 itself in one of its enactments gives the power. We have no such power given in the Companies Act of 1862, and even if a power of that kind were inserted in the articles of association, or indeed in the memorandum of association, it would not be effectual as against the provisions of the statute, which directly prohibit any such proceeding. But further, when we turn to the articles of association we find there is no such wide power given as to authorise directors to issue shares "on such terms" as they think fit, and the absence of these words, I think, makes all the difference between the two cases. On these grounds it appears to me that the argument founded upon the Companies Clauses Acts has no material bearing on the question which we are to decide, and that under the Companies Acts of 1862 and 1867 the issue of shares at a discount is *ultra vires*.

LORD ADAM.—I concur for the reasons now stated by your Lordships, and

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for the reasons stated by the English Judges in the *Almada* case. The only difference between this and the *Almada* case that I can see is that in this case the company has taken power by its memorandum of association to issue shares at a discount, or they have attempted to do so. Nobody disputes that there must be certain conditions inserted in the memorandum of association, and that these are essential conditions under the Act. If that be so, it has always appeared to me to be a very clear proposition that in the same memorandum of association you cannot insert valid conditions which will give power to the company, if exercised, to destroy all or any of the essential conditions required by the Act to be in the memorandum of association. Take, for example, the first condition which must be inserted, viz., that the name of the company shall be followed by the word "limited": would it be possible to insert a valid condition in the same memorandum of association giving the power to the company to alter the name of the company by the omission of the word "limited"? The thing would be absurd. And so you might go through every one of the essential conditions, and take power in the memorandum which would enable the company to destroy every one of the statutory essential conditions, and so reduce the memorandum to a nullity. This would be out of the question, and I quite agree with the reasoning of Lord Macnaghten on that point.

THE COURT pronounced this interlocutor:—"Grant the prayer of the petition: Ordain the said respondents to rectify the register of the company, and to delete therefrom the entry of the petitioner's name as holder of 300 shares of the capital stock of said company (part of the shares issued in July 1887) standing in his name in the said register, and direct that the respondents give due notice of such rectification to the Registrar of Joint Stock Companies in Scotland: Further, interdict and prohibit the said company from making or enforcing any call or calls on the petitioner in respect of said shares, or for charging him for any alleged price in respect thereof, or from holding or treating him in any way as a shareholder of said company in respect of the said 300 shares, and decern: Further decern and ordain the said company to make payment to the petitioner of the sum of £15 paid by him in respect of said shares, with interest thereon at the rate of 5 per cent, from the 25th day of July 1887."

J. C. BRODIE & SONS, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

## No. 57.

GENERAL PROPERTY INVESTMENT COMPANY, AND LIQUIDATOR, Pursuers  
(Respondents).—*D.-F. Mackintosh—Salvesen.*

Dec. 21, 1888.  
General Prop-  
erty Invest-  
ment Co. and  
Liquidator v.  
Matheson's  
Trustees.

Mrs ALEXA URQUHART OR MATHESON AND OTHERS (Matheson's Trustees),  
Defenders (Reclaimers).—*Sir Charles Pearson—C. S. Dickson.*

GENERAL PROPERTY INVESTMENT COMPANY AND LIQUIDATOR,  
Petitioners.—*D.-F. Mackintosh—Salvesen.*

Mrs ALEXA URQUHART OR MATHESON AND OTHERS (Matheson's Trustees),  
Respondents.—*Sir Charles Pearson—C. S. Dickson.*

*Public Company—Power to purchase its own shares—Ultra vires—Companies Acts, 1862 and 1867—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 35.—Held (in conformity with Trevor v. Whitworth, July 11, 1887, L. R., 12 App. Cas. 409) that it is ultra vires of a company registered under the Companies Acts, 1862 and 1867, to purchase its own shares, and that such a purchase is not only voidable but void.*

A, a shareholder in a limited company incorporated under the Companies Act, 1862 and 1867, sold his shares to the company in 1876, there being a provision in the articles of association binding him to offer them to the company in the first instance. A transfer was executed, and his name removed from the register. The company was successful for some years afterwards, and paid large dividends. Subsequently calls were made, and the whole nominal capital was exhausted; and ten years after the sale, and nine after A's death, the company went into liquidation. Proceedings were thereafter taken by the liquidator to have A's transfer reduced, and the names of his representatives placed upon the list of contributories, and the calls which had been made paid by them, in respect that it was *ultra vires* of the company to purchase its own shares. It appeared that the shareholders generally were aware that the company was in the habit of purchasing its own shares, that other purchasers than the company could easily have been found for the shares in question, and that a considerable amount of debt, still outstanding, had been incurred before as well as after the sale. Held that the transfer fell to be reduced as being *ab initio* void, and that in terms of the 35th section of the Companies Act, 1862, "the justice of the case" required that the names of A's representatives should be placed upon the list of contributories.

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General Property Investment Co. and Liquidator v. Matheson's Trustees.

Question as to the liability of A's representatives to pay calls made after the transfer, and as to their right to dividends after that date.

Observations per Lord Shand on the case of *The Silkstone Coal Company*, in *re Dronfield*, 1880, L. R., 17 Chanc. Div. 76.

THE GENERAL PROPERTY INVESTMENT COMPANY, LIMITED, was incorporated under the Companies Acts, 1862 and 1867, on 3d February 1876, the object of the company being to purchase heritable property, and any rights secured over heritable property within the United Kingdom, to hold, manage, build upon, lend upon, feu, or sell the same, and do all such other things as were incidental to the attainment of such objects. The capital of the company consisted of 4250 shares of £10 each. It had no power under its memorandum of association to purchase its own shares.

1st DIVISION.  
Lord Trayner.  
B.

The articles of association of the company contained, *inter alia*, the following.—"IV. No shareholder shall transfer his shares until he has first made offer of them to the company at the then market price. V. Any shares acquired by the company may be retained as the property of the company, or disposed of in such manner as the company in general meeting thinks fit to direct."

The company did a considerable business for some years, and in 1877, 1878, and 1879, it paid dividends of 12 per cent. Subsequently to 1879 it paid no dividend, and on 24th November 1886 an order for its winding-up was pronounced on a petition at the instance of the company and three of its directors. David Myles, accountant in Dundee, was appointed liquidator.

Mr Robert Matheson, architect, was an original shareholder of the company to the amount of 250 shares, which he transferred to the company by transfer, dated 23d June and 7th October 1876, bearing to be granted "in consideration of the sum of £254, 11s. 10d. paid to me" by the company. The transfer was signed by Mr Matheson, and by three directors, and the secretaries of the company.

On 2d November 1887 the company and its liquidator brought an action of reduction of that transfer, and of an entry in the company's books, dated 31st October 1876, of the name of the company as holder of the 250 shares. There was also a conclusion for payment of £3066, 10s., being (1) the £254, 11s. 10d. above mentioned; (2) £2250, the amount of five calls made upon the 250 shares from 10th May 1876 onwards—the last being one of £1 per share on 30th June 1887, after the company had gone into liquidation; and (3) interest at five per cent



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on the £254, 11s. 10d. from the date of its payment by the company on the calls from the dates when these were respectively made.

The action was brought against Mr Matheson's trustees, he had died on 5th March 1877.

The pursuers averred that the sale and transfer of the 250 shares illegal and invalid, and in violation of the provisions of the Companies Acts, and that it was not known to the shareholders or creditors of the company that the transfer had been executed or accepted by the directors. They further alleged that the dividends of 1877, 1878, and 1879 had been paid out of capital.

The defenders stated that Mr Matheson had originally taken the shares in question on the understanding that he was to be architect and valuator of the company, but that in consequence of a Government appointment which he held he had to decline to act; that on 19th March 1876 he offered the shares in question to the directors, and informed them that if they did not take them another buyer was ready to purchase them; that they were accordingly bought by the directors, and the sale was approved and homologated by the shareholders, in whose knowledge the shares were also re-allocated to other persons; that since 1876 neither the name of Mr Matheson nor of the defenders had been entered in the register of shareholders, nor in any of the company's books, nor in its annual statutory return; that the defenders could not have held the shares after Mr Matheson's death, and that if they had been informed of the illegality of the transfer, they would at once have disposed of them. The defenders denied that the dividends had been paid out of capital.

They further averred that "the defenders were not called to attend the meetings of the company at which the question as to liquidating the company was considered, and they never received any notice whatever of any of the meetings of the said company, or of the liquidation proceedings or proceedings therein. . . . It is impossible for the pursuers to make *restitutio in integrum*, in the event of the said transfer being reduced, and the present claim now made by the pursuers in this action, if sustained, would involve great hardship and injustice and loss to the defenders and the trust-estate. The said claim is inequitable and contrary to the justice of the case."

The pursuers pleaded;—(1) The sale and transfer of shares by Mr Matheson to the company condescended on, being illegal and invalid and inconsistent with and in violation of the Companies Acts, 1862 and 1867,—(a) The said transfer should be reduced as concluded for; and a Decree should be pronounced in terms of the petitory conclusions of the summons.

The defenders pleaded, *inter alia*;—(3) The defenders should be absolved, in respect of the lapse of time since the transfer was granted and accepted, and of the actings of parties and the change of circumstances, condescended on. (4) *Restitutio in integrum* being impossible the defenders should be absolved. (5) No notice of any calls having been given to the defenders or Mr Matheson, and the said calls not having been duly made, so far as the defenders are concerned the defenders should be absolved from the conclusion for payment of calls. (6) The company and the shareholders and creditors thereof having acquiesced in and adopted and homologated the said sale and transfer the pursuers are barred from now maintaining their present claims.

A lengthy proof, both documentary and oral, was led, from which it appeared that of the 4250 shares 1250 were from first to last acquired by the company. A number of these were re-issued—but not those originally held by Mr Matheson—but 758 stood in the name of the company.

it went into liquidation. The minutes and balance-sheets of the company shewed that the fact of the company's holding its own shares must have been known to the shareholders.

There was evidence (quoted by Lord Shand, *infra*, p. 291) to shew that some of the company's existing liabilities had been incurred prior to May 1876, when Mr Matheson transferred his shares.

The Lord Ordinary (Trayner), on 10th March 1888, pronounced the following interlocutor:—"Finds that it was *ultra vires* of the General Property Investment Company to purchase from the late Robert Matheson the 250 shares mentioned on record, and that the transfer of said shares, now sought to be reduced, was illegal: Finds, further, that the pursuer, as liquidator of said company, is entitled to recover, and that the defenders are bound to make payment to him of the sum of £254, 11s. 10d., being the amount paid by said company to the said Robert Matheson, in respect of said transfer, with interest thereon at the rate of five per cent from the date of citation to this action till paid: *Quoad ultra* supersedes further consideration of the cause *in hoc statu*: Grants leave to reclaim."\*

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\* "OPINION.—The pursuers in this case seek decree against the defenders, the representatives of the late Mr Robert Matheson, in the first place for reduction of a pretended transfer by Mr Matheson to the company of 250 of the company's shares; and secondly, of a pretended entry in the books of the company, dated 1st October 1876, of the names of the company as holders of the 250 shares. These reductive conclusions are followed by a conclusion for payment of over £3000, made up of £254, 11s. 10d. paid by the company to Mr Matheson in respect of the transfer, and the balance of calls made on, and said to be payable in respect of, the 250 shares in question. The defenders say that no notice of any calls has ever been given to them, and that they should be absolved from the conclusions relating to the calls.

"The last of the calls is one made since the company went into liquidation, and it is quite obvious that with that I cannot meddle; that is a matter that must be disposed of in the liquidation. With regard to the other calls, I am not in a position to pronounce any judgment at present. No argument whatever has been addressed to me on one side or the other with regard to the question raised by the defenders' fifth plea. It is stated by the defenders that no notice was sent to them or to Mr Matheson that the calls in question had been made, and I might almost assume that to be true, because at the date of the respective calls Mr Matheson's name was not on the register of the company, having been removed in respect of the transfer now sought to be reduced.

"What effect the absence of due notice may have upon the question of the defenders' liability for the calls is a matter I may have to consider and determine. But I think it advisable to supersede consideration of that matter at present, for a nice question has been raised by the defenders as to whether in the whole circumstances of this case they are now subject to be put upon the register of the company as representing Mr Matheson, and thereby made liable as contributories. The defenders' argument is based upon certain words in the Companies Acts of 1862, and undoubtedly may give rise to some difficulty. At all events, it involves some nice considerations, and I am not disposed to throw any difficulty in the way of the defenders pleading that right which they have, if it is a right to exemption, before the Judge who is taking charge of the liquidation.

"Therefore, at this moment desiring not to prejudice anybody's rights, I am to supersede consideration of this case *quoad* the calls, to enable either the pursuer to apply to the Judge in the liquidation to have the defenders put upon the register of shareholders, or to allow the defenders, if they think right, to take any steps for their own protection against such liability as would thereby

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On 25th February 1888 the liquidator of the company had presented a note to the Lord Ordinary (Kinnear), before whom the liquidation depended, to have the list of contributories varied, and the names of Mr Matheson's trustees placed thereon in respect of the 250 shares. Answers were lodged by the trustees, and the parties having agreed that the evidence in the reduction process should be held as evidence in this cause also, the Lord Ordinary thereupon, of consent, reported the cause to the First Division.

Both causes were heard together.

Argued for the reclaimers (defenders in the reduction process, and respondents to the note in the liquidation);—I. It was immaterial to them in which of the two processes the questions which had been raised were decided, provided they were not deprived of the benefit of the 35th section of the Companies Act of 1862.\* That section fell to be read along with the 98th section of the same Act, which provided for the collection and application of assets after an order for winding up had been made. Under the 35th section it was for the liquidator to satisfy the Court "of the justice of the case." *Prima facie*, the present application for rectification was a most unjust one. Matheson had only been on the register for a few months when he transferred his shares at their market value to the company, and their name was substituted for his upon the register. Matheson himself had died within a year after the transfer of the shares, and nothing more was heard of the matter, and no notice of calls or of meetings had been made by the company until this claim was made by the liquidator ten years later. Matheson had been bound by the company's articles to offer the shares to the company in the first instance, and if they had not taken them he could have disposed of them to a third party. Even after Matheson's death his representatives might have sold the shares if they had known that the transfer could not stand. Besides, the fact that the company held a number of its own shares, even if not previously known, had been brought to the notice of the shareholders in the balance-sheet of 1882, from which it appeared that it at that time held 508 of these shares, and the shareholders had thereby homologated the transfer. All these were circumstances which the Court

be imposed. What I propose to do in the meantime is to find that the transfer in question was illegal and invalid, and that the defenders are liable in repayment of the sum paid by the company in respect of that transfer. It might have been supposed that, on that finding, I should at once have proceeded to the logical conclusion of reducing the transfer; but I do not do that in the meantime, because if I were to reduce the transfer, it might have the effect of restoring Mr Matheson's name to the register, and that might be settling the whole question against him, and practically against his representatives, and I do not desire to do that in the meantime. All that I shall do is to find that the transfer was illegal; that the defenders are bound to repeat the price; and *quoad ultra*, supersede consideration of the case."

\* The 35th section of the Companies Act of 1862 provides,—“If the name of any person is, without sufficient cause entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may . . . as respects companies registered in Scotland, by summary petition to the Court of Session . . . apply for an order of the Court that the register may be rectified; and the Court may either refuse such application . . . or it may, if satisfied of the justice of the case, make an order for the rectification of the register. . . .”

would take into consideration in judging of the "justice of the case." No. 57.  
 This case was distinguishable from that of *Trevor v. Whitworth*.<sup>1</sup> That  
 was a case where a shareholder who had sold his shares to a company  
 immediately before its liquidation sued the liquidator for payment of the  
 balance of the price, and it was an inchoate transaction, very different  
 from the present. If proceedings had been taken against Matheson or his  
 representatives *de recenti*, it must be admitted that the transaction could  
 not have been supported. But Lord Macnaghten's opinion in the case  
 of *Trevor*, in dealing with the judgment in the *Dronfield Silkstone Coal*  
*Company*<sup>2</sup> was in point, where his Lordship seemed to hold that the  
 actings of a company subsequent to the repurchase of its own shares  
 might operate as a bar to their obtaining the remedy which they sought  
 here. Upon the question of the liability for calls it could not be  
 pleaded, looking to the case of *Ferguson*,<sup>3</sup> that although notice of calls  
 was required under sec. 4 of Table A of the Companies Act, 1862, the  
 want of such notice was of itself fatal to the demand now made. But  
 this was a matter which must be taken into account in considering  
 "the justice of the case," because, if notice had been given, the defenders,  
 as had been already said, might have got rid of the shares. Further, it  
 was proposed to make these calls available to pay not only those who  
 were creditors at the date of the transfer but subsequent creditors also.  
 At any rate interest could not be claimed upon these calls. Besides,  
 credit must be given for the dividends which the company had paid, and  
 if the liquidator succeeded in his demand for payment of the calls, that  
 payment must suffer deduction by the amount of the dividends which  
 had been earned by the shares after their re-purchase. It was attempted  
 to say that these dividends had not been earned, and that they had been  
 paid out of capital, but that had not been proved. II. What was asked  
 implied that there must be *restitutio in integrum*, but that was impossible.  
 Ten years after Matheson's name had been removed from the register the  
 company had gone into liquidation, and it was proposed to restore  
 matters *in integrum* by offering his representatives 250 shares in a bank-  
 rupt concern. The company being in liquidation *restitutio in integrum*  
 was impossible.<sup>4</sup> III. Assuming the liquidator to be entitled to a  
 remedy, the proper course was to place upon the register the names  
 of the directors and secretaries of the company who had signed the  
 transfer.<sup>5</sup>

Argued for the liquidator;—I. The transfer by Matheson to the com-  
 pany of his 250 shares was not only voidable, but was *ab initio* void, and  
 it was not in the power of the company to bar themselves from making  
 good a challenge of it. The case of *Trevor* put this beyond doubt,<sup>6</sup> and  
 the legal result was that the contract of sale must be regarded as never  
 having been executed. The dicta of Lord Macnaghten in reference to the  
*Silkstone Coal Company* case in his opinion in *Trevor's* case, which had  
 been founded on upon the other side, were merely *obiter*, and were not  
 necessary to the decision. The Master of the Rolls (Jessel), in giving

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<sup>1</sup> 12 App. Cas. 409.

<sup>2</sup> Dec. 20, 21, 1880, 17 Chanc. Div. 76.

<sup>3</sup> *Ferguson v. Central Halls Co.*, July 20, 1881, 8 R. 997.

<sup>4</sup> *Addie v. Western Bank*, June 9, 1865, 3 Macph. 899, revd. H. of L., 5 Macph. 80; *Graham v. Western Bank*, Feb. 2, 1864, 2 Macph. 559, March 8, 1865, 3 Macph. 617, Lord Curriehill, p. 631.

<sup>5</sup> *Gardiners v. Victoria Estates Co., Limited*, July 18, 1885, 12 R. 1356.

<sup>6</sup> *Trevor v. Whitworth*, July 11, 1887, L. R., 12 App. Ca. 409, Lord Watson, p. 428; cf. also the *Ashbury Railway Carriage and Iron Co. v. Riche*, 1875, Eng. and Ir. Appa. 653, Lord Cairns, p. 672.

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his judgment in the *Silkstone* case<sup>1</sup> had held that the transaction being void, no lapse of time could make any difference. Besides, even assuming Lord Macnaghten's views on the *Silkstone* case to be sound, there was a material distinction between the facts of that case and of the present. There the company had the object of getting rid of a troublesome shareholder, and the shareholders authorised the transaction. Here the liquidator had an equitable claim so far as regarded those who were creditors for debts due by the company prior to the date when Matheson ceased to be a shareholder. The words of the 35th section, "if satisfied of the justice of the case," merely meant "if the case was quite clear," and their application was not restricted to the case of a liquidation. They applied equally to the common law action.<sup>2</sup> It might be that in so far as the liquidator could be said to represent shareholders who had ratified the transaction he was barred from questioning it. But here was a corporation which represented not only existing shareholders, but future shareholders and creditors, and if on looking back it appeared that the company or any of the shareholders had been acting beyond their powers, redress might be had at any distance of time. The corporation could not bar itself when the act in question was an illegal act. Neither could the directors nor the general body of shareholders bind the company to anything outwith its powers. No real distinction could be drawn between cases where those who were interested were creditors prior to the illegal transaction complained of, and others where those interested became creditors subsequently to the transaction. The cases which had been decided upon the subject of promotion-money were in point. No distinction of that kind had ever been taken in these cases between one set of creditors and another, and where a shareholder had paid up his shares in kind and not in cash, when this was discovered—however long afterwards—payment in cash might be demanded.<sup>3</sup> It might have been different if the proposition, that a call could not be enforced unless notice were given at the time, was sound. But it had been held that a liquidator might give notice of and enforce a call even after the liquidation had commenced.<sup>4</sup> II. A demand for *restitutio in integrum* could only be pleaded where a contract was voidable. Where there was a radical nullity that doctrine had no place.<sup>5</sup>

At advising,—

LORD SHAND.—The General Property Investment Company, with reference to certain of whose shares the present question has been raised, was incorporated under the Companies Acts of 1862 and 1867 in February 1876, with a capital of £42,500, the shares being divided into 4250 shares of £10 each. The object of the company was practically to speculate in land. They proposed to purchase lands which were likely to rise in value, to hold them for a time, and then to sell them as advantageously as they could, and they carried on business

<sup>1</sup> *In re Dronfield Silkstone Coal Co.*, 1880, L. R., 17 Chanc. Div. 76.

<sup>2</sup> *In re National and Provincial Marine Insurance Co.*, 1867, L. R., 2 Chanc. App. 685; *In re Gresham Life Assurance Society, ex parte Penney*, 1872, L. R., 8 Chanc. App. 446.

<sup>3</sup> *In re Canadian Oil Works Corporation (Hay's case)*, 1875, L. R., 10 Ch. App. 593; *Huntington Copper Company v. Henderson*, Jan. 12, 1877, 4 R. 294, aff. Nov. 29, 1877, 5 R. (H. L.) 1.

<sup>4</sup> *Stone v. City and County Bank*, 1877, L. R., 3 C. P. Div. 282.

<sup>5</sup> *Graham v. Western Bank*, Feb. 2, 1864, 2 Macph. 559, March 8, 1865, 3 Macph. 617; *Clarke v. Dickson*, April 26, 1858, 27 L. J., Q. B. 223; *Houldsworth v. City of Glasgow Bank*, March 12, 1880, 7 R. (H. L.) 53.

for about ten years, till November 1886, when they became insolvent. This No. 57.

Court then pronounced an order for winding up the company, and Mr Myles was appointed liquidator. It appears that during the existence of the company a number of the company's own shares were purchased by the directors, one of the articles of association purporting to confer on them a power to make such purchases. Part of these shares were re-allocated, mainly, if not altogether, to existing shareholders, but when the liquidation came into force the company had in their hands no fewer than 758 shares of their own stock. The late Mr Matheson had been an original shareholder of the company to the extent of 250 shares. He paid the deposit upon these shares, but shortly after having done so he found that the reason which had induced him to connect himself with the company no longer existed, because, while he had anticipated professional employment as a valuator for the company, he found that his engagements otherwise would not admit of his taking such employment, and accordingly an arrangement was made between him and the directors that the company should purchase his shares. This they agreed to do, and to repay the deposit of £1 on each share, with interest at 5 per cent to date. The company accordingly accepted a transfer of the shares. A call, I believe, had been resolved on by that time, but of course it was not enforced, the transfer having been accepted before it became payable, and it appears that Mr Matheson's name was removed from the register or stock ledger, and the shares carried to an account of shares re-purchased by the company. Mr Matheson died in 1877, and for ten years, and indeed until this liquidation occurred, no more was heard of these shares by anyone representing him. The company went on doing business, paying large dividends for one or two years, but these dividends ceased, and then calls were made, and I believe an additional call of £1 has been made since the liquidation commenced, exhausting the whole nominal capital. It appears, I think, that Mr Matheson might, and probably would have sold his shares to a third party in the market, or to some other shareholder, if the company had not bought them, and his executors after his death had no reason to anticipate any responsibility in connection with them, so that undoubtedly the case now presented, viz., that the contract must be set aside, and Mr Matheson's trustees placed on the register of the company, is one of very great hardship. There can be no question of that. But on the other hand, the liquidator, founding, as he was bound to do, on the strict principles applicable to joint stock companies under the statutes, has taken proceedings for two purposes. In the first place, he has brought an action of reduction to have the transfer by Mr Matheson set aside, and the price which he received repaid to the company with interest, with a conclusion also for payment of the calls made by the company and by the liquidator. That action depended before Lord Trayner, who has given findings to the effect, first, that it was *ultra vires* of the company to enter into the transaction with Mr Matheson; and second, that the pursuer is entitled to recover the sum of £254, being the amount paid by the company to Mr Matheson, and interest. In addition to that action there is before us a note presented to Lord Kinnear, in which his Lordship, as Judge in the liquidation, is asked to put the trustees and executors of Mr Matheson on the register, in respect of their holding of these shares, and there again there is a claim made for the payment of calls. That note has been simply reported to the Court to be taken up with the action of reduction, and we have now to deal with both proceedings.

So far as regards the action of reduction, I think that although a defence was

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urged against any decree for payment of calls, on the ground of the lapse of time that has taken place, and the actings of parties, it was scarcely maintained that there was any legal ground upon which the defenders could resist the conclusions in so far as the Lord Ordinary has given effect to them. His Lordship has found that it was *ultra vires* of the company, under the Joint Stock Companies Acts of 1862 and 1867, to become purchasers of their own shares, and upon that ground he has found that the transaction was illegal, and that the price must be repaid. If there was any argument against that view of the Lord Ordinary, I have only to say that I think the point has been clearly settled by the decision in the case of *Trevor v. Whitworth* (L. R., 12 App. Ca. 409), shortly before this action was raised, and as we have already had occasion to refer to that case very fully in the case of *Klenck* (*ante*, p. 271), I shall say no more than this, that I think it clearly decides that a transaction of this kind is not merely voidable, but is void, as being *ultra vires* of the company. It is a transaction which not only the directors had no right to enter upon, but which even the company themselves at a meeting of all the shareholders could not adopt, because it was directly in the teeth of the Statute of 1862. It is to be observed with reference to the opinions given by the learned Judges in the House of Lords that the judgment is the result of a careful examination of the provisions of the Statutes of 1862 and 1867, and is strongly placed upon the ground that creditors dealing with companies limited under the Companies Acts are entitled to look to the capital as disclosed in the memorandum of association as the fund to meet their debts, and that a company cannot cut into that capital by any such proceeding as purchasing back its own shares any more than they can by issuing shares at a discount. Now, that being so, it appears to me that we must plainly adhere to the interlocutor of the Lord Ordinary so far as it goes.

But the further questions under the conclusions for reduction and the petition have now to be disposed of. The first question is, is the transfer to be reduced?—and I think it follows from what I have said that there must be decree of reduction of that transfer. The next question is whether Mr Matheson's representatives are to be put upon the register as the holders of these shares. That is resisted by the executors on the ground, as I have said, of the lapse of time, and of the circumstances I have already referred to. It is stated, and I think it is made out upon the proof, that at least a number of the shareholders were aware that the company was purchasing its own shares. We have the fact that in the books of the company the shares after the delivery of the transfer were no longer in Mr Matheson's name, or in the name of his executors, but that they stood in the name of the company, and the balance-sheets circulated among the shareholders, at least after 1881, made it clear that the company had purchased and themselves become holders of a large number of their own shares. It was further said that, but for the conduct of the company, Mr Matheson would have sold his shares to a third party, and in any view, that his executors would have so sold them shortly after his death in 1877. That being so, it was contended that, under section 35 of the Statute of 1862, which, in dealing with the amending of the register by putting on a shareholder's name, uses the expression that the Court shall do so "if satisfied of the justice of the case," it would not be in accordance with "the justice of the case" that we should adopt that course here, and place the name of Mr Matheson's executors, as representing him, upon the register. On the other hand, it appears from the proof that there has been a very large amount of debt incurred by the company, and that there is

one special debt of very considerable amount which was incurred before the transaction with Mr Matheson for the purchase of his shares took place at all. Mr Myles is examined on that point, and he says,—“There is a bond to H. R. Cunningham for the sum of £3000, which is not all paid up. The money was received on 15th May 1876. Then there is £800 of Clarke’s trustees’ bond. No claim has been made in respect of that—indeed that has been paid up by a sale of the property by the bondholders since the liquidation. (Q.) With regard to Cunningham’s bond, there is a deficiency in the subject of security? (A.) Upwards of £1100 is the amount of the claim in the liquidation. (Q.) The heritable subjects not having been sold? (A.) They are interested in the property that has been sold by Clarke’s trustees, but they will get nothing out of it. (Q.) To some extent the security over which their bond extended has been realised? (A.) Yes, but by a prior bondholder, and they get no benefit. I am quite satisfied that the deficiency is not overstated in the claim that has been made; I think it will probably be more.” So that we have an existing debt of upwards of £1100 incurred before Mr Matheson sold his shares to the company, and a number of debts incurred afterwards.

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In that state of matters, the question is whether the liquidator is to be precluded from the remedy which he asks, of putting Mr Matheson’s execution on the register. I do not think the defenders can successfully resist the liquidator’s demand to that effect. If the legal right of the company be clear, then it follows that the justice of the case requires that effect shall be given to that right. Now, the ground on which the case of *Trevor v. Whitworth* was decided was that the purchase of the shares was *ultra vires* of the company. The transfer is therefore an absolute nullity, and when it is maintained for the defenders that the company have adopted or homologated what was then done, the reply is obvious, that a company of this kind, carried on under the statutes with the limited powers which these statutes confer, can no more by adoption or homologation make a proceeding of this kind legal than they can lawfully enter into the original transaction itself. It is a nullity originally, and the company cannot homologate or adopt a nullity, for that is equally *ultra vires*. And so upon that ground I think the case for the defenders fails. It is clear also that there are creditors who are not satisfied—creditors to a large amount, whose debt existed before this transaction took place,—and they are entitled, through the liquidator, to have it found that the proceeding, whether originally or by adoption, was *ultra vires* and could not prejudice them. Then there are creditors for large amounts whose debts were afterwards contracted. I do not express any final opinion, but the leaning of my opinion is to the effect that even later creditors are entitled to get behind a transaction of this kind, because it is within their right to say that they must have the whole capital of this company in the condition in which the shares were issued to the shareholders, in so far as the shareholders have not validly transferred their shares, and to be put in a position to realise that capital, and, through the liquidator, to cut down a transaction of this kind. The views that I have now stated as to this transaction being clearly *ultra vires* of the company, and as to the effect of a transaction of that kind being such that it cannot be adopted even by homologation, I think are strongly borne out by the decision of the Court in the case of the *Ashbury Railway Carriage Company*, which has been so often referred to in cases of this kind, regarding the powers of joint stock companies. There was a reference in the argument for Mr Matheson’s executors to an im-



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portant part of the opinion of Lord Macnaghten in the case of *Trevor v. Whitworth*, where he discusses the judgment in the case of the *Silkstone Colliery Company*, and where his Lordship indicates a strong opinion that although the judgment was bad in so far as it was held that the company could purchase back its shares, he indicates very strongly that he thinks it was well decided in the result, because of the actings of the company subsequent to the re-purchase of its own shares, and because of the position in which the company was when the claim to put the shareholders again on the register was first made. I shall only say with reference to the views his Lordship expressed on this point that this case differs materially from that of the *Silkstone Colliery Company* in this important particular, that in that case there was no creditor claiming who had been a creditor when the re-purchase of the shares was made by the company. The creditors all claimed on debts subsequently incurred. But further, his Lordship's dicta on this point were *obiter*, not entering into the grounds of judgment, and it appears to me that if it be just as much *ultra vires* of a company to homologate a transaction of this kind as it was to enter into it originally, the actings of the company subsequent to the transaction cannot make it effectual and binding on the company in liquidation. If the case had been one of a shareholders' liquidation only, there might be room for the argument that shareholders, and certainly shareholders who were parties to a transaction of this kind, would be barred from insisting on a former shareholder being brought on the register after all that had occurred, but the case does not bring any point of that kind up for consideration. Then, although it may be quite true that had this question been raised at a much earlier date, Mr Matheson or his executors might have sold the shares to a third party, this can be no answer to the liquidator's claim, for his reply is that the nature of the transaction being void it was open to challenge under the statutes at any time, and the shareholder was bound to know that this was the law. What I have said now leads, I think, first, to our proceeding a step further than the Lord Ordinary has done, viz., to the granting of a decree of reduction of the transfer, and, in the next place, to the putting of Mr Matheson's executors on the register.

But there remain questions about two matters which have not been fully discussed, and which, in any judgment that we now pronounce, must be reserved for consideration. I refer to the question as to the liability for calls, and also as to the right to credit for dividends. On that matter I should like to say that it appears that the calls were never intimated to Mr Matheson's executors, and naturally they could not be intimated because they were not treated as shareholders. It is clear, therefore, that in the absence of intimation till the service of the summons of reduction, an important question must, in any view, arise in regard to the interest which can be debited on account of calls. On the other hand, Mr Matheson's executors say that all the other shareholders during the period which elapsed after the re-purchase by this company of the shares in question received large dividends for some years, and they claim credit for these dividends, with interest applicable to them. In regard to these dividends, the liquidator has intimated that he is to maintain that they were paid out of capital and not out of profits. I must say I was not satisfied on the argument I heard that this has been made out on the proof, but that question remains for consideration, and all I shall say about it now is, that it will not do to say that property has come down greatly in value during subsequent years to look the question in the light of that great depreciation as the leading element

to guide us with reference to what the directors did at a time when there was no such depreciation, and when property was rising in value. They may have been sanguine, but if they honestly believed that the properties had largely risen in value so as to warrant the payment of dividends, the very purpose of the company was to take advantage of such rise in value, and to pay dividends accordingly. But a second point may further be urged for Mr Matheson's executors, that, if they are to be put in the position now of having to come into this company and to pay calls as if they had been in the company all along, they would have got dividends as the other shareholders did, and it is very hard to say that they shall not get the benefit of the profits, which in the case supposed would have been so much money in their pockets. I mention these matters for the purpose of leading up to this, that I think all that might very properly form a subject for settlement as between the parties. Equitable considerations fairly come in in questions of this kind. Of course Mr Myles must do his duty as liquidator, but it appears to me that there are materials, on the grounds I have now stated, for an arrangement with reference to the interest on these calls, and with reference to the dividends, and I hope parties may ultimately see their way, instead of spending more money in litigation, to arrange these matters without further proceedings.

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**LORD MURE.**—I concur in the view which Lord Shand has now expressed, for I can see no sufficient answer to the objection taken to the purchase of the shares by the directors from Mr Matheson. The sale was null and void from the first, and must therefore be set aside. That involves the affirmance of the Lord Ordinary's findings in fact, and the pronouncing of a decree as Lord Shand proposes. It also involves this, that the names of Mr Matheson's executors must be placed on the register. It is a hard case unquestionably in the circumstances, and if I could see my way to any course which would save Mr Matheson's representatives from the loss which this will lead to, I should be very glad to adopt it. But having regard to the nature of the transaction, and to the fact that the question is raised with creditors, I see no ground for relieving them to any extent at present.

I sympathise very much in the suggestion Lord Shand has thrown out as to the questions that may hereafter occur. If this question had been raised by the shareholders alone, and were not a question with creditors, there are, I think, words in the statute which appear to give the Court a discretionary power of dealing with such a question, because the shareholders were equally to blame in what was done. But these questions do not arise here, and when they do arise the consideration as to how far justice and equity may not require a modification of some of the demands that may then be made will also arise, but that is a matter upon which I am not in a position at present to offer any opinion.

**LORD ADAM.**—With reference to the first question here, I think that, upon the authorities and upon the reason of the case, there can be no doubt that the sale must be reduced and set aside, because I think it was a clear and absolute nullity—a sale which the company had no power whatever to enter into. Therefore, upon that point, I concur with Lord Shand, and the sale being a nullity, I should have thought that it followed almost as a matter of course that Mr Matheson's representatives should go upon the register. But it has been urged to us that the words of the 35th section of the Companies Act of 1862 apply, viz., that the Court may, if "satisfied of the justice of the case," make

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an order for the rectification of the register. In this case I am satisfied, on the grounds stated by Lord Shand, that it is in accordance with "the justice of the case" that the representatives should go upon the register; and I do not think it is necessary to consider what the particular force of these words in the 35th section may be, because I am satisfied, in any view of the case, that the register must be rectified by the representatives going on it. But it is obvious that after they are put upon the register, questions may arise as to the liability to calls, and as to interest. On these matters I reserve my opinion.

LORD PRESIDENT.—I concur with all your Lordships in holding that the judgment of the House of Lords in *Trevor v. Whitworth* necessarily rules this case so far, and that we must hold upon that authority that the sale of shares by Mr Matheson to the company, and the acceptance of that transfer by the company, was a nullity.

With regard to the special circumstances of the case which have been founded on by Mr Matheson's executors, the lapse of time during which Mr Matheson's name has been off the register, and the conduct of the company in dealing with these shares as no longer belonging to him, and so forth, I can only say that I have never been able to understand how a statutory company can confirm a nullity, and if they could not by direct resolution confirm a nullity, I do not see how that can be done *rebus et factis*. Acquiescence is nothing at all, unless it amount to confirmation or be equivalent to confirmation, and if it be impossible for a statutory corporation to confirm a nullity by direct resolution, it certainly cannot do so in any other way.

The judgment proposed, I think, is quite right, in so far as we advance a step further than the Lord Ordinary in the reduction has done, and pronounce decree of reduction, and also pronounce decree for repayment of the price, viz., £254, 11s., paid to Mr Matheson by the company. But the other question which is raised both by the conclusions of reduction and by the application of the liquidator is a question of novelty, and, I think, of very great importance, and it is one upon which hitherto we have heard no argument. Whether your Lordships will be inclined to remit the hearing of that to the Lord Ordinary in the reduction, or to the Lord Ordinary in the liquidation, or to keep it here and dispose of it directly, I am not disposed to offer any very confident advice, but that would require to be determined before we adjust the terms of our interlocutor. If the parties find themselves in a position to negotiate upon this subject, we might allow the matter to stand over. On the other hand, if there is no prospect of any settlement, perhaps the best plan would be to remit the matter to the Lord Ordinary in the reduction, for it is more directly and properly raised there than anywhere else.

In the action of reduction, the Court pronounced the following interlocutor:—"The Lords having considered the reclaiming note by Mrs Alexa Urquhart or Matheson and others (Matheson's trustees and executors), against Lord Trayner's interlocutor, dated 10th March 1888, and heard counsel for the parties, adhere to said interlocutor: Refuse the reclaiming note, and decern in terms of the reductive conclusions of the libel; also decern against the defenders for payment to the pursuers of the sum of £254, 11s. 10d. sterling, with interest thereon at the rate of five per centum per annum from the date of citation to this action till paid, reserving all questions of expenses."

In the note the Court ordered the names of the respondents to be placed on the list of contributories, but reserved the question of the respondents' liability for calls, and remitted to the Lord Ordinary to hear parties thereon. No. 57.

The case was ultimately compromised as regarded the questions reserved.

J. SMITH CLARK, S.S.C.—HORNE & LYTELL, W.S.—Agents.

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J. R. CUNNINGHAM, Pursuer (Respondent).—*Asher—Salvesen.*  
COLVILS, LOWDEN, & Co., Defenders (Reclaimers).—*Balfour—Ure.*

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*Ship—Seaworthiness—Charter-party—Exception—"Error or negligence of navigation"—Onus.*—The charter-party of a steamship freed the owners from liability for "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever nature and kind, during the said voyage." The vessel was lost through failure of steam-power, in consequence of which she drifted on a lee shore. In an action at the instance of the charterers against the owners for damages for the loss of the cargo, the Court (*rev. judgment of Lord Kinnear*) held (1) upon the evidence that the failure of steam-power was attributable to the water having been allowed to run too low in the boiler, so that the metal surfaces of the crowns of the wing furnaces and some of the boiler tubes were denuded of water, with the result that they contracted unevenly, and consequently leaked, when cold sea-water was admitted into the boiler, and (2) that the loss fell under the exception of "errors or negligence of navigation" in the charter-party, and that therefore the owners were not liable in damages.

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*Observations per Lord Shand* on the incidence of the *onus* of proof in a question between charterer and shipowner where cargo is not delivered owing to the loss of the ship.

*Opinion per Lord Shand* that in a charter-party under which a vessel sails to a certain port to take in cargo and convey it away there is an implied undertaking not only that she shall be seaworthy when she leaves for the port, but also when she sails from it, after the cargo has been taken on board.

(*See Seville Sulphur and Copper Co., Limited, v. Colvils, Lowden, & Co.,* 1st Division. Lord Kinnear. M. March 20, 1888, 15 R. 616.)

By charter-party dated 2d September 1886, it was mutually agreed between Colvils, Lowden, & Co., owners of the s.s. "Ethelwolf," and J. R. Cunningham, merchant, Glasgow, *inter alia*, "that the said ship, classed 100 A1, and being tight, staunch, strong, well manned, victualled, equipped, and in every way seaworthy, and well fitted for the voyage, shall, with all possible speed, sail and proceed to Seville, Spain, and after being well and sufficiently ballasted with ore or lead if required, and not sand or mud, or anything which may be prejudicial to the cargo, the said master shall take and receive on board the said ship, from the agent of the said charterer, a cargo of fruit, say not less than 3000 H/chests oranges, or other lawful merchandise which the said charterer agrees to ship, not exceeding what she can safely stow and carry, over and above her tackle, apparel, provisions, and furniture. . . . The cargo being thus loaded, the said owner engages that the said ship shall proceed therewith with all possible speed direct to one of the undernoted ports (as ordered on signing bills of lading), and there deliver the said cargo at the place and in the manner directed by the consignees, to whom the ship is to be addressed. . . . Penalty for non-performance of this agreement: estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, <sup>&c.</sup> errors or negligence of navigation, of whatsoever nature and kind, during the said voyage, always excepted)."

In pursuance of this charter-party the "Ethelwolf" sailed from Swansea

No. 58. to Seville, and on 4th December 1886, Mr Cunningham's agent shipped at  
 — Seville, on board the "Ethelwolf," 3200 boxes of Seville China oranges.  
 Dec. 21, 1888. The bill of lading bore;—"Shipped in good order and well conditioned  
 Cunningham by J. S. Macdougall, in and upon the good ship or vessel called the  
 v. Colvils, Lowden, & Co. "Ethelwolf," whereof Cargill is master for the present voyage, and  
 now lying in the harbour of Seville, and bound for Antwerp, 3200 boxes  
 best Seville China oranges, being marked and numbered as in the margin,  
 and are to be delivered in the like good order and condition at the fore-  
 said port of Antwerp, act of God, the Queen's enemies, fire, and all and  
 every other dangers and accidents of the seas, rivers, and navigation, of  
 whatever nature and kind soever excepted, unto order or to assignees;  
 freight for the said goods as per charter-party, with primage and average  
 accustomed."

The "Ethelwolf" sailed on 5th December from Seville for Swansea and Antwerp, but was lost, with her cargo, on the coast of Spain near Vigo, on the 10th of that month.

In October 1887, Mr Cunningham raised an action in the Sheriff Court at Glasgow against Messrs Colvils, Lowden, & Co., concluding for damages to the extent of £1536, in respect of the loss of his goods on board the "Ethelwolf."

The pursuer averred in his record:—(Cond. 4) "When the 'Ethelwolf' sailed from Seville, as above stated, she was not in a condition fitted for the voyage, but was in an unseaworthy condition. In particular, her boilers and machinery were defective and out of order, the boilers leaking and the boiler-pumps out of order, and unable to supply the boiler properly with water. The feed-pump was leaking, and the water-gauge was defective and out of order. The bilges were full of dirt, and the bilge-pumps choked with dirt, so that they could not pump the water out of the bilges, and the air-pump valves were broken. She was further unseaworthy, in respect that, prior to leaving Seville, the boiler was filled with excessively muddy water. Such water is very injurious to boilers, and apt to derange the boiler connections, and to lead to injury to the furnace crowns. The sails were old and defective, and insufficient in number, and no spare sails were provided, and her bridge steering-gear was out of order and useless."

The defenders answered:—(Ans. 4) "Denied. Explained that the vessel was in all respects seaworthy when she left Seville. Her loss was due to perils of the sea, or to error and negligence in navigation, or to both of these causes combined."

The pursuer pleaded;—(1) The defenders having failed to deliver the goods in question in terms of their contract, and the pursuer having thereby sustained loss and damage to the amount sued for, decree ought to be granted as craved. (2) Said goods having been lost in consequence of the unseaworthiness of the "Ethelwolf" when she sailed on the voyage in question, decree should be granted as craved.

The defenders pleaded;—(1) The pursuer's statements being unfounded in fact, the defenders are entitled to absolvitor. (2) The loss of the "Ethelwolf" having been due to causes falling under the exceptions specified in said charter-party, the defenders ought to be assolized.

The case was appealed for jury trial, but on 16th November 1887, the Court of consent appointed the cause to be heard without a jury, and remitted to Lord Kinnear (Ordinary) to proceed with it.

Proof was led in the cause, from which, and from the evidence in the case of the *Seville Sulphur and Copper Company, Limited, v. Colvils, Lowden, & Company*, above referred to\* (which by joint minute was

\* In that cause the pursuers, who were charterers of a cargo of ore, shipped

admitted as evidence in this cause), the following facts appeared:—The “Ethelwolf” left Swansea on 20th November 1886 and arrived at Seville on 27th November. On 5th December (the bill of lading having been signed on the 4th) she sailed from Seville with a cargo of 3200 boxes of oranges to be delivered at Antwerp. Seville is situated about sixty miles from the sea on the Guadalquivir, a sluggish and muddy river. About thirty-six hours before the vessel sailed her boiler was filled, as was customary with steamers at that port, with water from the river, there being no hydrant or other means for supplying clear water. At the time when the boilers were filled it was high tide, the river being thus in its least muddy condition. The boiler and crowns of the furnaces had been cleaned after the arrival of the ship at Seville. On her way down the river, and when she was about ten miles from the sea, the vessel grounded on a mud or sand bank, and remained fast for about an hour or an hour and a-half. During that time she was going alternately ahead and astern with a view to getting off the bank. It was not disputed that some water was taken into the boiler at this point, and that that water was muddy. When the vessel reached the sea the engineer did not blow out the muddy water from the boiler, and refill it with salt water, as is often done when muddy water has been taken into the boiler of a steamer, and it was proved that that was a simple and effective method of getting rid of mud from boilers. The weather continued fine during the 6th and 7th, but on the 8th the wind rose, and a high sea was lifted. Early on the morning of the 8th the assistant engineer noticed that the gauge-glass was shewing muddy water, owing to the fact that “the rolling had turned up the mud.” He reported this to the engineer, who stated that he could then “have got the supplementary feed to work and put in sea water, and blown out the river water and the mud along with it. That, however, did not occur to me at the time. . . . I did not do so, because I did not know there was any mud in the boiler to the extent of being a source of danger.” On the afternoon of that day, at about 4.30, the crowns of the wing furnaces came down. There were three furnaces, the crown of the central furnace being lower than those of the two wing furnaces. On noticing this the engineer, to prevent an explosion, drew the fires. The wind was at this time on shore, and the captain seeing that the vessel was in danger of being blown ashore, ordered the engineer to relight the fires. This he did at about 6.30, after refilling the boiler with sea water. In consequence, however, of leakage in the boiler sufficient steam pressure could not be got up to keep the vessel off the shore, and she was wrecked on the coast of Spain, near Vigo, on the 10th. It was not disputed that the cause of the wreck was the failure of steam pressure. The evidence as to the way in which the failure was caused was conflicting, and is fully given in the opinion of Lord Adam. The Court was of opinion that it was proved that the cause was that the engineer had allowed the water to fall too low in the boiler, thus exposing some of the boiler tubes and the crowns of the wing furnaces, which were higher than that of the centre furnace. The result of this was that the cold water drawn from the sea came in contact with the heated metal of the wing furnace crowns and of the boiler tubes, which being of unequal thicknesses con-

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on board the “Ethelwolf,” under a charter-party and bill of lading the same, *mutatis mutandis*, as in the present case, sued the owners for the value of their ore lost with the ship. On 20th March 1888 the Second Division of the Court of Session, affirming the decision of the Sheriff-substitute (Erskine Murray), found in law,—“That the cause of the loss of the ore does not fall under any of the exceptions of the charter-party and bill of lading, and that the defenders are liable to the pursuers in payment of the value of the said goods.”

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tracted unevenly and thus caused leakage. The engineer admitted that on the 8th December (the precise hour was not proved) he had shut off the main feed of the boiler, and consequently the supplementary feed, and that he had noticed prior to 4.30 P.M. a diminution in the steam pressure. During the whole of the day (8th) the gauge-glass had been shewing "false water," which misled the engineer as to the amount of water really in the boiler. This arose from the clogging of the gauge-valve with mud. About 4 P.M. he had ordered the fires to be cleaned "so as to try to get more steam." The evidence with regard to the pursuer's theory that the loss of pressure was due to the presence of mud in the boiler is fully given in the previous case (15 R. 616) against the owners of the vessel and in the opinions of their Lordships in the present case. Their theory, shortly stated, was that the mud in the boiler had settled down at the bottom of the boiler on the crowns of the furnaces so as to form a non-conducting crust which prevented the heat from the furnace reaching the water. The evidence led for the first time in this action was chiefly skilled evidence directed towards shewing the effect of mud in boilers, and of the water in boilers being allowed to run too low.

On 17th February 1888 the Lord Ordinary (Kinnear) granted decree against the defenders for £1536, with interest, being the sum sued for.\*

\* "OPINION.—This is an action against a shipowner for damages for failure to deliver a cargo shipped at Seville on board the defenders' steamship 'Ethelwolf.' The contract is contained in a charter-party, by which it is stipulated that the penalty for non-performance shall be 'the estimated amount of freight, the act of God, the Queen's enemies, and fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever nature and kind during the voyage always excepted'; and the only question is whether the defenders have proved that the loss of their vessel and their cargo was due to one or other of these excepted causes.

"The 'Ethelwolf' sailed from Seville on the 5th of December 1886. On the afternoon of the 8th, while she was off the coast of Spain, and in very rough weather, the crowns of the furnaces were found to be sinking, and the engineer considered it necessary to draw the fires in order to prevent an explosion of the boiler. But the ship could not make headway under sail; and, as the only means of keeping her off shore, the master ordered steam to be got up, while the boiler was not yet cool enough to allow of its being filled with cold water without injury. The boiler was filled accordingly by pumping water from the sea; and the natural effect of that operation was to cause serious leakage, so that it was found impossible to get up steam enough to work the engines. The ship drifted towards the shore, and ultimately went on the rocks, and was abandoned by the master and crew, and became a total loss.

"In these circumstances, there can be no question that the loss was caused by a peril of the sea, in the ordinary sense of these words; and it has been decided by the House of Lords in the case of the '*Xantho*,' L. R., 12 Appl. Cases, 503, that the words must have the same meaning in a contract of affreightment as in any other maritime instrument. But that decision does not affect the general rule that a stipulation for exemption from enumerated risks will not relieve the shipowner of his obligation to provide a ship that shall be seaworthy, and in every way well fitted for the voyage which he engages that he shall perform. Nor does it alter the rule that if he fails to deliver the cargo the burden lies upon him to prove that his failure is attributable to a cause for which he is not responsible under his contract. The defenders therefore must prove that the failure of the boiler which occasioned the loss of the ship was attributable to causes arising subsequently to the departure of the ship from Seville. If it was attributable to the negligence during the voyage of persons in their employment, they will not be responsible, because they have expressly stipulated that they incur no liability for the consequences of such negligence. But if it is to be ascribed to anything in the condition of the boiler before the sailing of

The defenders reclaimed, and argued ;—The questions to be determined No. 58.  
were (1) was the ship seaworthy, and (2) was she lost through error or

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the ship, the ship was not seaworthy, because, owing to the state of her boiler, she was not, to use the language of Lord Cairns in the case of *Steel v. the State Line Steamship Company*, 'in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, might be fairly expected to encounter,' upon the voyage she was required to perform.

"The evidence as to the condition of the boiler before the departure from Seville is not altogether satisfactory. There is evidence that the tubes were leaking, and also that a dangerous crust or scale might have been deposited, which, if it existed when the ship came into harbour at Seville, was not removed before she sailed on the voyage in question. On the other hand, there is evidence that the leakage was not greater than might reasonably be expected, and not sufficient to affect the soundness of the boiler, and that the ship had not been long enough at sea since the last occasion when the boiler was scaled to allow of a fresh accumulation of salt water crust. But there was another source of danger on which the pursuer lays greater stress. The boiler was filled with muddy water from the Guadalquivir, and this is said to have been done so long before the departure of the ship that the mud had time to settle in the bottom of the boiler, so that it could not be got rid of by blowing off the muddy water at sea, as might have been done if the mud had still been held in suspension, and refilling the boiler with water from the sea. The evidence as to the time when the boiler was filled is not satisfactory ; but, according to the only witness who speaks to the time, it was done on Friday evening, and the ship did not sail till Sunday morning. If this evidence is correct, the mud was in the boiler for thirty-six hours before the ship sailed, and the defenders, upon whom the burden lies, are not in a position to dispute the accuracy of a statement which they might have disproved, if it is erroneous, by the evidence of their engineer. The theory is that the mud having settled, so that it could not be cleared out at sea, was afterwards set in motion by the rolling of the ship ; that it would naturally settle on the heated surface of the furnace crowns, and by preventing the transmission of heat, would ultimately cause the crowns to collapse. The defenders make three separate points in answer to this hypothesis—first, that if there was mud in the boiler, it must have been taken in during the voyage, because the ship took the ground in going down the river, a certain quantity of steam was lost in getting her off, and fresh water was taken in to supply the deficiency, while the propeller was working and necessarily stirring up the mud ; secondly, that the boiler should have been cleared of the muddy water when the ship got to sea, and if this were not done, any mischief arising from the presence of mud must be ascribed to negligence during the voyage ; and thirdly, that if the mud were set in motion, as the pursuer suggests, it would have settled on the crown of the centre furnace which is lower than the other, and not upon the side furnaces which alone collapsed. It does not appear to me that these answers are satisfactory. The opinion of the experts examined for the defenders as to the probability of mud being taken in while the ship was aground is not given with sufficient reference to the facts in evidence. The contrary opinion is that the mud stirred by the propeller must have been carried away from the pumps by the tide which was running up the river, and this does not appear to me to be effectually displaced by the evidence for the defenders. But further, the quantity of water taken in on this occasion was very small in proportion to the contents of the boiler, and if it had contained any considerable proportion of mud, this must probably have been detected at once by the presence of mud in the gauge-glass, whereas the gauge-glass was clear for the first two days, and only shewed mud on the morning of the 8th of December. The objection that the boiler might have been cleared at sea does not meet the pursuer's case, if it is otherwise well founded, because this operation could not have been performed if the mud had already had time to settle before the ship sailed. The third objection does not appear to me to be established, because while there is a conflict of skilled opinion on the subject, the evidence of the defenders' wit-



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negligence of navigation, which were among the exceptions in the charter-party? The *onus* of proving unseaworthiness lay on the pursuer, there being a presumption of loss by perils of the sea.<sup>1</sup> The *prima facie* cause of the accident here was a peril of the sea, viz., the storm and high sea, and that being so, the pursuer must shew that that was really only the *prima facie* and not the real cause.<sup>2</sup> The presumption was for seaworthiness, and therefore anyone impugning it must prove his contention.<sup>3</sup> Expressions such as "perils of the sea," &c. must be read in the sense in which they would be read if they occurred in a policy of insurance.<sup>4</sup> There was no question here that the ship was in herself seaworthy when she left Seville. She had had a good passage out, and her boilers had been cleaned when there. The word "seaworthy" must be taken in its ordinary sense, viz., being fit to go to sea, and the words "error or negligence" covered cases of error or negligence in preparation for the voyage as well as faults when the ship was actually in motion.<sup>5</sup> Further, the voyage must be held under the charter-party to have begun at Swansea,

nesses comes to no more than this, that, other things being equal, the mud would have a tendency to settle upon the centre furnace crown rather than upon the others. But whether in the particular case it would adhere to one rather than another, or bring down one sooner than another of the crowns to which it did adhere, might depend to a material extent upon the antecedent condition of the various furnace crowns, as to which there is no satisfactory evidence.

"But it is a more material consideration that the pursuer is not required to establish the cause to which the accident must be ascribed. He has suggested a probable cause. But it is not enough for the defenders to shew that the cause so suggested has not been sufficiently proved. The fact is that their boiler failed; and the inference is that when the ship sailed it was not in a fit condition for the voyage, unless they can prove by affirmative evidence that the failure is to be ascribed to some specific cause arising during the voyage. I think there is no evidence sufficient to displace the inference arising from the fact of the failure. The only cause suggested by the defenders is that the engineer, by an error of judgment, shut off the feed, and so allowed the water to evaporate without supplying the place of what was lost. The opinion of the experts examined for the defenders upon this point proceeds upon the assumption that the feed was entirely shut off for a period of four hours. But there is no evidence for this. The only evidence tending to prove it is that of the engineer, William Thomson. His evidence is not, in my opinion, satisfactory. But he does not say, and there is nothing else in the evidence to prove, that the feed was shut off for the time that is indispensable to support the defenders' theory.

"On the whole, therefore, I am of opinion that they have not explained by any satisfactory evidence the failure of the boiler, which undoubtedly was the direct cause of the loss of the ship; and therefore that they have failed to prove that their ship was seaworthy when she sailed from Seville.

"I do not think it proved that she was unseaworthy in any other respect, except from the condition of her boiler. But in the view I have taken it is unnecessary to examine the evidence upon other points in detail."

<sup>1</sup> Boyson v. Wilson, 1816, 1 Starkie, 236.

<sup>2</sup> Moes, Moliere, & Tromp v. Leith and Amsterdam Shipping Co., July 5, 1867, 5 Macph. 988, 39 Scot. Jur. 546.

<sup>3</sup> Pickup v. Thames Insurance Co., 1878, L. R., 3 Q. B. D. 594; Bell's Comm. (7th edit.) vol. i. pp. 597, 663, 664; Czeck v. Steam Navigation Co., 1867, L. R., 3 C. P. 14.

<sup>4</sup> "Xantho," 1887, L. R., 12 App. Cas. 503; Thames and Mersey Marine Insurance Co., Limited, v. Hamilton, Fraser, & Co., *ibid.* 484; Hamilton, Fraser, & Co. v. Pandorf & Co., *ibid.* 518.

<sup>5</sup> The "Warkworth," 1884, L. R., 9 Prob. Div. 145.

and anything done at Seville fell under the exceptions therein mentioned.<sup>1</sup> The charter-party, and not the bill of lading, ruled the contract. It was said that the fact that the ship had taken in muddy water at Seville rendered her unseaworthy before she started. It was, however, proved that it was customary for ships to take in the river water there (in fact they had no choice), and no evil results had, so far as the evidence shewed, occurred from that cause in other cases. Then it was proved that the ship went aground after she had started on her voyage, and when moving about on the mud-bank had taken in some quantity of muddy water. It was more likely, if the presence of mud in the boiler was really the cause of the accident, that it was the mud taken in on the voyage that caused the loss than that taken in at Seville. If so, the defenders were freed by the terms of the charter-party and bill of lading. But further, if there were mud present in dangerous quantities when the ship arrived at the sea, the engineer should have blown it off, as it was proved he could easily have done, and as he would have done if he had followed the ordinary course. That he did not do so was error and negligence on his part, and was therefore covered by the exception of "error or negligence of navigation."<sup>2</sup> The fault could easily have been rectified, which distinguished this case from that of *Steel & Craig v. State Line Steamship Co.*<sup>3</sup> where, through error in loading, a port-hole through which the sea was entering could not be reached, and consequently the plea of unseaworthiness was sustained. But on the merits it was maintained that the mud in the boiler could not have been the cause of the final breakdown of the steam pressure. That was the direct result of the wing furnace crowns coming down. Now, the wing furnace crowns were higher than the centre furnace crown, which did not come down, and if a layer of mud on the crowns was the cause, the layer would necessarily be thicker on the lower crown than on the two higher, and besides a layer of mud could not settle to any appreciable thickness on the crowns when the ship was rolling heavily and the action of boiling was going on in the water of the boiler. The true cause of the accident was that the water was allowed to run too low in the boiler, and when cold sea water was admitted after the fires had been drawn the inevitable consequence was leakage from the unequal expansion of the metal of the denuded tubes and furnace crowns. That the water was allowed to run so low was the result of an error on the part of the engineer in thinking that because the gauge-glass was full there was too much water in the boiler. If that was the real cause of the accident, it was covered by the exceptions, and the loss was not caused by unseaworthiness of the vessel, but by error or negligence.

Argued for the pursuer;—The *onus* in the first place lay on the ship-owner to account for the fact that a cargo was not delivered. When it was shewn or admitted that *prima facie* the loss was due to peril of the sea, that being an excepted cause, the *onus* was changed, but when it was further shewn that the efficient cause of the loss was not an excepted cause, the *onus* again shifted. That was the case here, and it therefore was the duty of the owners to prove seaworthiness, and not of the pursuer to prove unseaworthiness. The contract was constituted by the charter-

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<sup>1</sup> Scrutton on Charter-Parties, p. 67; Hudson v. Hill, 1874, 43 L. J., C. P. 573; Bruce v. Nicolopulo, 1855, 11 Hurl. & Gordon, Exch. Rep. 129; Nelson v. Dahl, 1879, L. R., 12 Chan. Div. 568.

<sup>2</sup> Good v. London Steamship Owners Mutual Protection Association, 1871, L. R., 6 C. P. 563; "Argo," 1887, L. R., 19 Q. B. D. 242.

<sup>3</sup> Steel & Craig v. State Line Steamship Co., July 20, 1877, 4 R. (H. L.) 103.

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party and the bill of lading taken together, and the liability of the owners must be settled by a reference to their terms, seaworthiness being a condition precedent of the contract.<sup>1</sup> In the bill of lading the charter-party was referred to, and it contained the words "during the said voyage." The question therefore came to be, was the loss caused by anything which occurred "during the voyage," i.e., the voyage for which the parties were preparing when the bill of lading was entered into. The duty of the owners was to provide a seaworthy ship at the time she started.<sup>2</sup> That duty they failed to fulfil owing to the boilers being filled with muddy water at Seville thirty-six hours before the "Ethelwolf" started. The lapse of time between the filling of the boilers and the start must have necessarily allowed the mud to settle in the boiler on the furnace crowns. In all the cases cited by the defenders in which the exception of error or negligence had been given effect to, the effective cause of the loss had emerged during the voyage from port to port, and none of them touched the question whether mishaps at the port of loading could be held to have taken place "during the voyage." The amount of mud taken in when the vessel was on the bank must have been very small, as very little water at all was taken in there. There was evidence that when the ship left Seville, and up to the time when she began to roll heavily, the mud did not shew in the gauge-glass. It must have collected at the bottom of the boiler and on the crowns, and only have remixed with the water when the sea rose. If that was so, it would not have been possible (as, indeed, was said by several witnesses) for the engineer to have blown off the mud when he reached the sea; he could at most have only blown off a little round the small aperture of the blow-pipe. Then when the sea rose, and the mud mixed with the water, the gauge-glass got choked, and the engineer could not have told how much water or mud he was blowing off; at all events, it would have taken, as it was said in *Steel & Craig's* case,<sup>3</sup> "considerable trouble" to get rid of the cause of danger, if, indeed, it could have been got rid of at all by "blowing off" from the boiler, and therefore this case fell under the rule of that case, or rather (if it was impossible to blow off the mud) was *a fortiori* of it. With regard to the engineer's act in shutting off the feed from the boiler, he was not acting negligently, because the state of the gauge-glass (which shewed false water when he did so) would lead any engineer to do the same. It was the proper thing to do under the circumstances. A gauge-glass full to the top shewed that there was too much water in the boiler. With regard to the theory that if mud, settled on the wing furnace crowns, brought them down, it would have brought the centre furnace crown down first—the natural currents in the boiler would account for the wing furnace being coated first. Further, when the ship had been under weigh for some time, oil leaking from the condenser would have mixed with the mud in the boiler and made it so viscous that it would adhere much more readily to the surface of the furnace crowns, and would have rendered it more difficult to blow it off. Apart from that, if a ship had anything within her at the time she started on her voyage which required only moderately bad weather to become a source of danger, she was in the eye of the law unseaworthy.<sup>4</sup>

<sup>1</sup> Cohn v. Davidson, 1877, L. R., 2 Q. B. D. 455; Kopitoff v. Wilson, 1876, L. R., 1 Q. B. D. 377; Smith v. Dart & Son, 1884, L. R., 14 Q. B. D. 105.

<sup>2</sup> Worms v. Storey, 1855, 11 Hurl. & Gordon's Exch. Rep. 427.

<sup>3</sup> 4 R. (H. L.) 103.

<sup>4</sup> Tattersall v. National Steamship Co., 1884, L. R., 12 Q. B. D. 297.

At advising,—

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LORD ADAM.—This is an action brought by the charterer of the steamship "Eihelwolf" against the owners for payment of the sum of £1536 in respect of their failure to deliver a cargo of oranges shipped by the charterer on board the steamship at Seville.

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By charter-party, entered into between them of date 2d September 1886, it was agreed that the said ship being tight, staunch, strong, well manned, victualled, equipped, and in every way seaworthy, and well fitted for the voyage, should, with all possible speed, sail and proceed to Seville, Spain, and that the master should take and receive on board the said ship from the agent of the charterer a cargo of fruit, say not less than 3000 H/chests oranges.

It was further thereby agreed that the master should sign bills of lading at any freight required by charterer, but without prejudice to the charter-party.

The charter-party further contained a clause in these terms,—“Penalty for non-performance of this agreement: estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other danger and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever nature and kind during the said voyage always excepted).”

The vessel left Swansea on the 20th November, and arrived at Seville on the 27th November 1886. She then shipped 3200 boxes of oranges, for which on 4th December the master signed a bill of lading, which bore that the said oranges were to be delivered at the port of Antwerp,—“Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted.”

It will be observed that the bill of lading does not except “errors or negligence of navigation of whatsoever nature and kind during the voyage” as the charter-party does, but it was not disputed by the charterer that he was bound by the clause of exception as contained in the charter-party.

The vessel sailed from Seville on her voyage to Antwerp on the morning of the 5th December. Seville is on the River Guadalquivir, about sixty miles from the sea. Some time after leaving Seville the vessel grounded on a bank in the river, where she remained about an hour, more or less. On getting off she proceeded on her voyage, and got to sea on the same evening. The weather was fine during the 6th and 7th, and all went well, but on the 8th it began to blow hard with a very high sea. About 4.30 on the afternoon of that day the crowns of the wing furnaces of the boiler came down. When this occurred the engineer, to prevent an explosion, drew the fires. The captain, finding the ship was being blown on a lee shore, ordered the fires to be relighted. The engineer accordingly about 6.30 refilled the boiler with water from the sea and relighted the fires. The boiler however leaked to such an extent that sufficient steam pressure could not be maintained to prevent the vessel from being driven on shore, and she and her cargo were lost on the coast of Spain, near Vigo, on the afternoon of 10th December. There is no question that the vessel was wrecked in consequence of the failure of steam power, and that this failure is to be attributed to the coming down of the crowns of the furnaces, which accompanied the drawing of the fires.

The loss of the ship was undoubtedly caused “by the perils of the sea,” and falls within the risks excepted in the charter-party. But the charterer maintains that the ship was unseaworthy when she left Seville, and that this unseaworthi-

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ness caused the loss of the ship. No doubt, if this be so, the owners will be liable. The owners, on the other hand, maintain that the ship was in every respect seaworthy, and that the injury to her boiler was caused by the error or negligence of the engineer, and that they are not liable in respect of the exception of "error or negligence of navigation" contained in the charter-party. These, therefore, are the questions for decision in this case, and the first is the question of fact, whether the vessel was seaworthy when she sailed from Seville and commenced her voyage.

The charterer sets forth in the 4th article of his condescendence several particulars in respect of which he alleges that the ship was unseaworthy, but the only one about which there is, I think, any room for serious controversy is thus expressed,—“She was further unseaworthy in respect that prior to leaving Seville the boiler was filled with excessively muddy water. Such water is very injurious to boilers, and apt to derange the boiler connections, and to lead to injury to the furnace crowns.”

The facts as to filling the boiler with water at Seville appear to be as follows.—The boiler had been blown down (that is, emptied of water) after the ship arrived at Seville for the purpose of making some repairs. These having been finished, the crowns of the furnaces were cleaned and the boiler washed out. Then about 10 o'clock on the night of Friday the 3d December, or about thirty-six hours before the vessel sailed, the boiler was filled with water from the river. This time was chosen because it was then high-tide, when the water of the river would probably be freest of mud.

The question is, whether the taking in of this water rendered the ship unseaworthy. There is no doubt, I think, that the presence of mud in the boiler of a steamer, in large quantity, may be an element of danger. But I think it is proved that when water is taken in from a muddy river, such as the Guadalquivir, it may be objectionable as tending to produce priming, and to clog the valves and their connections, but that it is not a source of danger to the boiler by forming a deposit on the furnace crowns or otherwise.

It is proved that there are no hydrants, or other facilities, at Seville by which steamers which have blown down their boilers can refill them except with water from the river. It is proved that it is the regular practice of such steamers to do so, and that no injury has resulted to them from doing so. There is no contradictory evidence as to this. It is also proved that it is the practice of steamers to do so in rivers of a like character to the Guadalquivir, such as the Seine and Garonne. If this be so, it would be difficult to hold that all such steamers are thereby rendered unseaworthy.

But it is said that in this case the muddy water was taken in so long before the vessel sailed, about thirty-six hours, that the earthy matter in suspension would be precipitated, and so cause danger to the boiler. There is, however, no evidence that it was anything out of the usual course to fill the boiler so long before sailing, or that the earthy matter would not have been as completely precipitated in six as in thirty-six hours. There are no questions asked on the subject. It does not appear to have occurred to the pursuer, when the witnesses were being examined, that there was anything objectionable in the matter. I do not myself see that the mud constituted a greater element of danger, lying at the bottom of the boiler, than when in suspension in the water, and in fact the pursuer's case is, that the mud was stirred up from the bottom by the rolling of the ship, and in this way, and not till then, became a source of danger.

But the defenders have another answer on this part of the case. They say that if the presence of the mud in the boiler constituted such an element of danger as to produce unseaworthiness if not removed, yet it could and ought to have been removed as soon as the vessel got to sea by blowing it out of the boiler and taking in sea water. This, they say, is a method quite simple, and known to every engineer, and that if the vessel was lost by reason of the presence of the mud she was not lost because of unseaworthiness, but because of the error or negligence of the engineer in not blowing it out of the boiler. In my opinion the defenders are right in this contention, and it is supported by the principles laid down in the House of Lords in the case of *Steel & Craig*, 4 R. (H. L.) 103. In that case, where a ship sailed with an open or insufficiently secured port-hole, by which the water entered and damaged the cargo, it was suggested that whether the ship was or was not seaworthy depended on the position of the port-hole; if it was easily accessible, and could be easily closed, the ship would be seaworthy; but if it was not so accessible, but would cost much time and trouble to get access to it in order to put it right, the ship might be unseaworthy. So here, if the steamer was not in any danger from the mud in the boiler so long as she was in the Guadalquivir river,—and it is not suggested that she was,—and if the mud could have been easily removed on reaching the sea, then I think she was in a seaworthy condition, and perfectly fit for her voyage when she left Seville, and the danger, if any, from the state of the water arose from the engineer's not having removed it.

Now, I think it is proved that the muddy water in the boiler could have been easily removed. One of the witnesses, Mackenzie, thus describes the operation,—"It could easily," he says, "have been cleared out afterwards, when the vessel got out to sea—that could have been done by blowing or scumming the boiler. The bottom blow-off cock could have been turned on, and the water taken in from the sea alternately until the water in the boiler was found to be perfectly clear. That is the proper method, and is well known to engineers." Six or seven of the defenders' witnesses speak of this as being a common and simple method of getting rid of mud in boilers.

But the pursuer has examined three witnesses—Messrs Neish, Donaldson, and Darling—who say that it would not have been practicable in this case, because the mud had had time to settle in the bottom of the boiler. Neish says, "that if the mud in the water had thirty-six hours to settle before steam had been got up, I don't think you could blow it off after steam had been got up. The mud would settle down in the bottom of the boiler, and get comparatively hard with the cold water, and get quite quiescent. There would be no inducement for it to be blown off, except just round about the orifice of the blow-off cock," and Messrs Donaldson and Darling agree with him.

Mr Neish, however, says, at another part of his evidence, that the particles forming the mud would be in the condition of loose soft sludge, and if this was its condition, I do not see why it should not be easily blown off. I do not think it is proved that the mud would get into any such hardened condition as here described. The evidence shews that the mud was in such a condition that, when the ship began to roll, it mixed with the water, which had theretofore been clear. Roger, the assistant engineer, is asked,—“Did anything unusual occur during your watch? (A.) Yes, the water in the gauge-glass got very muddy about three in the morning” (that was of the 8th). “(Q.) What was wrong? (A.) The wind had got abeam, and the rolling had turned up the mud. When I saw the

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The pursuer's witness Donaldson is asked,—“If an engineer could not get better water than muddy water, and had then to take it out, his duty would be to blow down the boiler, and thereby blow out the muddy water when he got to sea? (A.) Yes, I should think it would be his duty to do so. I think he could not get the whole out in that way which had settled as a deposit. (Q.) But if the vessel began to roll, so as to mix the mud with the water, he could blow it off then? (A.) Yes, he could get rid of it then, when mixed with the water. I think that if mud was moving about in the boiler in such a way that it could reach the furnace crowns, or shew itself in the gauge-glass, it could have been blown off. (Q.) Is it not a perfectly familiar operation to engineers of ordinary skill to blow muddy water out? (A.) Yes.”

It appears to me therefore to be proved that there could have been no difficulty in this case in blowing out the mud, either when the ship first reached the sea, or, at anyrate, later, when it was moving about in the boiler.

The two engineers of the ship, who ought to have known best, are of that opinion. Roger says so, and Thomson, the engineer, says,—“I could have got the supplementary feed to work and put in sea water, and blown out the river water and the mud along with it. That, however, did not occur to me at the time”; and he says,—“We could have blown off the mud after we started if we had tried. I did not do so because I did not know there was any mud in the boiler to the extent of being a source of danger.”

On this part of the case therefore I am of opinion that the ship was seaworthy when she sailed on her voyage from Seville.

The defenders maintained further, that if the ship was unseaworthy because of mud in the boiler, it was not the muddy water taken at Seville that rendered her so, but mud taken in when she was aground on the bank in the river, in which case they say the vessel was lost from dangers of navigation during the voyage.

It is not necessary in the view I have taken of the case to consider that matter at length, but my opinion is that the quantity then taken in can have made no appreciable difference on the amount of mud already in the boiler due to the water taken in at Seville, and can have made no difference in the result.

It is also right to state that it was maintained by the owners that on a sound construction of the charter-party and bill of lading the voyage must be held to have commenced at Swansea, and not at Seville; that consequently, if the taking in of the muddy water at Seville rendered the vessel unseaworthy, that was caused by error or negligence of navigation during the voyage, for which under the charter-party they are not liable. In the view, however, which I take of the facts, it is not necessary to determine that question either.

The next question to be considered is the cause of the collapse or falling down of the furnace crowns. The falling down of the furnace crowns was undoubtedly caused by the over-heating of the metal, and this again is attributable to one or other of two causes, either to the deposit thereon of a non-conducting crust, which prevents the transmission of heat from the metal to the water in the boiler, or to the water in the boiler having been allowed to fall below the level of the crowns.

The facts bearing on this part of the case appear to be as follows:—Nothing

went wrong with the engines or boilers until about 11.30 on the morning of the 8th, when the gauge-glass instantly filled with water. This, no doubt, was caused by the gauge-valves, or their connections, becoming clogged with mud. About 4.30 the crown of the port furnace collapsed, and a few minutes afterwards that of the starboard furnace. Thereupon the engineer drew the fires and reported the fact to the captain. The captain, however, finding that he was drifting on a lee shore, shortly afterwards ordered steam to be got up again. The boiler was refilled from the sea, and the fires relighted about 6.30. In consequence, however, of the cold water coming in contact with the still heated metal of the boiler, such an amount of leakage took place that steam of a sufficient pressure in the boiler could not be got up to enable the vessel to make headway enough to keep her off the land, and hence the catastrophe.

I think the collapse of the crowns of the furnaces was caused by the water in the boiler having been allowed to fall below the level of their crowns. The engineer is of that opinion now, and he was of that opinion at the time. This is clear from Captain Cargill's evidence. He says—"I remember about 4.30 in the afternoon of the 8th having a conversation with the engineer. He told me that he would have to withdraw the fires. (Q.) What reason did he give? (A.) That the water had got so low in the boiler that he could not keep up the steam." And further down he is asked—"Did you remonstrate or say anything to him? (A.) Yes, I said the ship is in a very dangerous position to do that. Could he not keep steam on till I got the ship perhaps eight or ten miles from the land? (Q.) Did he draw the fires? (A.) He came back and said that he must draw them, there was nothing else for it. The ship might be blown up. He did draw them." In cross-examination he is asked—"You have told us that the engineer reported to you that he had to draw the fires because the water was so short? (A.) That is so. I am sure that that is the report he made to me."

Then the fact that the crowns of the two wing furnaces, which were higher than that of the centre furnace, and consequently would be first denuded of water, came down, while the centre one remained intact, indicates that the reason was want of water. Again, the boiler was refilled with water from the sea before the fires were relighted. But this would not have been necessary, and would not have been done, had the boiler been fed with water in the usual way, as in that case the boiler would have been full. Then, again, the result which followed from filling with cold water the still heated boiler was exactly what was to be anticipated. The cold water coming in contact with the heated metal of the plates and tubes of the boiler, which were of different thicknesses, was certain to cause unequal contraction of the metal and consequent leakage. The result was, that whereas the normal working pressure before the fires were drawn was from sixty to seventy pounds, a greater pressure than from twenty-five to thirty could not be afterwards obtained.

Nor is there any difficulty in accounting for the water having been allowed to fall so low in the boiler. The engineer is asked—"Did you ever shut off the main feed?" The answer is—"Sometimes I have done it. (Q.) Did you do it on 8th December? (A.) I believe I did, but I do not remember. I thought there was too much water in the boiler from the indication of the steam packing and the engine priming. I cut off the main feed in that way, believing that that was the right thing to do." It will be observed that by shutting off the main feed he shut off all water from the boiler, as it had also

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the effect of shutting off the supplementary feed. He is not asked if he turned the main feed on again. But I do not doubt that he would have said so if he had, because he could not fail to know that if he did not do so, the whole blame of the loss of the ship must rest on his shoulders. That he should have neglected to turn the feed on again is perhaps to be explained by his attention having been taken up by his endeavours to rectify the gauge-glass. But however that may be, if he turned off the main feed at the time that he says that he did, and did not turn it on again, then it is proved that the crowns of the furnace collapsed about the time they might have been expected to do so.

There is one circumstance which is said to be proved, and is strongly insisted on by the pursuer as shewing that the collapse of the furnace crowns could not have been caused by want of water: it is, that as the tubes of the boiler became successively denuded of water by its evaporation, the heat would cause them to leak, and permit the escape of steam, eventually producing so large a leakage of steam, and a corresponding diminution of pressure of steam in the boiler, that the engineer could not have failed to notice it. It is said to be proved that there was no such leakage or decrease of pressure of steam noticed, and that therefore the tubes could not have been denuded of water. As it was steam leakage that would result, the steam would escape by the smoke-jack, and it would appear that its escape might not have been noticed by the engineer.

But I do not think that it is proved that no diminution of pressure was noticed before the fires were drawn. The evidence on the point is certainly not satisfactory, because apparently the parties had not realised the importance of it when the witnesses were being examined. Rogers, the assistant-engineer, no doubt says that they were able to keep up the normal pressure till the fires were drawn. But the engineer, who was the proper person to speak as to this, is not specially examined on the subject. It may be gathered, however, from his evidence that he had noticed a diminution of pressure of steam. Thus he says, "I formed the idea that the boiler was getting short of steam, and that there was too much water in it." And a little lower down he says—"At four o'clock in the afternoon" (that is, about half-an-hour before the crowns collapsed) "I gave orders to have the fires cleaned so as to try to get more steam."

We have also the evidence of Captain Cargill, who says that when the engineer informed him it would be necessary to draw the fires he told him that the water had got so low in the boiler "that he could not keep up the steam"; and again, that he said "the water had got so low in the boiler that he would be obliged to draw the fires; he could not get steam." I think, therefore, that it is sufficiently proved that there was a deficiency of steam in the boiler before the fires were drawn. The proof is not so satisfactory as it might have been, but the fault lies with the pursuer, who ought to have cleared up the matter if he meant to make a point of it.

I do not think it necessary to say much as to the rival theory of the pursuer, that the falling of the crowns was caused by the deposit of mud thereon. It appears to me to be based on assumptions of fact which are not proved, and do not exist in this case. As to the deposit of mud from muddy water in the boiler, I think the evidence shows that mud *per se* will not form a dangerous deposit on the furnace crowns of a boiler. Mr Neish, the pursuer's leading witness, says that "mud by its nature will not form a deposit or crust on the furnace crowns so as to injure them when the boiler is under steam."

It appears, however, that mud may possibly do so when it is mixed with oil

or grease, and accordingly the pursuer assumes, for the purposes of his theory, an admixture of oil and mud in this case. But there is no proof, and nothing to lead to the inference, that there was any such admixture in the boiler. I think, therefore, that there is no foundation for the pursuer's theory. But even assuming that there might have been such a dangerous admixture of oil and mud in the boiler as the pursuer assumes, I think the facts shew that it had formed no dangerous deposit on the crowns of the furnaces. If such a deposit had been formed, one would have expected it to have been first formed on the crown of the centre or lowest furnace, and that it would have come down first. In the next place, the boiler would have been in its usual condition as to water, and would not have required to have been filled with water from the sea, as the engineers say they filled it. Neither would there be anything to account for the great leakage which took place after the fires were relit, as there would have been no cold water to come in contact with the heated metal, and nothing to cause increased leakage; and finally, if a deposit on the crowns of the furnaces had been the cause of their collapse, it is difficult to see why, after the fires were relit, the crown of the centre furnace should not have collapsed, and the crowns of the wing furnaces come still further down, seeing that the *origo mali*, the deposit, was presumably still upon them.

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On the whole matter, I am of opinion that the collapse of the crowns of the furnaces, and consequent deficiency of steam pressure and loss of the vessel, is clearly traceable to want of water in the boiler, and that this deficiency of water was caused by the negligence of the engineer in failing to turn on the main feed after he had turned it off; that consequently the loss of the vessel was caused by error or negligence of navigation during the voyage; that therefore the failure to deliver the cargo is covered by the exception to that effect in the charter-party, and that the defenders are entitled to absolvitor.

We were referred to the case of the *Seville Sulphur and Copper Company* against the present defenders (15 R. 616), which was an action brought against them for the delivery of 350 tons of sulphur ore, which formed part of the cargo of the "*Ethelwolf*," and was lost with the vessel, and in which the Second Division arrived at a different conclusion from that at which I have arrived, but it is enough to say that the evidence we have had to consider is materially different from the evidence in that case.

**LORD MURE.**—I have come to the same conclusion as Lord Adam on all the important points raised in this case, and I concur in the views that he has expressed as to the import of the evidence. I find it therefore unnecessary to go into any detail on any of these points. The way the case has presented itself to my mind is shortly this—The cause of the wreck was plainly the failure of the boiler to answer the purposes of the boiler of a steam-vessel, and the boiler, I think, failed, according to the evidence, from one or other of two causes—either from the effects of the mud in the water, which was said to have been improperly taken in and which, mixed with certain substances, settled down on the crowns of the furnace, and thereby produced a state of matters which led to the collapse of the furnace crowns; or secondly, if that was not the cause of the accident, from the fact that the boiler failed through the engineer shutting off the feed, so causing so great a decrease of water in the boiler as to produce a state of matters which would lead in the ordinary course to the collapse of the furnace crowns. From one or other of these causes the ship was wrecked, there

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being a want of power to enable the engine to do what was required of it in the weather which prevailed at the time. Now, it appears to me upon the evidence that to whichever of these causes we attribute the accident, it was negligence in the navigation of the vessel which led to this collapse. It was the duty of the commander of the vessel, knowing that there had been muddy water taken in at Seville, to get quit of that muddy water when they went down the river, and it is clear on the evidence that in a well-managed vessel leaving Seville in these circumstances that course would have been taken.

The other cause of the accident—the shutting off of the feed—as has been explained by Lord Adam, was due to a mistake of the engineer in regard to the working of the boiler at the time when he examined it. He took the wrong course, and therefore there was negligence in that respect. Now, to whichever of these causes we are to attribute the accident, there was negligence on the part of the crew leading to the loss of the vessel, and that negligence is covered by the words of the charter-party. On the question of the seaworthiness of the vessel on leaving Seville, I am quite unable to see that the fact of her taking in muddy water at Seville was of itself sufficient to render the vessel unseaworthy, because even assuming it to be proved that the water taken in from the river was extra muddy (I am not quite sure that that is proved, but even assuming it to be proved) I think it is plain on the evidence that any engineer who chooses to attend to his ship can take means to get that muddy water cleared out of the boiler before he gets to sea on the way down the river. No doubt there is contradictory evidence on that point, but the evidence led by the defender on that part of the case is to my mind conclusive that that muddy water would not have operated injuriously if there had been a proper exercise of discretion on the part of the engineer on his way down the river. Therefore I think the vessel was not unseaworthy when she left Seville.

LORD SHAND.—I had an opportunity of considering the opinion which my brother Lord Adam has delivered, and I entirely concur in that opinion, both in the substance of it and in the careful and detailed examination of the evidence which his Lordship has made, subject to one observation, and only one, namely, that I attach more importance than he has done to the stranding of the steamer on the bank in the river shortly after she left Seville. I do not mean to go into the evidence, but taking it as a whole I think it is proved that there was on that occasion a considerable amount of mud drawn in from the river during the struggle that was made to get off the bank. The evidence shews, I think, that the steamer was on the bank for a material time, and there was a good deal of stirring up of the mud in the attempt to get off the bank, and accordingly I think that there was then a considerable addition made to any mud that was previously in the boiler. If so, and if the loss of the vessel can be attributed to the presence of mud in the boiler, of course the defence of perils of the sea would cover the loss, if caused by the presence of mud taken in after the vessel had left Seville, and in this view it is important to observe that there is a mass of evidence that vessels did frequently take in the ordinary muddy water of the Guadalquivir at Seville without supervening mischief of any kind.

Then, generally, in regard to the case, the pursuer's claim is made upon the footing that the cargo and the ship were lost because the taking in of the muddy water, producing unseaworthiness, really caused the accident, by having

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been the direct cause of the falling down of the crowns of the boiler, and consequent failure of the motive power. Now, the Court must be satisfied upon this point, not only that the vessel was unseaworthy, but that the unseaworthiness caused the loss of the cargo. The case is not one like that of insurance where it is quite sufficient, in order to void a policy, to prove that there was unseaworthiness, even though the unseaworthiness was not proved to be the cause of the loss. In the case of insurance, it is a condition precedent that the vessel shall be seaworthy, and if that condition be not fulfilled the contract of insurance cannot be enforced. In this case, however, there must not only be unseaworthiness, but it must appear on the evidence that the unseaworthiness caused the loss.

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We had a good deal of discussion upon the question of *onus* in the case, and I desire to say a few words upon that point. It appears to me in the first place, that the shipowners having been entrusted with the carriage of the goods, and being unable to deliver them, have an *onus* upon them to shew that they are to be relieved of the obligation to deliver, and I think that *onus* is discharged primarily by shewing that the vessel was driven on to a lee shore and wrecked. In proving that, however, it came out in the evidence that the cause of the vessel being so wrecked and driven on shore was the failure of motive power. The pursuer maintains that it is clear that the *onus* is thereby thrown upon the defenders in the action to account for this, and that it is to be presumed that the failure of the motive power arose from the unseaworthiness in respect of the boiler being defective, or in a condition dangerous to the ship when she left Sevilla. The defenders say no; that there is a clause in the charter-party saving them from the effects of the negligence of those who were working the ship, and that this was just as likely to happen from the negligence of those working the machinery as from the alleged defective state of the machinery itself three or four days before, when she left Sevilla, and before she encountered the severe weather that she did. Upon that matter it appears to me that there is no presumption of law arising in the circumstances one way or the other which can be referred to as determining the question of *onus*. It is purely a question of presumption of fact one way or the other, and that is for the Judge or jury dealing with the circumstances of each case. The case of *Cohn v. Davidson* (L. R., 2 Q. B. D. 455), referred to in the course of the discussion, was one in which, I think, the presumption of fact was absolutely clear. A vessel or lighter drawn into the harbour, in all respects apparently seaworthy, took in her cargo, and everything appeared right when she left the pier, but within two hours of her getting to sea a very heavy leakage occurred, and that leakage went on and became so bad that the vessel ultimately sank. The only inference, that could be drawn from the circumstances there, was that the vessel had received damage while the cargo was being put on board, and that a hole had been driven in her bottom, and consequently it was there held that she was unseaworthy at the time of sailing. That was simply, however, because of the special circumstances that occurred. In this case it is perhaps difficult to determine exactly how the presumption stands after the vessel had been three or four days out, and her machinery had gone wrong. If one could conceive a case in which there was no evidence to be got on the subject, and no light to be had on the matter at all, I rather think the pursuer would be right that one would rather infer unseaworthiness at starting than negligence causing the accident. But we have no

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case presenting these features, for here we have a body of evidence with two conflicting theories, and I am quite clear that the Court must on that evidence simply come to a conclusion on these theories, and say which of them is right. We have a great deal of evidence on both sides, and I do not consider the question of *onus* to be of the slightest consequence. We have simply the two theories, and the evidence in support of these is not so nicely balanced that you cannot say which of the two alleged causes of the failure of the vessel's motive power is the more probable. On the contrary, there is evidence which, I think, enables the Court to come to a conclusion as to the true cause.

Now, so taking the case on this question of *onus*, which I think is simply a question as to the presumption arising from fact, I entirely agree in the view which Lord Adam has expressed as to the true cause of this accident. Even supposing it had been proved that the vessel had taken in so much mud with the muddy water that was taken in at Seville, as might possibly cause danger to the boiler (which, however, is not proved in my opinion), yet I am of opinion with his Lordship that the pursuer has failed to make out that that was really the cause of the accident. It appears to me that the theory on which the pursuer proceeds is ingenious, but much too speculative, and having fully considered the proof on the subject, that theory, which seems to me to proceed on too many assumptions of fact, does not recommend itself to my mind. I do not think that there are facts proved in the evidence on which that theory can be satisfactorily established, and I think there are facts proved which conflict with it. When the vessel left Seville, according to Neish and other witnesses, who took the view that mud had ultimately settled down on the crowns of the boiler and caused them to collapse, everyone seems to be agreed that the muddy water having been thirty-six hours in the boiler, the mud must have fallen as a deposit—I shall not call it a cake, because it was a loose deposit—on the bottom of the boiler. There is no suggestion that there was anything on the furnace crowns then. Now, what is necessary in order to make out Mr Neish's theory? In the first place, the mud which was at the bottom has to be stirred up, and I agree with the witnesses in thinking that it necessarily must have been stirred up. The putting on of fires and the heating of the boiler would immediately cause a certain amount of boiling, and therefore stirring up of the mud, and as she went to sea the motion of the vessel would increase that, and after the third day, when the wind and the sea began to rise, it would be increased more and more. In that state of matters it appears to me that the mud which was at the bottom must have gone all through the boiler. But to make out the pursuer's theory it is required to bring that mud down and deposit it on the two upper furnace crowns which first gave way, and to deposit it there so that it became a cake adhering to the metal, with the result that the fire was no longer able to act on the water around the two upper furnace crowns. That is the theory I think. It appears to me that if there was a settling of mud there—I doubt whether there was opportunity from the motion of the vessel for the settling of the mud at all—it would go to the bottom of the boiler again, and that at least the lowest furnace-crown would be the one most readily covered, and would be the first to shew symptoms of weakness and to come down, whereas it was the two upper ones that came down. And besides, to carry out the theory you require to prove (1) a certain admixture of oil so as to make the mud adhesive, while all the time the presence of the oil requisite is not proved, and (2) the existence of a current or currents in the boiler of this peculiar nature that they would carry the mud over the low

under crown and land it on the top of the two higher side crowns. Looking at all the evidence on the subject, I can only say that this theory does not commend itself to my mind. I think the accident was much more likely to have occurred, and I believe it did occur, according to the evidence, because Thomson, the engineer, to some extent lost his head in the difficulty in which he was placed. When he went to the glass which indicated the presence of mud in the boiler, and the water very high up, and at a time when he says he thought there was priming also, the first thing he would naturally do was to shut off the feeds. The result of this would of course be to let the water get gradually low, and I think the real evidence in the case tends to shew that this was what happened. The first account accordingly which Thomson gave to the captain, when the occurrence was looking serious, was that the boiler was short of water. If the true view of the evidence be that the engineer cut off the water and omitted in proper time to turn it on again, as I think he is brought to confess, that accounts entirely for what happened. The water fell in the boiler, the two upper furnace crowns became exposed to great heat, there was no water to cover them, the action of the fire at once told, and the necessary result was that the two furnace crowns came down. Then there are the other points into which Lord Adam went fully on the evidence. I could not give a better *résumé* of the evidence on that point than he has done. And so I am of opinion that at the outset of the case there is a failure on the pursuer's part to prove that the cause of the accident was unseaworthiness of the vessel.

But, even if that were the cause, I am still of opinion that the pursuer cannot succeed, because I do not think it has been proved that the vessel was unseaworthy. The case of *Steel & Craig v. The State Line Shipping Company* shews that if a vessel goes to sea with some defect which, though it would be a cause of danger if left unremedied, may yet be easily cured, as by shutting a port-hole, or by any operation that will obviate the danger before it arises, even when the vessel is at sea, that cannot be regarded as unseaworthiness. The owners of the vessel stipulated that any error of navigation during the voyage should relieve them from responsibility. Now, I think the evidence in this case brings out a point which was not before the other Division of the Court in the former case, namely, that if there is such a quantity of mud in the water in the boiler as to lead to any apprehension of danger, the engineer has it in his power at once to cure that by blowing off the muddy water and taking in a supply of sea water. I am not prepared to say that when the vessel left Seville there was sufficient mud to cause danger, but if there was a dangerous quantity of mud so taken in everyone is agreed that the engineer had nothing to do but blow it off. The mud must be shaken up before it could produce the accident,—that is part of the pursuer's case,—and as soon as it was shaken up in the water, then was the time to blow it off. It is said by the pursuer's witnesses that the mud was all lying at the bottom, and that by blowing it off only the part of the mud at and around the orifice by which the water was driven out would be removed, but the theory of the pursuer's case is that it would be all shaken up before being deposited again on the crowns. There were two days of fine weather, and on the third day there was a heavy sea, so there was ample opportunity to have the muddy water blown off, and to take in sea water, and Thomson says if it had occurred to him he would have taken that course. Therefore I am of opinion that in his view it was not from unseaworthiness, but from an omission on the part of the engineer that the loss occurred. Taking it in either way, my opinion is that

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the loss was caused either by Thomson having cut off the water and omitted to turn on the feed again, or that it was caused by his failure to blow off the muddy water. In either case the loss was caused by the negligence of one of the servants of the defenders, and on these grounds I concur in the opinion of Lord Adam.

The defenders maintained another point in argument, viz., that they were not bound under the special terms of the charter-party to have a seaworthy ship starting from Seville, but the best consideration I have been able to give to that question leads me to the opinion that this argument is unsound. It is quite true that the vessel began her voyage at Swansea, and the provision of the charter-party undoubtedly is, that the vessel being then staunch and strong and seaworthy, and fitted for the voyage, should sail for Seville, and there take on board her cargo, and then the exceptions of perils of the sea and errors in navigation occur, relating to the voyage as a whole. I do not doubt in the least that if the vessel, being seaworthy when she left Swansea, had been lost or delayed on her way to Seville by a cause within the clause of exceptions no claim of damage could have been made against the owners of the vessel for non-arrival or non-arrival in time. The exceptions would apply to any part of the voyage contemplated. But, on the other hand, I am of opinion that though we have here a voyage in one sense out and home, we have also a cargo voyage. The charterers required to have a vessel out into which they could load their cargo, and it appears to me—and there is pretty clear authority for saying—that in every case where there is a provision for taking cargo on board, even on such a charter-party as we have here, it is an implied term of that contract that the ship at the time she leaves with her cargo shall be seaworthy. There are two leading cases on that point which were referred to, one of them in 1876 and the other in 1877, in the Queen's Bench Division of the High Court of England. The first of these was the case of *Kopitoff* (L. R., 1 Q. B. D. 377), where a bill of lading having been granted for goods, the Court held, although there was no stipulation on the subject, that if a person undertakes carriage of goods on board his ship there is implied in the contract that he shall present a seaworthy ship to carry the cargo. The other was the case of *Cohn* (2 Q. B. D. Rep. 455), and there the case of *Kopitoff* came up again for consideration, but with this difference, that in the case of *Cohn*, which I have already referred to on another point, there was a charter-party which provided that the vessel should leave a certain place where she was, go into harbour, take on board her cargo, and then sail with it. It seemed to be proved that the vessel was perfectly sound when she left the place at which she had been lying when the charter-party was entered into, that she was perfectly seaworthy when she presented herself to take on board the cargo, but an accident occurred through her grazing on the harbour bottom before she left the harbour, and it was maintained that if the vessel was seaworthy when the charter was signed, and when she started to sail from the harbour, the owner was not bound to have her seaworthy when she started with her cargo on board; but the Court in that case laid down the same principle as in the case of the bill of lading, viz., that when the charterer came to put the cargo on board the vessel, then is the time when it is important for him that the ship shall be seaworthy, and unless that undertaking is positively excluded it must be held to be implied in the contract. I do not propose to read the opinions, but the judgment came very clearly to this, that as in a bill of lading, so in every charter-party, there is an implied undertaking that the vessel at the time of sailing with her cargo shall be seaworthy. That is very well ex-

plained in the unanimous opinion of the Court, that to hold otherwise might defeat the power that a shipper of goods has to make his insurance effectual. He cannot insure his goods except on the footing of having an implied warranty of seaworthiness, and so the law holds in the contract of carriage that seaworthiness is plainly implied as an obligation on the shipowner. I am therefore of opinion that that plea maintained on the part of the defenders would not have availed them. But on the facts of the case otherwise, as I have stated, I am of opinion that the defenders ought to succeed, and that the judgment of the Lord Ordinary should be recalled.

LORD PRESIDENT.—I concur entirely in the opinion of Lord Adam, and have nothing to add.

THE COURT recalled the interlocutor reclaimed against, sustained the defences, and assoilzied the defenders from the conclusions of the summons.

BOYD, JAMESON, & KELLY, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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JAMES BRAND, Petitioner.—*D.-F. Mackintosh—R. V. Campbell—W. Campbell.*

MRS F. W. SHAW AND OTHERS, Respondents.—*Sir Charles Pearson—Maconochie.*

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*Parent and Child—Bastard—Tutor—Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27).*—A mother cannot appoint a tutor to her bastard child.

*Held* that the Guardianship of Infants Act, 1886, does not apply to bastards, and that therefore a mother cannot nominate a guardian to her bastard child under the provisions of that Act.

*Parent and Child—Bastard—Custody—Wish of deceased parent—Nobile officium.*—The mother of a bastard gave up the custody of the child, aged one year, to Mrs S., a member of the Scottish Episcopal Church, who maintained the child until the death of the mother, about 4½ years thereafter. A few weeks before her death, the mother, who had meanwhile become a Roman Catholic, and was living in a Roman Catholic Convent, executed a settlement, in which she nominated J. B., a Roman Catholic, to be tutor and guardian to her child, and said, "being a Roman Catholic myself, it is my desire that my said son be brought up in that faith." On the day on which she executed the settlement she raised an action against Mrs S. for delivery of the child, but died during the dependence of the action, which was accordingly dismissed. In a petition at the instance of J. B. against Mrs S. for delivery of the child, *held* that as it was not disputed that the child would be equally well cared for and educated, whether it was in the custody of the petitioner or of Mrs S., the expressed wishes of the mother should be given effect to. The Court therefore *granted* the prayer of the petition.

(*VIDE Brand v. Shaws*, Feb. 24, 1888, 15 R. 449.)

Ann Hammel, on 3d April 1882, gave birth to an illegitimate child, John Ingram Hammel. Ann Hammel died of consumption in October 1886, while an inmate of the Convent of the Good Shepherd, Dalbeth, near Glasgow, leaving the following settlement, dated 31st August 1886,—"I, Ann Hammel, residing at the Convent of the Good Shepherd, Dalbeth, near Glasgow, do hereby leave and bequeath my whole means and estate to James Brand, contractor, Glasgow, in trust for behoof of my son, John Ingram Hammel, and I hereby nominate, constitute, and appoint the said James Brand to be my sole executor, and to be tutor, curator, and guardian to my said son; and, being a Roman Catholic myself, it is my desire that my said son be brought up in that faith."

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She was possessed of no means whatever at the date of her death.

In March 1883 Ann Hammel had been admitted with her child to the Ochiltree Home, Ayr. In May of that year she handed over the child to the care of Mrs and Miss Shaw, Ayr. The child was thereupon baptised into the Scottish Episcopal Church, and from that time down to the date of the case the child was taken charge of and all expenses in connection with its maintenance and education were paid by Miss Shaw. Ann Hammel left the Ochiltree Home about the middle of 1883, and was in service for some time. Towards the end of the year 1885 Mrs Shaw having discovered that Hammel was in jail for a breach of the peace, paid a fine, in default of payment of which Hammel had been sent to prison, and so obtained her release. Her health was then very delicate, and Mrs Shaw procured her admission into the Roman Catholic Convent at Dalbeth, where she remained until her death.

On 31st August 1886, the same day on which the settlement above quoted was executed, Ann Hammel raised an action in the Sheriff Court at Ayr against Mrs Shaw (which was subsequently conjoined with a similar action against Miss Shaw), for delivery of her child. Hammel having died during the dependence of the action, Mr Brand, founding on her settlement, craved the Court to sist him as pursuer in her room. The Sheriff (Brand), recalling the interlocutor of the Sheriff-substitute (Orr Paterson) dismissed the action. Mr Brand appealed to the Court of Session. On 24th February 1888 the Court found that Mr Brand had no title to pursue the action, and therefore dismissed the appeal.

On 7th November 1888 Mr Brand presented a petition to the Court of Session praying for an order on Mrs and Miss Shaw to deliver up the child, John Ingram Hammel, into his custody. The facts above narrated were admitted.

The petitioner averred ;—" Ann Hammel's health having failed, she obtained admission, by the aid of the respondent Mrs Shaw, in 1885, to an institution at Dalbeth, near Glasgow, called the Convent of the Good Shepherd. She hoped for recovery, and desired to take her child under her own charge on leaving the institution. But her illness (consumption) becoming more clearly developed, the said Ann Hammel desired still more urgently to have her said child beside her before she died, and she had proper arrangements ready for its reception and custody, and for its education and upbringing. The said Ann Hammel's desires were made known to the respondents by herself personally on more than one occasion before and after the actions after mentioned, at visits which they made to her in the said institution, and letters were written by her, or on her behalf, early in 1886, to the respondents, or to Mrs Shaw for herself and her daughter, requesting that the said child should be returned to its mother.

" The petitioner, in execution of the trust and guardianship committed to him by the mother, holds the respondent Mrs Shaw primarily and directly responsible to him for the said child. If she has, as stated by herself and by the other respondents in the said actions, left the said child to the other respondent Miss Shaw, then Miss Shaw is also liable to him.

" The petitioner has arrangements ready for the due education and upbringing of the child in accordance with its mother's last wishes ; and he will submit, if necessary, to the Court a scheme for its due care and custody.

" The petitioner contends that he is entitled to have the child restored and delivered to him. He founds on the right of the mother at common

law to the custody of the child, and on her consequent power to entrust him with the care of her child after her death. He also founds on the recent statute relating to the guardianship and custody of all infants or pupils in Scotland (49 and 50 Vict. c. 27), and the power thereby conferred on the mother of any pupil to appoint by deed or will a guardian, or in Scotland a tutor, to such pupil after her death. In any event, and if there should be no technical title either by statute or at common law, the petitioner submits that the Court, in regulating the custody of this child, will have regard to the wishes of the deceased mother, as expressed in her said settlement.”

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The respondents averred ;—“ It is denied that she ever (before the date of the raising of the first action mentioned in the petition) expressed a wish to any of the respondents, either verbally or in writing, to have her child removed from Miss Shaw's custody and handed over to the Roman Catholic sisters of the convent.\* Mrs Shaw occasionally visited Ann Hammel in the convent, and corresponded with her, so that she had ample opportunity to express such a wish. It is admitted that the respondent Mrs Shaw received two letters from one of the sisters, dated 5th May and 20th July 1886. Denied that it was at the request or with the consent of Ann Hammel that the demand for the custody of the child therein contained was made. In the last letter received by Mrs Shaw from Ann Hammel, which is dated 9th May 1886, the writer merely

\* The following are excerpts from the only letters received by the respondents from Ann Hammel or any person at the convent.

From Sister Mary Frances to Mrs Shaw.—“ Convent Gd Shepherd, Dalbeth, May 5th.—Dear Mrs Shaw,—I have told Ann of your wish that she should write to you herself occasionally, and have given her full permission to do so, she seems a little better, and the doctor thinks she is now on the road to convalescence, but I must say I do not agree with him in his opinion of her . . . Her little one seems now the only anxiety she has. She very naturally yearns to see him a child of that faith which has brought her such peace and happiness. I have told her to write to you fully all that is in her heart upon this subject, feeling quite sure that with your kind heart you will fully enter into her feelings as a mother, and do by her child when she is gone what you would wish done by your own child under similar circumstances, and I think you know enough of Catholics to understand how very strong our feelings are upon this point.”

From Ann Hammel to Mrs Shaw, June 1886.—“ I should like very much to hear about the little boy it would make me feel very happy to know for certain how he is if it is not too much to ask you may I hope to see him some day and if it not to be because Dear Mrs Shaw I feel my end is not far off in this world and I may truly say it is my only wish ungratified I feel sure you with your own mother's heart will grant me this as my last wish from you.” The letter contained no further reference to the child.

From Sister Mary to Mrs Shaw.—“ Convent of the Good Shepherd, Dalbeth, Glasgow, July 20, 1886.—Dear Madam,—I write to you on behalf of one of the poor girls under our care, Anne Hammel, she will not live over the autumn, and of course she is in an unhappy state of mind about her boy, knowing that the Catholic faith is the only one in which she can in conscience permit him to be brought up. I have a Catholic home ready for him, and he will be educated and cared for well, and Anne knows this, and is anxious that the child should be brought to us without delay, though she is in nowise forgetful of the equal advantages that you offer to him, at least as far as this world goes, and as I said above she is deeply grateful for all you have done for them both. Anne has a right according to law over her child, unfortunately illegitimate, and wishes to exercise that right, which she is bound as a Catholic to do, regarding the religion of her child.”

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asked for news of the child, and expressed a hope that she might be allowed to see him before her death, which she felt was very near. The said letters are printed in the appendix hereto.

"Admitted that Ann Hammel raised the two actions referred to in the petition. The proceedings therein are referred to. These actions were raised very shortly before her death, when she was mentally and bodily in an extremely weak state, and easily influenced by those around her.

"Ann Hammel, when she entered the convent at Dalbeth, was a Protestant by religion, and the child has been brought up as an Episcopalian.

"The respondent, Miss Shaw, is willing and anxious to continue to take charge of the education and upbringing of John Ingram Hammel, in conformity with the promise she made to his mother. The child is now between six and seven years of age; and the respondents humbly submit that the welfare of the child, as well bodily as moral, will be best assured by his being left under the charge of those who have known and taken care of him from his earliest infancy, and have therefore a strong interest in him, and by allowing him to continue his education on the same lines as up to this time.

"The respondents maintain that the petition is incompetent, and the petitioner's statements irrelevant. Ann Hammel, as the mother of an illegitimate child, had no power to appoint the petitioner, or any other person, tutor to her child, and the petitioner has no legal right, either at common law or under the Act 49 and 50 Vict. cap. 27, to insist in this petition. They submit that the Court is the proper guardian of John Ingram Hammel; and that, having regard to his welfare, the prayer of the petition ought to be refused."

At the date of the petition the child was at the Aberlour Orphanage.

Argued for the petitioner;—(1) It was conceded that under the common law the mother of an illegitimate child had no power to nominate a tutor to the child, but that power was conferred on her, if not expressly, at least impliedly, by the Guardianship of Infants Act, 1886. That Act was intended to give to mothers generally a new power, that of acting as or of nominating tutors to their children. The Act must be read in its broadest sense, as it was intended to be a new step in the law of parent and child. The act applied to the guardianship of infants, i.e., any infants. The words "only minor" had been read as including illegitimate children under the Scots Acts, 1555, c. 35, regarding the choosing of curators, and the subsequent Act of 1672, c. 2, which dealt with the inventories to be given up by tutors.<sup>1</sup> In the case of *Johnston v. Clark*,<sup>2</sup> the claim of the tutor, appointed by the putative father of a bastard, to the custody of the child, had been preferred to that of another person to whom the putative father had confided the child some years before his death. (2) On the facts as stated in the petition and answers, the child should be handed over to the petitioner. It was not disputed that the child would be as well taken care of and his welfare be as assured whether he was in the custody of the petitioner or of the respondents. In such circumstances the Court would look for some fact which would entitle them to decide in one way or the other. That fact was here furnished in the express wish of the mother as stated in the settlement, and as further shewn by the fact that she had raised the actions above referred to, to which there could have been no answer had she lived. Every other

<sup>1</sup> Wilson v. Campbell, March 10, 1819, Fac. Coll.

<sup>2</sup> Johnston v. Clark, 1785, M. 16,374.

consideration being equal, the Court should give effect to the mother's dying wish. The respondents hinted that Hammel had been subjected to undue influence from those around her, but her wish that her child should be brought up as a Roman Catholic in a Roman Catholic home was only natural when she had voluntarily become a Roman Catholic herself. No. 59.  
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Argued for the respondents;—(1) Under the common law, no one but the father could appoint tutors to his child. Any stranger who left money to a child might appoint trustees, but only for the purposes of the fund.<sup>1</sup> The Guardianship of Infants Act was not intended to alter that law as regarded mothers, except the mothers of legitimate children. The intention of the Act was to put them in a better position in questions with the administrator-at-law, or with tutors appointed by the father. The language of the Act throughout contemplated that the infant should have two parents, whereas, in the eye of the law, bastards had only one. (2) If the mother could not appoint a tutor, the question came to be whether in the exercise of their discretion the Court would take away the child from those to whom the mother had voluntarily entrusted it, and who had supported it for some years, and give it to an utter stranger to her. From the mother's letter it was clear that in June 1886 all that she wished was to see the child before her death. She did not express any wish to have its custody then, though the letters of the sisters with whom she lived gave a different account of her wishes. The actions were raised, and the settlement executed, within a very short time of the mother's death, when she would be easily influenced by those around her, who would naturally press upon her the duty of giving up her child to the care of some Roman Catholic. The question simply came to be, whether the Court would change the custody of the child on a purely religious ground, viz., to have it brought up as a Roman Catholic. There was no case where such a course had been taken. If the petition were to be granted it would come to this, that the mother of a bastard might in all cases get the better of the common law, and practically nominate a tutor to her child, simply by expressing such a wish in any *mortis causa* deed.

At advising,—

LORD PRESIDENT.—In dealing with this case it is impossible not to recognise the charitable manner in which the respondents interfered for the protection of this poor woman, who is now dead—to protect her from the consequences of her own misconduct. But while that is undoubtedly so, the question before us is not very much concerned with considerations of that kind. It is quite conceded on both sides that whatever is to be done in providing for the education of this child could be quite well done by either of the parties before your Lordships. Both are unexceptionable and equally trustworthy. But there is one part of the case which involves a question of law, and it is quite necessary that we should dispose of it before we proceed to the other considerations. Ann Hammel when she was in Dalbeth Convent raised an action against the respondents for the purpose of obtaining possession of her child, which had been taken charge of by the respondents, and at the same time that she raised that action she executed a will, in which she appointed Mr Brand, the petitioner, to be her executor, and also to be the curator of her illegitimate child. That action had proceeded a certain length in the Sheriff Court when Ann Hammel died, and then Mr Brand proposed to sist himself as pursuer in place

<sup>1</sup> Stair, i. 6, 6; Ersk. Inst. i. 7, 2; Bell's Prin. sec. 2071; Fraser on Parent and Child, p. 174.

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of the deceased under the title which he said he obtained by virtue of the will to which I have referred, and the judgment which was pronounced when he proposed to sist himself as a party was that he had no title to sue. That was on the ground, as the petitioner himself sets forth, "that the mother's title to sue was personal to her, and intransmissible in the sense that no one could conduct and continue that action after her death, and that the petitioner, in order to carry out the mother's last wishes, must proceed by petition at his own instance" --I do not think that the last part of the sentence formed any part of the judgment, but it may be perhaps matter of inference—and accordingly he presents this petition now, and instead of basing it entirely on the expressed wishes of the deceased Ann Hammel, he asserts his right under the will to the office of guardian, and that he supports by a reference to the Guardianship of Infants Act, 1886. Now, it appears to me that the Act referred to gives no title whatever either to the mother of an illegitimate child, or to anyone on her behalf, in her child which she had not possessed at common law. In short, I am of opinion that the Act does not apply to the mother of an illegitimate child. The 2d section provides that on the death of the father of an infant "the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." And the 3d section provides that the mother may "appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly." The 2d subsection of that section provides that the mother may by her "will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court after her death, if it be shewn to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians" appointed by the mother. Now, it seems to me that throughout these enactments it is presumed that there is a father of the child—a father whom the law recognises, and who has independently of this statute certain legal rights of guardianship, and that it applies to any case in which there is a father having such legal rights—in short, it applies to the case of a mother, and gives certain rights to the mother in competition with the rights of the father of a child and those of a tutor-at-law. But in the case where there is no father that the law can recognise, and no tutor-at-law, the statute can have no application. Independently of the statute no mother has any right to nominate a tutor—neither the mother of a legitimate child nor of an illegitimate child—and therefore the only rights given by statute to the mother are in the case of the mother of a legitimate child.

Having cleared away that legal difficulty, we come now to consider the case on its merits. The history of this mother is told, I think, very clearly and candidly by the respondents in their defences to the action in the Sheriff Court, and I shall refer to two or three of the statements there for the purpose of endeavouring to explain what are the considerations to be kept in view in this matter. After Mrs and Miss Shaw had taken charge of this unfortunate woman and her child, and had provided a situation in service for the mother, it appears that she

again lapsed into criminal courses, and she was found to be in prison in Ayr. No. 59.  
 But the respondents go on to say in the sixth article of their statement of facts Dec. 22, 1888.  
 in the Sheriff Court—"As the petitioner was very penitent, and was wishful to Brand v.  
 be sent on her release from prison to some place where, as she could not take Shaw's.  
 care of herself, she would be looked after by others, Mrs Shaw obtained her  
 admission to a Roman Catholic institution at Dalbeth called the Convent of the  
 Good Shepherd." It seems therefore that the residence of Ann Hammel in this  
 convent was brought about by the interposition of the respondents themselves.  
 They recommended her to go there, and provided for her admission. It was  
 arranged, they say, "that the pursuer was to remain there till Mrs Shaw removed  
 her. The pursuer has since remained in this institution. Under the influence  
 of the religious sisterhood who manage this institution the pursuer some time  
 ago, it is believed, embraced the Roman Catholic faith." Then, in the seventh  
 article of their statement they say that "during the time that the pursuer has  
 resided at Dalbeth Mrs Shaw has occasionally visited her and received letters  
 from her, and neither verbally nor in writing did the pursuer prior to the said  
 action being raised against Mrs Shaw ever express a wish for the custody of the  
 child, or that the boy should be taken from the defender. On the last occasion  
 Mrs Shaw saw the pursuer prior to said action (which would be in or about June  
 1886) the pursuer stated that she was desirous of leaving the institution. On the  
 recommendation of the Sisters Mrs Shaw urged the pursuer to remain for some  
 time longer, and Mrs Shaw promised to remove her when she was fitter to be  
 taken away." And then in article 8 they say that some letters received by Mrs  
 Shaw were "not believed to be in accordance with the real desire of the pur-  
 suer, or sent with her authority, or at least as a weak-minded woman she is  
 entirely under the influence and direction of the nuns. The pursuer has never,  
 since its delivery to the defender, taken any interest in her child, and the  
 defender believes and avers that the present proceedings have been raised with-  
 out her authority and consent, and that if left to herself, and freed from the  
 influence of her present surroundings, she will totally disclaim them." Then  
 they add,—“The pursuer has been visited by Mrs Shaw since the raising of the  
 action against the latter, but as the interview permitted was in the presence of  
 nuns it is believed that the real wishes of the pursuer could not be ascertained.  
 The pursuer stated that the child, if returned to her, was to be placed under the  
 guardianship of a Roman Catholic gentleman.”

Now, I think the effect of these averments is this, that when Mrs Shaw and  
 her daughter recommended that Ann Hammel should be taken into this convent  
 at Dalbeth they must have been very well aware that in such a position she  
 would be subject to a good deal of religious influence, and they admit that under  
 the urgency of that influence she had professed the Roman Catholic faith, and  
 had before she died, and in pursuance of that profession, executed the will by  
 which Mr Brand was attempted to be made the legal guardian of her child.  
 Now, in these circumstances it does not appear to be of much relevancy for the  
 respondents to say that she was under the pressure of very strong influence in  
 changing her religious profession. I do not doubt that is so in point of fact.  
 I do not think anybody can doubt that is so. In all such changes it is a matter  
 to be assumed that a good deal of it is due to influence. One is supposed to  
 understand that every minister of religion, and probably every Christian lay-  
 man, is bound to use his influence to persuade those who come in contact with  
 him to embrace what he believes to be the true faith, and if the profession of a

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particular creed is to be construed as a mere sham and pretence, and not the real impression of the person's wish or belief, because influence was used, I am afraid we should require, in every case of the kind, to make inquiries of the most troublesome and difficult kind. But the Court have no such duty laid upon them. They must accept the facts as they find them, and what we find in this case is that this woman Ann Hammel, before her death and during her residence in the convent, professed the Roman Catholic faith, and expressed her desire and wish in her will that her child should be brought up in accordance with Roman Catholic principles. The Dean of Faculty, on behalf of the petitioner, put the case very well, I think, thus—He said all other considerations may be equal, the child may be in perfectly safe hands if left either to the petitioner or in the Orphanage, where it now is,—the well-being of the child, its material prosperity, its health and morals, will be equally well attended to in the hands of whichever party it may fall under, but there is one consideration which ought to weigh, and that is the expressed wish of the parent. Now, the mother of the child is undoubtedly the proper custodian of that child, especially when it is of tender years, and probably if Ann Hammel had not died she would have succeeded in the action she raised in the Sheriff Court. I do not see very well how she could have failed to obtain an order in that action for delivery of the child. It may have been very ungrateful in her to take that course, but we have nothing to do with that. She had a legal right to do so, and although she had no legal right to appoint a guardian to the child, and cannot do so with effect, still the connection between her and the child, both natural and legal, is such that I cannot help thinking that her expressed wish on this subject ought to receive effect unless there is some strong reason to the contrary. Therefore I am, generally speaking, for granting the prayer of this petition; but I understood the petitioner's counsel to say—and to say very properly—that the child in reality is a ward of this Court, and that they will be prepared to present a scheme for the maintenance and education of the child to be approved of by the Court, and if that course is followed, I think we can settle this matter without further discussion.

LORD MURE.—I am of the same opinion as expressed by your Lordship on all these points.

LORD SHAND.—When one is made aware, as the Court has been, of the circumstances of this case, one must be satisfied that it was very important for Ann Hammel, the mother, and for the child itself, that they found such friends as Mrs and Miss Shaw, for undoubtedly both the mother and child have received great kindness at the hands of these parties, and it is clear that the child has been fully maintained and cared for by them during the last five years. It is natural, and only natural, that in such circumstances a certain lively interest, and indeed attachment, must to some extent have arisen between these ladies and the child, but while that is so, it is the case that where the custody of a child is taken from the parents, or from some natural guardian, it can only be subject to this, that a time may arise when that parent or guardian may assert his right, to which there may be no answer. In this case we have it clearly shewn that there is no material question arising as to the interest of the child with regard to moral or physical advantages. It cannot be said, on the one hand, that if the child were left in the custody of Mr and Mrs Shaw it would lose great advantages, nor can it be said, on the other hand, that if the child be

delivered up, as the petitioner asks it shall be, it will suffer disadvantage. In the one case its education will go on in Aberlour Orphanage; in the other case it will go on in some similar home under the charge of the petitioner, but it will be educated in a different religious belief. I assume of course in saying so that the petitioner now offers to have a scheme prepared and approved of by the Court, and is ready to assure the Court that that scheme will be so satisfactory in point of character, and with reference to the duration of the education that will be given, as to make it clear that the child will not suffer from being taken out of the care of those who have been so kind to it. That being so, I have come to the conclusion that there is no doubt or difficulty in the case.

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I think the only other element in the case is the mother's recorded expression of what she desired. We find that in the settlement that was executed on 31st August 1886 it is stated by the deceased that, being a Roman Catholic "myself, it is my desire that my said son be brought up in that faith," and she nominates and appoints Mr Brand, who is known to be of that religious belief, to be the curator of the child. Reference has been made to the proceedings and statements in the action in the Sheriff Court. Of course they go to confirm what has been stated, and so far I regard them as satisfactory, but for myself I am bound to say that if there had been nothing of the kind in the case, my view would have been precisely in the terms of that settlement. I agree that of course we must see that the settlement in that matter really records the wish of the person who makes it. I also agree with what your Lordship in the chair has said with reference to the influence that may have induced a change of the mother's religious belief. It is true that where a question of property is concerned this Court is entitled to inquire whether a person has been in a weak and facile state of mind when disposing of it, and when he executes a settlement whether undue influence has been used to induce him to execute it. There is some intelligible issue, but it appears to me it would be out of the question for this Court to direct inquiry with reference to what is or is not probable in reference to a question of change of religious belief. I venture for myself to say that where there was a change of faith, although it might be considered sudden, that would make no difference on my opinion.

I agree, further, in thinking that the Guardianship of Infants Act in its provisions relates entirely to the guardianship of legitimate children, but nevertheless the statute is not, in my opinion, to be altogether laid aside in considering this case. Its provisions are an advance in determining the propriety and expediency of giving the mother a larger power of guardianship of infant children than the law formerly allowed even in a question with the father or his representatives. The reasons of the provisions apply with even greater force in the case of the mother of an illegitimate child, because the law recognises no competing right in the case of a putative father as in the case of the parent of a legitimate child, and while the Court ought not and cannot by judgment alter the existing law as the Legislature has made it, it nevertheless in questions such as the present will administer it within temperate limits so as to adapt it to modern views. These considerations, combined with the fact that it has been held in the case of *Macpherson* (14 R. 780) that the mother of an illegitimate child during her life has an absolute right to the custody of that child, are, in my opinion, sufficient to shew that the Court in this case ought to give effect to the application made by the petitioner. The mother has a legal right to the custody of her child apart from the right of the mother of a legitimate child to appoint



No. 59. a guardian. The result is, that effect is to be given to the direction she has left, and I am content to put my judgment on that ground alone, and accordingly  
Dec. 22, 1888. I concur in thinking that the application should be granted.  
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LORD ADAM.—I think this case comes to a very narrow point. I agree with your Lordship that the petitioner has a right to demand custody of this child, that nobody else has a right to demand custody of it, and that the plan which the Court proposes to adopt is the best in the circumstances. There is no question here about the moral or material welfare of the child. It is admitted on both sides that these interests will be as well attended to by the one side as by the other. That being so, it appears to me that the two conflicting elements of the case are these. On the one side there is the fact that the respondents have now, and have had for a considerable time, the care and custody of this child, and I cannot say that that is not a circumstance which would weigh a good deal on my mind unless a stronger case were made out on the other side for the custody of the child. But the countervailing circumstance on the other side is the desire of the mother. Now, I myself have no doubt that we have the deliberate desire of the mother expressed in her settlement as it is called. I have as little doubt that that was written under influence, but I do not think it was written under what in any sense can be called undue influence. I think that being in the circumstances in which this woman was, becoming an inmate of a Roman Catholic convent and associating with and being under the care of Roman Catholics, she was subjected to an influence which resulted in a change of religion. I am very far from thinking it did not. Having become a Roman Catholic apparently shortly before the raising of the action in the Sheriff Court, it was a very natural desire for her to express that her child should be brought up in her own faith, and in the custody of those who agreed with her in that faith. Therefore I have come to the conclusion that the desire which this mother expressed was her desire, and not brought about by undue influence in any sense. That being so, the question in my mind is, is that expressed desire to weigh against the fact that this child has been in the hands of the respondents for a considerable time, and has been well taken care of? I think the expressed desire of the mother is a matter of such weight that it ought to be given effect to in this case. I have therefore come to the same result as your Lordships.

The petitioner thereafter lodged in process the following scheme :—  
“The petitioner having in view the present age of the boy John Ingram Hammel, and the manner in which he has hitherto been brought up, proposes the following scheme for his further education and upbringing [which he undertakes \*]—The petitioner’s proposal is that the boy should be sent for a year or two to a junior school where he will be under the charge of ladies, and be properly prepared for his ultimate admission to a school for older boys. After being at the latter school until the age of thirteen, the petitioner proposes to assist the boy into and through an apprenticeship of four to five years’ duration in some trade or business whereby he may be able to support himself. The petitioner has inquired and considered as to the junior and senior school respectively most suitable for carrying out this scheme for the boy’s education, with the following results :—The junior school which the petitioner has in view in the first place is the boarding school for little boys attached to St Elizabeth’s House, Bullingham, Hereford, under care

\* The scheme was amended at the bar by the addition of these words.

of Sisters of Charity. The terms for this school are from £16 to £18 per annum. The school for older boys to which it is proposed that the child should be sent after his preparation at the said junior school is St Francis' Home, Shefford, Bedfordshire. This school is under the direction of the Very Reverend Canon Collis, and the ordinary terms are £25 per annum for each boy." No. 59.  
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THE COURT thereafter pronounced this interlocutor:—"Approve of the scheme, together with the undertaking contained in the amendment, and ordain the petitioner, James Brand, to find caution in common form for the carrying out of said scheme and performance of the undertaking contained therein as amended; and on caution being found grant the prayer of the petition, and decern."

W. B. GLEN, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

WILLIAM BLAIR, Petitioner (Reclaimer).—*Watt*. No. 60.  
NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, Respondents.—  
*Balfour—Low—Macnochie.*

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*Bankruptcy—Sequestration—Recall—Affidavit—Administration of oath to petitioning creditor—Latent objection—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 22.*—The affidavit produced with a petition for sequestration bore that the petitioning creditor appeared before a Justice of the Peace named, and, "being solemnly sworn and interrogated, deposed" to the amount of the debt, &c., and concluded with the words "all which is truth, as the deponent shall answer to God," and bore the signature of the deponent and of the Justice. In a petition by the bankrupt for recall of the sequestration (which was opposed only by the petitioning creditor) on the ground that the affidavit was invalid by reason of the granter not having been put on oath, it was proved that though the creditor had signed the affidavit in presence of the Justice he had not been put on oath, but had merely, in answer to a question by the Justice, stated that what was set forth in the affidavit was true. The Court recalled the sequestration, holding (1) that the affidavit was invalid, and (2) that the objection to the affidavit, though latent, should in the circumstances be sustained, as it had not been shewn that the recall would be prejudicial to other creditors.

On 16th August 1888, the North British and Mercantile Insurance Company presented a petition to the Lord Ordinary on the Bills for sequestration of the estates of William Blair, Dundee. Bill-Chamber.  
1st Division.  
Ld. Wellwood.  
M.

The affidavit produced with the petition bore that Philip R. D. MacLagan, secretary of the company, appeared before Frederick Walter Carter, Justice of Peace for the county of the city of Edinburgh, and, "being solemnly sworn and interrogated, deposed" to the amount of the debt, &c. It concluded with the words, "all which is truth as the deponent shall answer to God." It was signed by Mr MacLagan and Mr Carter.

Sequestration was awarded on 18th August, and Mr Daniel M'Intyre was appointed trustee therein.

Blair thereafter presented a petition to the Lord Ordinary on the Bills, praying for recall of the sequestration.

In the petition, as originally presented, he averred,—"The affidavit and claim produced with the said petition by the said company bears it was deposed to by Mr Philip Robert Dalrymple MacLagan, secretary of the said company, and that the oath was administered by Mr Frederick Walter Carter, one of Her Majesty's Justices of the Peace for the county of the city of Edinburgh. Notwithstanding that the said affidavit and claim bears that Mr MacLagan was solemnly sworn and interrogated by Mr Carter, it is believed and averred that Mr Carter did not put Mr

No. 60. MacLagan upon oath or interrogate him in any manner of way in relation to the contents of the said affidavit."

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The respondents answered,—“It is admitted that the affidavit and claim produced with the petition for sequestration bears to have been deposed to by the secretary for the respondents, and that the oath was administered to the said secretary as averred. Denied that the oath was not in point of fact administered to the said secretary.”

They further averred that the petitioner's statements were irrelevant.

On 16th November, the Lord Ordinary (Wellwood) pronounced this interlocutor:—“Finds that the petitioner has set forth no relevant or sufficient grounds for recall of sequestration: Therefore refuses the petition.”\*

The petitioner reclaimed. At the bar he added the following averment:—“Mr MacLagan did not attend before Mr Carter to get the oath administered, but, after signing the affidavit, sent it along to Mr Carter to be signed by him. Mr MacLagan and Mr Carter never met with reference to this matter.”

The respondents denied that averment.

It appeared from the trustee's report in the sequestration that the total assets of the bankrupt amounted to about £25, and the total liabilities to about £18,000, of which £17,000 was secured over a heritable property.

The Court allowed the reclamer a proof of his averments as amended, which was subsequently led before Lord Adam.†

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\* “OPINION.—The first ground upon which the petitioner maintains that the sequestration should be recalled is, that the affidavit on which sequestration was awarded was not made upon oath. He states that he believes and avers that the Justice of Peace before whom it bears to have been made did not put Mr MacLagan, the respondents' secretary, upon oath, or interrogate him in any manner of way in relation to the contents of the said affidavit. This is denied by the respondents, and the affidavit is *ex facie* regular, and sets forth that the compeer was ‘solemnly sworn and interrogated.’

“Now, the proceedings being *ex facie* regular, it is in the discretion of the Court to allow or refuse inquiry—the petitioner asks for a proof at large—to contradict the formal document on which sequestration was awarded. Such averments are easily made, and it would manifestly lead to great inconvenience and expense to creditors if an inquiry were granted in every case in which the bankrupt chose to assert that, contrary to the statement on the face of the affidavit, the petitioning creditor had not, in point of fact, sworn to the verity of the oath. But I am clearly of opinion that if inquiry is ever to be allowed in such cases, it must be upon averments much more specific than those made in the present case. To use the words of the Lord President in *Gillon v. Caesar*, November 1, 1882, 10 R. 61, ‘the petitioner would require to state what are his means of knowledge of the alleged fact that there is something wrong, and in what manner he proposes to prove his averments.’ In the course of the discussion in the present case, I invited the counsel for the petitioner to give some further information upon these points, but he was unwilling to do so, and preferred to take a judgment upon the petition as it stood.”

† Mr MacLagan deposed,—“I perfectly remember signing this affidavit. It was signed in Mr Carter's office. It was signed on the date that it bears. Mr Carter was present. There was no other person present. I had gone to Mr Carter's office with it, for the purpose of getting it signed. I cannot quite recollect what took place. I had read the affidavit before I went. It was not read over in Mr Carter's office by me. My impression is, that I told Mr Carter the purpose for which I had come,—that I said this was the document which I wished to sign before him as a Justice of the Peace. Thereupon I signed it. Mr Carter adhibited his signature with J.P. after it. I cannot remember whether anything else took place, but I think the usual course was followed. But I don't remember that. I was not put on oath. I went through the form,

Argued for the reclaimer;—By the Bankruptcy Act, 1856, secs. 21 and 22, it was provided that the creditor must take an oath to the verity of his debt before a Justice of the Peace or other magistrate. On the proof it was admitted that this had not been done, and the affidavit being thus inept, the sequestration fell to be recalled.<sup>1</sup> It was true that this was not an objection which arose *ex facie* of the affidavit,—but even on the assumption that it did not arise *ex facie*, but was a matter for proof, the Court in the exercise of its discretion ought to recall the sequestration,—especially as no other interests were involved besides those of the bankrupt.<sup>2</sup>

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Argued for the respondents;—It was admitted that there had been an irregularity here, and that the oath had not been taken in regular form. It had, however, been proved that the practice of not administering an

—at least I believe I went through the form—which is usually adopted, which is simply to say, ‘Is this all true?’ I think that is the common practice among Justices of the Peace. I could not swear that that was said. I did not use the words, ‘I swear that is true.’ . . . By the Court.—I know what an affidavit is. I understand it is a declaration. (Q.) Just a common declaration? (A.) Well, no. I should not say that—a declaration on oath. (Q.) This affidavit bears—‘Compeared Philip R. D. MacLagan, who, being solemnly sworn and interrogated, depones.’ Now, were you solemnly sworn? (A.) No, I cannot say I was. (Q.) And how did you understand this to be an affidavit? (A.) When I went there, the course was just what I have been accustomed to. No Justice of the Peace that I have appeared before has ever sworn me. I thought the usual practice was just that they said—‘Is this all true?’ That is the common phrase. (Q.) Do you think it is a proper practice to sign a document which bears that you were solemnly sworn when you were not, or that the Justice should do also? (No answer.)”

Mr Carter, after evidence to the like effect, deponed,—“(Q.) Are you aware the affidavit bears at the beginning, after the compearance of Mr MacLagan, ‘who being solemnly sworn and interrogated, depones’? (A.) I am not aware. I did not read it, but knowing it was an affidavit, I presume it would be so. I was not aware these words were in that special document. (Q.) And so you did not consider it necessary to put him on oath? (A.) It is never done. In practice of my own I have had to make affidavit very often, and never had the document read to me at any time within the last twenty-five years. I never was put on oath myself, and never put any other body on oath. I did not interrogate Mr MacLagan in any way regarding the contents of the document.

. . . Cross.—I always do put the question, ‘Is this true?’ or words to that effect. I then get it signed, and myself sign the document. (Q.) Have you any doubt as to putting that question in this case? (A.) None whatever. . . . By the Court.—I am a Justice of the Peace. (Q.) And I suppose you understand the duties that you undertook as a Justice of the Peace; are you aware this document bears these words—‘Compeared Philip R. D. MacLagan, who, being solemnly sworn and interrogated, depones’ so and so, and you append your signature to that as being true, and you now tell us it was not true—that he was not sworn? (A.) But, my Lord, going back over all these years, I have made affidavits very many times, and never was sworn by men older than I am. (Q.) Don’t you see you have been putting your name to what was not true? (A.) I am referring to the other way when I have made affidavit. I have followed my predecessors; I may be wrong. (Q.) Is there any question that it is wrong to sign what is not true? (A.) On inquiry, I find other Justices follow the same practice.”

<sup>1</sup> Hall v. Colquhoun, June 22, 1870, 8 Macph. 891, 42 Scot. Jur. 596; Campbell v. Miles, May 27, 1853, 15 D. 685; M’Cubbin v. Turnbull, June 28, 1850, 12 D. 1123, 22 Scot. Jur. 523; Gibson v. Greig, Dec. 17, 1853, 16 D. 233.

<sup>2</sup> Mitchell and Lawrie v. Motherwell, Nov. 22, 1888, *ante*, p. 122.

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oath orally was very common, and was probably accounted for by the fact that the signatures of the deponent and the Justice of the Peace were adhibited to the *jurat* "as the deponent shall answer to God." In an analogous case, where it was proved that the practice existed of notaries-public certifying that they had personally served the protest of a bill, when in point of fact they had not done so, the Court had disregarded an objection to the protest.<sup>1</sup> At all events, the objection in the present case did not appear *ex facie* of the affidavit, and it was settled law that in such cases sequestration would not be recalled unless it were shewn that injustice would be done to the bankrupt by allowing the sequestration to go on.<sup>2</sup> The affidavit being *ex facie* regular, the other creditors of the bankrupt were entitled to rely on the sequestration, and grave injustice might be done to them if it were recalled.

At advising,—

LORD PRESIDENT.—The ground on which we are asked to recall this sequestration is that the petition for sequestration, which was presented by a creditor whose debt was of the requisite amount, was not accompanied, as the statute requires, by an oath. The oath which is produced, or what is called the oath, appears *ex facie* regular, but it now turns out that it is not an oath at all. That, however, has been ascertained by evidence, and did not appear *ex facie* of the proceedings. It is, therefore, not imperative on us to recall the sequestration because of that defect; it is in the discretion of the Court to say whether they will recall the sequestration on that ground or not.

The distinction which has been established in a number of cases that have been referred to at the bar between objections arising *ex facie* of the proceedings and objections which require to be established on proof is now perfectly well settled in practice. In the one case the failure to observe the statute on the face of the proceedings is fatal; in the other case, where the defect in the proceedings, or the objection to the proceedings, requires to be verified by evidence, it is in the discretion of the Court to say whether they will sustain the objection or no. Now, in the present case it has been established that there was no oath taken at all, but the petitioning creditor, the North British and Mercantile Insurance Company, represented by its secretary, subscribed the paper, which is also subscribed by one of Her Majesty's Justices of the Peace for the county of the city of Edinburgh, in which it is set out that the claiming creditor was solemnly sworn and interrogated, and that he deponed to the verity of the debt, and the paper winds up with these words—"All which is truth, as the deponent shall answer to God." It is no longer disputed—it cannot be disputed—that, in so far as the paper sets forth that the secretary of this company was put upon oath, and that he deponed to its truth and verity as he should answer to God, this paper is entirely false, because no oath was administered.

Now, the lodging of an oath in a petition for sequestration is by no means a light or unimportant matter in the view of the Bankruptcy Act. There are several sections which bear upon it, and shew very clearly what the purpose and object of requiring the oath is. The 21st section provides that such a petition shall be accompanied by "an oath to the effect hereinafter specified," and

<sup>1</sup> M'Cartney v. Hannah, Feb. 11, 1817, Hume's Dec. 76.

<sup>2</sup> Ballantyne v. Barr, Jan. 29, 1867, 5 Macph. 330, 39 Scot. Jur. 149; Gillon v. Caesar, Nov. 1, 1882, 10 R. 59; Mitchell and Laurie v. Motherwell, Nov. 22, 1888, *ante*, p. 122.

"the effect hereinafter specified" is this, that the deponent shall swear "to the verity of the debt claimed by him"—that is in the 22d section—and shall set out the security which he holds for the debt, if any. Now, it must be kept distinctly in view that this is an oath of verity, and not an oath of credulity, and therefore it is quite clear from the sections to which I have already referred that if a creditor makes a false statement, and swears to the verity of a debt which is not a debt, or makes any other wilfully false statement, he will be liable to be prosecuted for perjury. That is a result which would flow from the ordinary common law. But the matter does not even stand upon the common law only, because the statute attaches a very great importance to the form and effect of this oath which is lodged with a petition for sequestration. There is a special section applicable to this matter—section 178—which provides this,—  
 "If any person shall be guilty of wilful falsehood in any oath made in pursuance of this Act, he shall be liable to a prosecution either at the instance of Her Majesty's Advocate or at the instance of the trustee, with the concurrence of Her Majesty's Advocate, provided that in the latter case the prosecution shall be authorised by a majority of the creditors present at a meeting to be called for the purpose, and such person shall, on conviction, besides the awarded punishment, forfeit to the trustee for behoof of the creditors his whole right, claim, and interest in or upon the sequestered estate, and the same shall be distributed, either under the sequestration or, if it be closed, under a process of multiplepoinding as is hereinbefore provided."

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Now, looking at these provisions in the statute, one cannot fail to see that the Legislature has attached very great importance to the making of this oath, and it cannot in the least derogate from its importance that by another Act of Parliament it is provided that in certain cases an affirmation may be substituted for an oath in cases of this description, because that statute makes very special provisions as to the conditions on which affirmation shall be allowed to take the place of an oath. The 2d section of the Act 28 Vict. cap. 9, provides that if a person called as a witness, or required or desiring to make an affidavit or deposition in the course of civil or criminal proceedings, "shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the Court or Judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following,—'I do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare,'" and so on, which is the substance of his affidavit. Now, the first observation I make here is that it is not merely the expression of a desire on the part of the person who seeks to affirm in place of to swear that is to entitle him to do so. The Court, or Judge, or Magistrate must be satisfied of the sincerity of his objection to take the oath, and the party himself who proposes to make an affirmation instead of an oath must use the very words of the statute. There is no alternative form—nothing in the shape of an affirmation—but "the words following" must be used, and among "the words following" are these, "that the taking of any oath is, according to my religious belief, unlawful." But still further, the next section provides that any false statement made in such an affirmation will subject the party making it to the pains of perjury. Now, if an affirmation of this kind, made under this statute, and with all these conditions and safeguards,

No. 60. had been laid before us, of course we should have sustained it. But what have we got? We have got a paper which is neither an oath nor an affirmation, and which therefore does not bind the conscience of the party, and does not subject him, if it be false, to the pains of perjury. It is therefore quite impossible to say that this paper can be taken as coming in place of or serving the purpose of an oath as required by the terms of the Bankruptcy Act.

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Now, except for one consideration, that would be conclusive of the whole matter, but no doubt we have here power to exercise a discretion for the reasons I have already stated, and in the exercise of that discretion we are bound to look at the circumstances of the case. If this had been a sequestration, the awarding of which had had the effect of reducing undue preferences, or of equalising diligences, or of creating a right or cutting down a right, or of preferring one or more creditors, that might have been a reason for considering whether it was necessary in the circumstances of the case with the view of doing justice between the parties absolutely to recall it. But in the present case it is not said—and it obviously cannot be said—that the awarding of this sequestration, or the first deliverance on the petition, has had any of these effects. There has been no diligence cut down, no preference created, no equalising of diligence—nothing in short that yields to any particular creditor a right, or has deprived any particular creditor of a preference which he would otherwise have had, and therefore I think this case is a very simple one under the Act of Parliament. It is said that in exercising our discretion we should not interfere with the sequestration unless its existence is to work some injustice to some person—in short, unless it is necessary, in order to do justice between the parties, that the sequestration be recalled. I do not think that is the proper view. I think there are many considerations which ought to operate with us in exercising this discretion, and one of those which operates chiefly on my mind in the present case is this, that the recalling of this sequestration will be a most excellent example, and that if we were in the circumstances of this case to refuse to recall it that refusal would be *peccati exempli*, and would tend to perpetuate a practice which is utterly illegal, and I think is also immoral. Therefore I am for recalling the sequestration.

LORD MURK.—I am of the same opinion. The practice which your Lordship has alluded to seems to have crept in to a considerable extent; but it is not in accordance with the statute, and does not comply with one of its main provisions. For, as I read the Bankruptcy Act, a petitioning creditor, when he presents an application to enable him to obtain sequestration, must produce an oath to the verity of his debt, and that has plainly not been done, as the oath was not properly administered. I concur, however, with your Lordship in thinking that when the proceedings are *ex facie* regular, and the objection is only established after investigation, the Court have a discretion in dealing with the matter, and may dispose of the sequestration as circumstances may appear to warrant. Now, in the present case, it appears to me that it is not desirable that this sequestration should be allowed to go on, because on the admitted facts of the case the sum covered by the sequestration is about £25, and the balance of the heritable debt which is claimable against the bankrupt is £17,000. In these circumstances there seems to be little left to dispute about, except the question of expenses; and I therefore think it will be of advantage that the sequestration should come to an end. I concur with your Lordship in your

remarks on the irregularity of making an affidavit in the way in which I understand it was done here. The oath was not actually administered, and yet the debtor is put into the position of being sequestrated by the production of an oath which had not in fact been taken. I think we are obliged in this case, in the exercise of our discretion, to recall the sequestration.

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LORD SHAND.—I think the principles on which the Court should proceed in questions of this nature as to the recall of a sequestration have been very distinctly stated and settled in the case of *Ballantyne v. Barr*, and in the recent case of *Motherwell v. Laurie*. If the proceedings disclose a case in which *ex facie* of the oath of the petitioning creditor there is something clearly wrong, then the sequestration ought to be recalled. Anyone looking at the oath is bound to see that it is not an oath which would warrant sequestration, and a third party cannot say he suffers any hardship if he does not examine the proceedings, including the oath. If, on the other hand, the oath is in all respects *ex facie* regular, and a third party—a creditor—relies on that, the considerations are quite different when an application for recall of the sequestration comes to be made. The Court has held that in this class of cases there is a discretion to recall the sequestration or not, according to their view of what is just in the circumstances.

Accordingly, I think the question here is, whether in the discretion of the Court this sequestration ought or ought not to be recalled? It is a sequestration in which everything would appear to a third party to be *ex facie* regular. Now, in that aspect of the case, if it had appeared, now that we have the sederunt-book and the whole proceedings, that the recall of the sequestration would be a serious injury to the creditors generally, because it would leave or make preferences granted by the bankrupt unchallengeable which might otherwise have been set aside, I should have had the utmost difficulty in saying that the sequestration should be recalled. As was pointed out in the case of *Motherwell v. Laurie*, section 42 of the Bankruptcy Act contains this important provision,—“In all questions under this Act or preceding Acts regarding sequestration of the estates of debtors, the sequestration shall be held to commence and take effect on and from the date of the first deliverance on any petition for sequestration, which shall be held to be the date of the sequestration, although the sequestration be not actually awarded until a later date”; and, again, under the title of “effect of sequestration on ranking of creditors,” there are very important provisions in sections 107 to 111, both inclusive, of the statute, which all take effect from the time when the first deliverance in the sequestration is granted. One of these is to the effect that the order shall operate as “a decree of adjudication of the heritable estates of the bankrupt for payment of the whole debts of the bankrupt, principal and interest.” The second is, that sequestration “shall be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding.” There is an interruption of prescription by section 109 and a cutting down of preferences by sections 110 and 111 of the statute.

Now, if the case had presented this aspect—that there were creditors here ranking who had relied on the sequestration in ignorance of the fact that the alleged deponent, the petitioning creditor, had not taken an oath, as he ought to have done, and their interests had therefore been prejudiced, because they had been induced to rest satisfied with this sequestration, and so had not taken



No. 60. proceedings themselves—then I should have said that, in its discretion, the Court ought not to recall the sequestration.

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But, in the circumstances, I entirely concur with your Lordship. I am of this opinion because the question is now one entirely between the bankrupt and the petitioning creditor. The bankrupt maintains that this creditor who seeks to maintain the sequestration is not in a position to do so, and neither the trustee nor any other creditor has resisted the recall. Your Lordship has gone fully into the provisions of the statute in regard to the necessity for an affidavit. Nothing could be more express than the enactment of section 22 of the Bankruptcy Act of 1856—which refers back to section 21, requiring that there shall be an oath taken,—and that such oath shall be taken before the Judge Ordinary, Magistrate, or Justice of the Peace. That is because these are the only parties who are in use or are entitled to administer oaths. The purpose for which the party goes before the Judge Ordinary, Magistrate, or Justice of the Peace is, that he shall take an oath as the statute requires. Then, as your Lordship has pointed out, both under a declaration in terms of the provisions of the Act 28 Vict. cap. 9, and under an oath duly made, a person who has made any false statement is, in the first place, liable to prosecution for perjury, and in the next place, is liable to forfeiture of his claim on the estate. These are circumstances shewing the importance of the oath to be administered, but we do not require these circumstances, for section 21 makes it clear that an oath must be administered.

We have had previous cases of this kind. There was one in which, in a competition for a trusteeship, one of the parties stated that all the oaths on the other side were open to objection on this ground (*Wylie v. Kyd*, 11 R. 968). I confess I was impressed with the conviction that the averment could only be stated to delay the case, or at least as a mere haphazard statement. I could not have believed that such an intolerable practice existed as appears from this proof. There is this to be said for the person appearing before the Justice on this occasion, that apparently business men had got lulled into the view that they may call a thing an oath which is not an oath, and I concur in thinking that the sooner business men are taught that this is an unsound view the better, and that we should recall this sequestration, if for no other reason, with the view of marking decisively the impropriety of proceedings of this kind.

I should like to add that I put my judgment on the general question, and not on the specialties of this sequestration. There may be little, if any, estate for division amongst unsecured creditors, but I can understand that the heritable creditors may find the sequestration valuable in enabling them to give a title. In cases of sale it is notorious that a title by the trustee in a sequestration is a valuable title, for it is generally free from exception, and I can understand why creditors should resort to sequestration in order to be able to give such a title. But if they do so they must comply with the provisions of the statute, which in this case I am satisfied has not been done.

LORD ADAM.—In my opinion the difference between *ex facie* objections and latent objections is perfectly sound, and well established in law. I think it is also quite clear that the latter class, namely, latent objections which must be a subject of proof and inquiry as to whether they are established, will be taken in nine out of ten cases in applications for recall of sequestration, for, if they are not *ex facie*, the sequestration will be granted, and therefore inquiries into latent objections will take place in the sequestrations. And

that being so, there is no doubt that it has been held in such cases that when the latent objection is established it is entirely in the discretion of the Court whether the sequestration be recalled. It occurs to me that where the truth of the latent objection has been established the sequestration should be recalled, unless it can be shewn that there are interests involved which should lead to a different result, and accordingly I think the question is—Is it or is it not established as against the recall of the sequestration that other creditors have acquired rights which would be prejudicially affected by a recall? I think that would be the proper inquiry. If that be not shewn, then it would occur to me that it should be recalled. Now, in the present case it appears to me that it has not been established, certainly it has not been so to my satisfaction, that any other creditor would be prejudiced. No preference has been acquired, no preference has been cut down, and so far as we can ascertain, nothing has been done whereby the interests of other creditors would be affected by the recall of this sequestration. If the affidavit is a bad one, I do not know that the fact that it is a particularly bad one, as it is in this case, would affect the question whether the sequestration should be withdrawn, looking to the interests of the other creditors. In this case, though there is really no oath at all, if I had been satisfied that the other creditors would be prejudicially affected I would hesitate to recall, but being satisfied that they are not prejudicially affected, I concur with your Lordships that the sequestration should be recalled.

No. 60.

Jan. 8, 1889.  
Blair v. North  
British and  
Mercantile  
Insurance Co.

THE COURT granted the prayer of the petition, and recalled the sequestration.

WILLIAM OFFICER, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

DONALD THOMSON Senior, Appellant.—*Goudy*.

GEORGE M'BAIN Junior (Donald Thomson's Trustee), Respondent.—*G. W. Burnet*.

No. 61.

Jan. 12, 1889.  
Thomson v.  
Thomson's  
Trustee.

*Master and Servant—Wages—Proof—Presumption.*—A father claimed wages from his son, who was a country grocer, for his services as vanman for a period of eight years. The trustee on the son's sequestrated estate rejected the claim on the ground that the father, as appeared from the bankrupt's deposition, had been maintained and clothed by the son, and that there was no agreement to give wages. In an appeal against that deliverance the Court held (following *Anderson v. Halley*, 9 D. 1222) that there was a presumption in favour of wages being due, and allowed a proof.

On 16th January 1888 Donald Thomson, merchant, Hill of Fearn, 1st Division, Ross-shire, granted a trust-deed for behoof of his creditors, and on 13th April following his estates were sequestrated, and George M'Bain junior, C.A., was appointed trustee.

Donald Thomson senior, the bankrupt's father, lodged a claim in the sequestration for £160 and interest, vouched by (1) An account bearing to be dated 16th January 1888, which was in the bankrupt's handwriting, stating in somewhat ambiguous language, that the amount represented "eight years' wages due by you to me for the period from 16th January 1880 to this date for travelling through the country with my (*sic*) horse and van and selling my (*sic*) goods, and purchasing eggs for me, at £20 per annum"; and (2) a promissory-note by the bankrupt in favour of the claimant, likewise bearing date 16th January 1888.

Sheriff of the  
Lothians.  
M.

## No. 61. The trustee rejected the claim.\*

Jan. 12, 1889.  
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The claimant appealed to the Sheriff of the Lothians, and stated in his minute, *inter alia*,—"1. The appellant is the father of the bankrupt, and was in his employment as vanman for the period charged in the claim lodged. Had he not given his services the bankrupt would have required to have employed another assistant and paid him wages. The services of the claimant were rendered, and wages were not paid."

The trustee stated in answer,—“4. The appellant lived in family with his son, and in his leisure time was accustomed to drive his (the bankrupt's) van through the country collecting goods. For this occasional work he received his board, clothing, and any sums of money he required for his own purposes. . . . As a matter of fact, the appellant was just in the natural position of being maintained by his son, and partly in return for such maintenance, and partly to occupy his leisure time, he drove the van.”

The Sheriff-substitute (Hamilton), on 3d December 1888, dismissed the appeal.

The claimant appealed to the Court of Session, and argued;—There was admittedly no specific agreement about wages, but in these circumstances there was a legal presumption in favour of remuneration.<sup>1</sup> Cases like that of *Jones' Trustee v. Jones* were not in point, because there the wages had been paid, and the trustee maintained that he was entitled to repetition on the ground that they had been paid within sixty days of bankruptcy.<sup>2</sup> Here the trustee ought to have allowed evidence to be led under the 126th section of the Bankruptcy Act, 1856, before rejecting the claim.<sup>3</sup> The Court should now order proof either before the trustee or the Sheriff.

Argued for the trustee;—This was not a case for proof, and the trustee and Sheriff had done right in rejecting the claim. There was no contract of service alleged, the mere incidental use of the word “employment” being the only attempt on the claimant's part to aver such a contract. Accordingly, the claim for wages could not be sustained.<sup>4</sup> The case of *M'Naughton*<sup>5</sup> was decided on the ground, as explained by the Lord Justice-Clerk, that “a right to wages formed part of the original conditions or

\* The trustee stated in his deliverance,—“The bill and holograph acknowledgment produced were granted on the same day as that on which the bankrupt granted a trust-deed for behoof of his creditors. The claimant is father of the bankrupt. By the holograph acknowledgment the bankrupt acknowledges that he is indebted and resting owing to the claimant the sum of £160, as per an account prefixed, which he says is correct. That account is also holograph of the bankrupt, and although the personal pronouns in it are a little mixed, it is evident that it is an account for eight years' wages, said to be due by the bankrupt to the claimant. In his examination before the Sheriff of the Lothians and Peebles the bankrupt said,—‘I assisted in maintaining my father since I started business; my sister also contributed. My father lived with me till about three or four months ago. He acted as my vanman, but I gave him no wages, merely his meat and clothing. I never agreed to give my father wages.’ These statements, one of which is the foundation of this claim, are contradictory of each other. The claim appears to be a collusive one, and the trustee therefore rejects it.”

<sup>1</sup> *M'Naughton v. M'Naughton*, 1813, Hume's Decns. 396; *Anderson v. Halley*, June 11, 1847, 9 D. 1222, 19 Scot. Jur. 532; *Fraser on Master and Servant*, 44.

<sup>2</sup> *Jones' Trustee v. Jones*, Jan. 25, 1888, 15 R. 328.

<sup>3</sup> *A and B v. Tunnoek's Trustee*, Nov. 25, 1865, 4 Macph. 83, 38 Scot. Jur. 59; *Ritchie v. Balgarnie*, Jan. 14, 1875, 2 R. 297.

<sup>4</sup> *Ritchie v. Ferguson*, Nov. 16, 1849, 12 D. 119, 21 Scot. Jur. 610; *Russell's Trustees v. Russell*, Dec. 11, 1885, 13 R. 331.

<sup>5</sup> *M'Naughton v. M'Naughton*, Hume's Decns. 396.

engagements of the parties.”<sup>1</sup> Here nothing was said at the commencement or during the relation as to wages, and the presumption was therefore excluded.

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LORD PRESIDENT.—I think we are all agreed that we can take no notice of the documents which have been presented with this claim. If they are to have any effect at all, in my view that effect is against the appellant. But the question is, whether there is enough averred to entitle him to a proof, and I am of opinion that there is. His averment is, that he “is the father of the bankrupt, and was in his employment as vanman for the period charged in the claim lodged,” and he then goes on to say that he gave his services as vanman for eight years, and that no wages were paid in return for these services. I assume that the law applicable to a case of this kind is correctly stated by the Lord President in the case of *Anderson v. Halley*, 9 D. 1222, and giving effect to that law, I think that if the averments of the claimant are proved in point of fact he will be entitled to wages. I am further of opinion that if there is to be inquiry it ought to be before the Sheriff.

LORD MURE concurred.

LORD SHAND.—I am of the same opinion.

I observe that Lord Fraser in commenting upon the case of *Ritchie*, 12 D. 119, to which reference has been made, makes this observation (Fraser on Master and Servant, p. 44),—“The question of remuneration seems rather to depend not upon any general presumption, but upon a consideration of the whole circumstances under which the services were performed.” That expresses exactly my opinion on the merits of such a case as the present, after we have, as the result of inquiry, the facts fully before us. His Lordship then goes on, “if any general presumption in favour of the servant exist, it is at best a weak one, and easily rebutted by circumstances indicating that the services were intended to be gratuitous.” So far as that passage is concerned, I do not think the existence of the presumption is a matter which is at all doubtful. I think it does exist. The case of *Anderson v. Halley*, 9 D. 1222, looked at in the light of the previous case of *M'Naughton*, Hume's Decns. 396, is an authority to that effect. I agree in thinking that in many circumstances it may be a weak presumption which admits of being readily rebutted. For instance, if no claim for wages has ever been made, and not a farthing has been given,—if any actings of the parties tend to shew that it was not intended that any payment should be made,—if maintenance and clothing have been gratuitously supplied, and the services rendered seem to have been thereby substantially remunerated,—all these are circumstances which must, of course after inquiry, be taken into account, and they may in a particular case entirely meet the presumption. Still, I am of opinion that the proper course is to have an inquiry. I am further of opinion that, in a small matter of this kind, it would have been quite legitimate for the trustee to have called the parties before him, and to have taken the evidence himself. But he has not done this, and as the case has already been before the Sheriff, I think the cause should be remitted back to him to hold the inquiry.

LORD ADAM concurred.

THE COURT pronounced this interlocutor:—“Sustain the appeal;

<sup>1</sup> *Alcock v. Easson*, Dec. 20, 1842, 5 D. 356, at p. 368.

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recall the interlocutor appealed from; and remit to the Sheriff to allow the appellant and respondent a proof of the averments contained in their respective minutes, and to proceed farther as shall be just and in terms of law: Find no expenses due to or by either party."

THOMAS McNAUGHT, S.S.C.—WAUGH & McLACHLAN, W.S.—Agents.

## No. 62.

Jan. 15, 1889.  
Schaw v.  
Black.

ROBERT SCHAW, Pursuer (Reclaimers).—*Gloag—Martin.*  
MRS MARGARET KILGOUR OR BLACK AND ANOTHER, Defenders  
(Respondents).—*Sir Charles Pearson—Shaw.*  
JOHN INGLIS AND OTHERS, Defenders.

*Title to sue and defend—Property—Pro indiviso proprietor.*—One of several *pro indiviso* proprietors of subjects let as grass parks borrowed a sum of money, and in security thereof granted a bond and disposition over his share of the estate. The bond contained an assignation to the rents. The bondholder raised an action of mails and duties against the tenants for payment of his debtor's share of the rents, calling also as defenders his debtor and the other *pro indiviso* proprietors. The debtor alone defended the action, and, while admitting the debt, maintained that the pursuer had no title to sue.

The Court *repelled* the defences, holding that the debtor had neither interest nor title to object to effect being given to his own assignation.

*Question*, whether a *pro indiviso* proprietor of an estate let under lease has a title to sue for his share of the rents of the estate without the concurrence of the other *pro indiviso* proprietors.

1st DIVISION.  
Lord Kinnear.  
B.

MRS MARGARET KILGOUR OR BLACK, wife of Roger Black, solicitor, Kirkcaldy, was proprietrix of two-fifths *pro indiviso* of the lands of Bruntshiels, in the county of Fife.

In 1881, Mrs Black borrowed from Robert Schaw, Edinburgh, a sum of £1600, and in security of that loan she, with consent of her husband, granted a bond and disposition in security over her share of the *pro indiviso* estate. The bond contained an assignation to rents.

The lands of Bruntshiels were divided into fourteen enclosures, which were let as grass parks. In the articles of roup of these parks for 1888, it was provided that the rents should be paid to Mr John Inglis of Colluthie, one of the *pro indiviso* proprietors, for behoof of himself and the other *pro indiviso* proprietors.

On 16th July 1888, Schaw raised this action against (1) Mr and Mrs Black, (2) the other *pro indiviso* proprietors of Bruntshiels, (3) the tenants of the grass parks. The conclusions of the action were, *inter alia*, for payment of the rents, mails, and duties of the several grass parks, "but that only to the extent of two-fifths of said rents, mails, and duties, being the proportion thereof due and leviable in respect of the said share or portion extending to two-fifths *pro indiviso* of said lands and others belonging to the said Margaret Kilgour or Black."

The only comparing defenders were Mr and Mrs Black, who admitted the debt, but averred that the tenants of the parks were in no way bound to pay any portion of the rents of the grazings to them, but only to Mr Inglis of Colluthie, for behoof of all the *pro indiviso* proprietors.

The pursuer pleaded, *inter alia*;—(1) The pursuer, as heritable creditor infest in the subjects and others foresaid, is entitled, in the default in payment before set forth, to enter into possession of the lands disposed in security, and uplift the rents thereof, and he is entitled to decree of mails and duties in terms of the conclusions of the summons.

The defenders pleaded;—(1) No title to sue. (2) The action is incompetent. (3) No relevant case. No. 62.

On 16th November 1888, the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Sustains the second plea in law for the defenders, and in respect thereof, dismisses the action, and decerns."\* Jan. 15, 1889.  
Schaw v. Black.

\* "OPINION.—This is an action of mails and duties at the instance of a heritable creditor. The defender, the granter of the bond, is the proprietor of two-fifths *pro indiviso* of the subjects described in the summons, and the question is, Whether such an action is competent at the instance of the creditor under a bond affecting a *pro indiviso* right? By the terms of the leases the tenants are taken bound to pay the stipulated rents, not to the leading defender, or to all the proprietors in definite proportions, but to one of their number, Mr Inglis of Colluthie, for the benefit of all.

"The pursuer maintains, first, that when subjects are set in lease by two or more *pro indiviso* proprietors as joint lessors, each of them has a separate right to sue the tenants for his own proportion of the rent; and, secondly, that Mr Inglis is a mere factor for himself and his co-proprietors, and that no arrangement for the ingathering of rents by a factor can defeat the right of any one proprietor or of his creditor.

"No authority was cited in support of the first proposition, and it appears to me to be inconsistent with the nature of the right. The assumption upon which the argument proceeds, and upon which also the summons is framed, is that the defender is a part owner, having right to two definite fifth parts or shares of the subjects, or at least of the rents. But a *pro indiviso* proprietor is not a part owner but a joint owner. The distinction is very clearly brought out in Lord Moncreiff's judgment in the case of *Cargill v. Muir*, 15 S. 408, where he explains the position of heirs-portioners. 'Heirs-portioners are not joint proprietors, but, as their name imports, part owners or portioners. They hold *pro indiviso* while the subject is undivided. But each has a title in herself to her own part or share, which she may alienate or burden by her own separate act. The condition of two joint proprietors in this case is very different; they have no separate estates, but only one estate vested in both, not merely *pro indiviso* in respect of possession, but altogether *pro indiviso* in respect of the right. The distinction is the same which is expressed by English lawyers by the terms joint tenants and tenants in common.' It is on this principle, viz., that every part of the whole subject is vested in each and all of the proprietors, that it has been held that one of them has no title without the concurrence of the others to sue a declarator of marches, or to grant leases, or to sequester or remove tenants. On the same reasoning no single proprietor can have a title to sue separately either for the whole or for a part of a rent which is payable to all jointly, and the debtor has no separate right in any part of the estate, and no separate action against the tenants for any part of the fruits.

"I do not doubt that it would be possible, in the administration of such a property, to grant leases so conceived as to give each proprietor a several right to recover a definite proportion of rent, but that is not what the proprietors in the present case have done. By the terms of their contract, the tenants are taken bound to pay the entire rent to one proprietor, who is not the present defender. The defender has no right or title to sue upon these contracts for separate payment to herself of her own proportion of the rent; and the pursuer, who is her assignee, can have no title to recover rent which she could not recover by action in her own name. The purpose and effect of an action of mails and duties is simply to put the creditor in the position of the lessor in so far as regards the right to recover rents, and it follows that no such action can be competent which would give the creditor a higher or more definite right than that which the debtor possessed.

"The position of Mr Inglis is altogether different from that of a factor, who is a mere agent appointed to collect rents which are payable by the contract of lease to his principal. The entire rents are payable under the contract of lease

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The pursuer reclaimed, and argued;—The first question to be determined was, what was the nature of Mrs Black's right to the subjects which she had burdened? Was it a right of joint ownership, as the Lord Ordinary had held, or a right of part ownership, or of tenancy in common, as it was called in England? The distinction between these two classes of rights was not very clearly defined in the cases on the subject.<sup>1</sup> Of the former class a good illustration was a conveyance to trustees in ordinary terms, while the latter class was illustrated by the case of heirs-portioners. Mrs Black's right as a *pro indiviso* proprietor was of the same character as that of an heir-portioner. Her right was not one of joint ownership with the other *pro indiviso* proprietors, but each of them had a distinct and separate title to his or her share of the estate. That being the nature of her right, the second question was as to whether she would have had a title to sue this action if she had chosen to do so? The right of a *pro indiviso* proprietor to sue an action was different in questions with third parties and in questions *inter socios*. In the former case, the consent and concurrence of the other proprietors was necessary,<sup>2</sup> while in the latter no such consent was necessary.<sup>3</sup> In the case of *Morrison*,<sup>4</sup> the Court had sustained the title to sue in the face of an objection by one of the proprietors. Had this action been one *inter socios*, Mrs Black could have sued it. Much more could she have done so when none of the parties cited as interested in the matter objected. It followed, then, that her creditor, to whom she had assigned all her rights and interest in her share of the estate, had a good title to sue. By defending the action she was just attempting to prevent effect being given to her own assignation without any legal ground or interest stated.

Argued for the defenders;—On the first question, Mrs Black's right was merely a joint right of ownership as defined by Lord Moncreiff in *Cargills v. Muir*.<sup>5</sup> Her right was a right in one estate vested in all the *pro indiviso* proprietors, none of whom had any separate share in the estate.<sup>6</sup> It was a right of limited ownership. In *Johnston v. Crai-*

to him alone, and they cannot be recovered from the tenants otherwise than in terms of the contracts by which the tenants are bound.

"It is not disputed that the defender has effectually burdened her *pro indiviso* interest. And her creditor may enforce his right by diligence of a different kind, or by sale. But the diligence he proposes to use by this action appears to me to be incompetent.

"The cases of *Kay v. Clough*, and of *Ferguson v. Murray*, cited by the pursuer, have, in my opinion, no bearing. The question in these cases was, Whether the appointment of a judicial factor for the management of an estate could bar the diligence of creditors, assuming such diligence to be otherwise competent. The objection in the present case is that the action of mails and duties is not competent, because a creditor can attach by any form of diligence nothing but the rights and interests of the debtor exactly as they stand in him."

<sup>1</sup> 2 Bell's Com. 544, 7th edit.; Bell's Prin. 1072; Rankine on Land-Ownership, 485; Williams on Real Property, 157; *Cargills v. Muir*, Jan. 21, 1837, 15 S. 408, per Lord Moncreiff, 489.

<sup>2</sup> *Millar v. Cathcart*, March 16, 1851, 23 D. 743, 33 Scot. Jur. 380; *Stewart v. Wand*, Feb. 5, 1842, 4 D. 622, 14 Scot. Jur. 245.

<sup>3</sup> *Johnston v. Craufurd*, July 3, 1855, 17 D. 1023, 27 Scot. Jur. 520; *Morrison*, Dec. 11, 1857, 20 D. 276; *Lawson v. Leith and Newcastle Steam Packet Co.*, Nov. 26, 1850, 13 D. 175, 23 Scot. Jur. 51; *Lade v. Largo Banking Co.*, Nov. 6, 1863, 2 Macph. 17, 36 Scot. Jur. 16.

<sup>4</sup> *Morrison*, 20 D. 276.

<sup>5</sup> 15 S. 408.

<sup>6</sup> *M'Neight v. Lockhart*, Nov. 30, 1843, 6 D. 128, per Lord Justice-Clerk (Hope) 136, 16 Scot. Jur. 108.

*furd*,<sup>1</sup> although the pursuer sued in the character of a *pro indiviso* proprietor, there was no other person to vindicate the subject from improper use. In the case of *Morrison*,<sup>2</sup> the petitioner was judicial factor, not on the estate of one of the *pro indiviso* proprietors, but on the whole estate, and it was held a mere corollary of the power to gather the whole rents that he should grant a lease for the whole period. The case of *Lade*<sup>3</sup> was very special. It dealt with a question of pleading, and further, it only dealt with the title of a *pro indiviso* proprietor to sue where another of the *pro indiviso* proprietors was aiding a third party in dilapidating the subject. In *Millar v. Cathcart*,<sup>4</sup> it was held that a *pro indiviso* proprietor had no title to sue a declarator of marches. Mrs Black then would have had no title to sue this action, and it followed that her creditor could have no higher right.

At advising,—

LORD PRESIDENT.—I think this a very special case indeed, and that its decision will not establish any general rule, or interfere with any of the decisions already pronounced in this class of cases.

The defender, with consent of her husband, granted a bond and disposition in security over her share of the lands of Bruntshiels, which share extended to two-fifths *pro indiviso*. The bond contained the usual clauses, and amongst these there was an assignation to the rents, which by statute gives the creditor power to enter into possession of the subjects contained in the bond by an action of mails and duties. Mrs Black now practically refuses to allow her creditor to use this assignation to the effect of drawing the rents.

Now, if this defence had been stated by parties other than the granter of the bond, a very different question from that now before us would have to be determined. But the sole compearing defenders are Mrs Black and her husband. All the other parties called as defenders are perfectly content that the creditor in the bond should get possession of the rents by this action of mails and duties to the extent of the proportion of the subjects effeiring to his debtor in the bond. The arrangement by which the rents of the parks were to be paid to Mr Inglis of Colluthie, one of the *pro indiviso* proprietors, was a convenient arrangement for the administration of the estate, but it can in no way interfere with or control the rights of the heritable creditor. Mr Inglis makes no objection to the course taken by the creditor. The other *pro indiviso* owners and the tenants also make no objection. In these circumstances, I am of opinion that the defenders have no interest or title to object.

LORD MURR.—I agree with your Lordship in thinking that the circumstances of this case are very special, and enable us to determine the main question at issue, without going into the more difficult questions raised in the course of the discussion. The action is one of mails and duties by the holder of a bond and disposition in security against the debtor in the bond for payment *pro tanto* of a debt admittedly due out of the rents of the land covered by the bond, of which the defender is one of the *pro indiviso* proprietors, to the extent of the rents due for her *pro indiviso* share of the property. All the parties interested have been called, including the other *pro indiviso* proprietors and the tenants of the parks which form the subject-matter of the security.

Now, none of these parties have appeared to defend the action except the

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<sup>1</sup> 17 D. 1023.

<sup>2</sup> 2 Macph. 17.

<sup>3</sup> 20 D. 276.

<sup>4</sup> 23 D. 743.



**No. 62.** debtor in the bond, who pleads as preliminary defences (1) that the pursuer has no title to sue; (2) that the action is incompetent; (3) that there is no relevant case. But she does not seem to me to set out any specific defence on the merits, probably because, having regard to the facts of the case, as it appears to me, she has really no defence upon the merits, for the debt is admittedly due. In these circumstances, it may, I think, be fairly held, in the absence of the other *pro indiviso* proprietors who have been duly called, that they concur in the pursuer's action; and as the tenants offer no opposition, I am of opinion that the defender is not entitled to have this case thrown out of Court on the technical grounds stated in defence.

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**LORD SHAND.**—The principal defender in this case is proprietor *pro indiviso* of two-fifths of the estate of Bruntshiels, which is let in grass parks to tenants whose rents form the subject of the present litigation. Her right being one *pro indiviso* is a right over the whole estate, but it only extends to so much of the rents as corresponds to her two-fifths share of the property. She has conveyed away her rights in the property to the pursuer. She granted a bond and disposition in security for money lent to her by the pursuer, conveying to him, as the condition of the loan, her two-fifths share of the estate, and assigning the rents effeiring to that share.

Now, if the objection which she has stated here had been taken by the tenants on the estate I do not see reason to doubt that it would have been well founded. They contracted for payment of their rents as a whole, and they would, I think, be able to maintain successfully that they were not bound to apportion the rents and pay them among the different *pro indiviso* proprietors and their assignees according to their several rights. In like manner, the other *pro indiviso* proprietors might succeed in maintaining that one of their number was not entitled to have the rents split up—directly drawing his or her share from the tenants—but that the rents should be paid over in one *cumulo* sum to the person having the authority of all the proprietors to grant a discharge. The Lord Ordinary has so held, and I see no reason to doubt that he is right.

A good deal has been said in the course of the argument as to the views expressed by the Judges in the cases of *Cargills v. Muir*, 15 S. 408, and *Lauson v. Leith and Newcastle Steam Packet Company*, 13 D. 175, with reference to what are called joint rights as contrasted with the rights of tenants in common, as they are called in the law of England.

I do not think that it is necessary to give any opinion on those matters. I rather take it to be clear that neither a joint owner nor a tenant in common could in his own name sue either for the whole rent or for his own share of the rent. An instance in our law of joint proprietorship, in the sense of the joint ownership in the law of England, is that of trustees holding a conveyance in ordinary terms for trust purposes. In joint ownership the property is vested in A and B and the survivor. On the death of one of them his right goes necessarily to the survivor. A tenancy in common (as it is called in England), on the other hand, seems to arise where each of the *pro indiviso* proprietors has a certain share or right in the property, which he may himself dispose of as he thinks fit by a deed granted by himself. It appears to me that the right here held by the creditor in the bond and also by each of the *pro indiviso* proprietors is a right of this latter kind, because each of the proprietors may dispose of his own share of the estate, and upon his death there is no vesting of his

share in the surviving *pro indiviso* proprietors. The law seems to be the same in England as in this country, that in actions on the contract of lease—as distinguished from actions to protect the property from injury or to vindicate claims of damage because of its wrongful destruction—one *pro indiviso* proprietor has not a title to sue—Woodfall on Landlord and Tenant, p. 12; *Descharmes v. Horsgood*, 10 Bing. 526. I assume the Lord Ordinary is right in his general view of the case, but I think he has lost sight of the fact that the defender Mrs Black, in the position in which she stands, has no case on the merits. She conveyed away to the pursuer all her rights. The specialties of this case are that neither the tenants nor the other *pro indiviso* proprietors object to the action, and I think Mrs Black has averred no right or legitimate interest to do so. Had she raised an action for the rents, or rather her share of them, she would have been successful unless the tenants stated a defence, which they have not done here, and her creditor is not to be put in a worse position than she herself was in.

On the whole matter, I am of opinion that Mrs Black has no legitimate interest or right to maintain her defence, which is simply an attempt to prevent effect being given to her own assignation without any legal ground for so doing, and that we ought to recall the Lord Ordinary's interlocutor and grant decree to the pursuer in terms of the conclusions of the summons.

**LORD ADAM.**—I also concur, but I reserve my opinion on the main questions argued until they arise with a joint proprietor or a tenant.

THE COURT recalled the interlocutor of the Lord Ordinary, and repelled the defences for Mr and Mrs Black, and granted decree in terms of the conclusions of the summons.

**HENDERSON & CLARK, W.S.—JOHN RHIND, S.S.C.—Agents.**

**WILLIAM HENDERSON, Pursuer (Appellant).—Sir Charles Pearson—Law. No. 63.**  
**DAVID ROBB AND OTHERS, Defenders (Respondents).—**  
**Sol.-Gen. Darling—Salvesen.**

Jan. 18, 1889.  
*Henderson v. Robb.*

*Title to Sue—Process—Bankruptcy—Cessio—Creditor suing his debtor's*—A creditor of a person divested of his estate by decree of cessio raised action to recover his debt against a person alleged to be a debtor to the estate. The action concluded alternatively for payment to the pursuer, or otherwise to the trustee in the cessio, and was founded on averments to the effect that the pursuer was the only unpaid creditor, and that the trustee had declined to move in the matter.

*Held* that the pursuer had no title to sue.

*Observed* that the pursuer might have compelled the trustee to give the use of his name on security being found for expenses, or to grant an assignation of his claim against the defenders.

In March 1886 a petition for cessio was presented to the Sheriff Court of Forfarshire against Joseph Robb, tenant of the home farm of Glen-Sheriff of Forfarshire, at the instance of a creditor, and on the 25th of that month decree was pronounced against him, and William Carnegie, farmer, Mains of Coull, was appointed trustee on the estate. William Henderson, crofter, Kirriemuir, lodged in the process an affidavit and claim for £100.

On 29th March 1888, Henderson raised this action against David Robb and David Howe, farmers, and Archibald Smith, solicitor, Kirriemuir, as alleged debtors to the bankrupt estate, for payment of the £100. The conclusions of the summons were alternatively for payment to the pursuer, or to the trustee in the cessio.

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The pursuer made the following averments :—The sum concluded for was the amount of an advance made by him to Joseph Robb in 1883. On 1st April 1886 the defenders had, without consulting the trustee in the cessio, sold and disposed of the whole stock and cropping on the farm of Glenquiech. A trust-disposition and assignation executed in April 1884, under which they professed to have done this, was to the prejudice of the whole creditors of Joseph Robb. The pursuer was the only unpaid creditor whose claim existed at the date of the decree of cessio, and was still undischarged. He had repeatedly in vain asked the trustee to take steps against the defenders.

The defenders David Robb and David Howie, who had succeeded Joseph Robb as tenants in the farm in 1884, averred that in April 1884 Joseph Robb had executed a trust-disposition, by which he had, with the consent of his landlord, assigned in their favour the crop, stocking, &c., on the farm in security of a debt due to them by him. They further averred that during the interval between the granting of the deed and the cessio no steps had been taken by Joseph Robb's general creditors, or by the pursuer, to make him bankrupt.

The pursuer pleaded, *inter alia* ;—(1) The defenders having, without title, warrant, or authority, intromitted with and sold the crop and stocking which belonged to the said Joseph Robb, and had become vested in the said William Carnegie, as trustee for Robb's creditors, are liable to such creditors for the amount of their claims. (4) The trustee on the estate of the said Joseph Robb having refused to call the defenders to account, his creditors are entitled to do so in their own interest. (5) In the circumstances condescended on, decree ought to be pronounced against the defenders, in terms of one or other of the alternative prayers of the petition, with expenses. (6) In the circumstances condescended on, and the pursuer being the only creditor of the said Joseph Robb, whose claim existed at the date of the decree of cessio, and is still undischarged, he is entitled to a direct decree against the defenders.

The defenders pleaded, *inter alia* ;—(1) The pursuer has no title to sue. (2) The prayer of the petition is incompetent, inasmuch as it is indefinite in its terms, and craves alternatively that payment be made to a trustee who is not a party to the action, and who does not even consent to it. (3) The pursuer's averments are irrelevant, and insufficient to support an action against the defenders. (4) The defenders not being obligants to the pursuer, and having no connection with the pursuer's claim, the action should be dismissed, with expenses. (5) The trustee on Joseph Robb's cessioned estate is the only person entitled to an accounting from the defenders under the deed in their favour, and he is not a party to this action.

On 14th June 1888 the Sheriff-substitute (Robertson) found that the pursuer had not stated a relevant case on which a decree could be granted; therefore to that extent sustained the preliminary pleas, and dismissed the action.

The pursuer appealed.

Argued for the pursuer ;—There were alternative conclusions here,—1st, for payment to the pursuer directly ; and, 2d, for payment to the trustee in the cessio. The first conclusion was supported by averments—which were the specialties of this case—to the effect that the pursuer was the only unpaid creditor, and therefore alone interested, and that he had failed to induce the trustee to move in the matter. These averments made the case one in which payment should be made directly to the pursuer. The defenders suggested that the pursuer had no title to sue unless he succeeded in obtaining from the trustee the use of his name

or an assignation of his right and title to maintain the claim. Such a form of process, however, would lead to unnecessary circuitry, and only create expenses. It might have been different if there had been outside creditors. That might have made it right for the Court to take the case on the second alternative conclusion, and to order payment to the trustee with a view to distribution among the whole creditors. In the absence of other competing claims, however, the objection to the pursuer's suing directly was purely technical. No doubt it had been laid down that neither a general residuary legatee<sup>1</sup> nor a beneficiary under a trust-deed<sup>2</sup> could sue a debtor of the testator or of the trust-estate directly, but that did not apply in a case of bankruptcy. As regarded the second alternative conclusion, the trustee had an undoubted title to sue for payment of the value of the property carried off by the defenders. Even if it were held that the pursuer must keep the trustee *indemnitas* in return for the use of his name, there was no averment here that the pursuer was *vergens ad inopiam*, or was unable to pay the expenses of the process.

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Argued for the defenders;—The pursuer had no title to sue under either of the alternative conclusions. Under the first, he was just suing directly an alleged debtor of his debtor, which was incompetent. Under the second, he had failed to take advantage of the two well-recognised forms of process<sup>3</sup> for suing where there was a decree of *cessio* on the estate which he sought to attach. He had neither obtained from the trustee the use of his name nor an assignation to his right and title to maintain the action. He said the trustee declined to move; but he could have compelled him to do so, provided he found security to keep him *indemnitas* in the expenses of the process.

At advising,—

LORD PRESIDENT.—The pursuer in this case is the alleged creditor of Joseph Robb, tenant of the home farm of Glenquiech, for the sum of £100, being money advanced to Robb in the year 1883. If Robb had remained solvent, this action would have been raised against him, but unfortunately he became insolvent. A process of *cessio* was raised against him in March 1886, and on the 25th of that month decree was pronounced against him, and William Carnegie was appointed trustee on the estate.

This action is directed neither against the pursuer's original debtor nor against the trustee in the *cessio*, but against certain persons who are said to have intromitted with the crop and stocking on the farm, and to be liable to account therefor.

Now, of course the only person who can call them to account for the debt must be the trustee in the *cessio*. The original debtor is divested, and the decree of *cessio* has the effect of vesting the estate in Carnegie, not indeed to the full extent of a statutory sequestration, but still it gives to the trustee an active title to recover the debts of the insolvent estate. The pursuer, however, says that the trustee will not move in the matter, and he maintains that he is therefore entitled to raise the action directly himself, and he says he is the only unpaid creditor.

I am of opinion that the pursuer has no title to sue. He is doing that which has been found over and over again to be incompetent, trying to sue his debtor's

<sup>1</sup> Hinton v. Connell's Trustees, July 6, 1883, 10 R. 1110.

<sup>2</sup> Rae v. Meek, July 19, 1888, 15 R. 1033, per Lord Shand, 1050-1051.

<sup>3</sup> Sprot v. Paul, July 5, 1828, 6 S. 1083; Spence v. Gibson, Dec. 13, 1832, 11 S. 212; Gray v. Fraser, Feb. 6, 1850, 12 D. 684, per Lord Moncreiff, p. 686, 22 Scot. Jur. 238; Teulon v. Seaton, &c., May 27, 1885, 11 R. 971.

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debtor. The defenders, if the original debtor had been solvent, would have been debtors to him, and now that he is insolvent they are debtors to the trustee in the cessio, and the pursuer can have no direct action against anyone except the trustee. The remedy of the pursuer is to claim against the estate, which, I suppose, he has done, and then if the trustee declines to sue the alleged debtor, to ask him to put him in a position to do so by lending him his name or by granting him an assignation. That of course the trustee will not be bound to do except upon condition of being kept free of the costs of the litigation, and upon that being done, the trustee, if not willing, may be compelled to put the pursuer in a position to insist on the claim.

Nothing of that kind, however, has been done here. The pursuer sues in his own name, and without any assignation. He is therefore simply suing his debtor's debtor.

LORD MURE.—I am of the same opinion, and from the nature of the case I regret that I am obliged to come to that conclusion. The pursuer's debt is not seriously disputed in the record, and he has an interest to endeavour to recover that debt. Unfortunately, however, he has no title to sue, for the trustee is the party whose right and duty it is to recover whatever is due to the bankrupt estate. Your Lordship has very clearly explained the circumstances in which the pursuer might have been allowed to prosecute his claim. His course was to have called on the trustee to take proceedings, and if he refused, to ask him for the use of his name, or for an assignation to the right to maintain the action, on condition of keeping the trustee free of the costs of the litigation. That course, however, was not taken, and I am of opinion that the pursuer has at present no title to sue.

LORD SHAND.—I do not think it was suggested in the argument that we have any decision bearing directly on the question here raised, which as a question of title to sue is I think an important one. I agree with your Lordship in thinking that there are clear general principles which exclude the pursuer's action on the ground of no title. As Lord Mure has pointed out, one would desire, if possible, to sustain the pursuer's title, because, in the first place, I do not think the argument against the relevancy of the action has any foundation. The action would be relevant if it had been brought by the trustee. And, in the second place, considerable expense has been incurred in reaching this point of the litigation. It is further said that the pursuer is the only unpaid creditor and if so, he has the material interest to have the question tried, if it be assumed that his averments are true. But though the case in this view looks like one of hardship, I am afraid that if the Court were to yield to that consideration this might hereafter be cited as one of those hard cases which make bad law. We should be sanctioning a principle which might lead to confusion in the administration of insolvent and bankrupt estates, and to the pursuit of claims by creditors who have no real title seeking to have their actions maintained on specialties. It is, I think, clearly safer and better to lay down a rule or to adhere to a rule which rests on general principles.

Now, the material fact of the case is this, that Robb's estate was transferred under a decree of cessio to Carnegie, the trustee in the cessio, and that he is consequently now the person in right of the administration of the estate. If Robb has any debts due to him Carnegie is vested with the right and duty of recovering these debts. The creditors of Robb have no right to do so.

because Carnegie is vested with the sole title to the estate. The petitioner has raised his summons, with alternative conclusions that the money shall be paid to himself, or otherwise to Robb's trustee. But even as regards the second alternative the trustee is the only person with a title to maintain the demand. It would be very embarrassing if separate creditors were entitled to raise the question. An alleged debtor of a bankrupt would be liable to an action at the instance of any creditor of his creditor, which cannot be allowed. The alleged debtor, moreover, is not the proper person to discuss the question whether the pursuer is really a creditor of the bankrupt. That is a question with the trustee. Farther, a debtor is entitled to say that he must have the trustee to deal with as being a person with means, and that he shall not have to litigate with a third party.

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There is a well-settled rule as to how parties should proceed in such circumstances, which is very well illustrated in the two cases of *Sprot v. Paul* (6 S. 1083), and *Spence v. Gibson* (11 S. 212). In both cases the Court held that the trustee was bound to give his name, if required to do so, on security being found for his expenses, or to give an assignation to the claim, which, of course, where the claim is not purchased, may be made subject to the condition that any sums found due should ultimately come into the trust-estate.

That being so, I think there is nothing more to be said, and I agree that this creditor cannot be allowed to move on his own account.

The case is analogous to that of a beneficiary on a trust-estate. The trustees are the parties to sue for debts due to the trust-estate. The beneficiary has no direct title. If the trustee refuses to sue, his title in certain circumstances may be acquired by the beneficiary, either by the use of his name or by an assignation to his right and title to maintain the action. The beneficiary is not entitled to sue directly for payment of a debt due not to himself but to the trust-estate. This view is borne out by the opinion of your Lordship in the case of *Hinton*, 10 R. 1110, and I have only repeated what I said on this latter point in the case of *Rae v. Meek* (15 R. pp. 1050 and 1051). I accordingly agree in thinking that we must dismiss the action.

LORD ADAM.—I concur in thinking that it is very clear on principle, and is perfectly settled, that a creditor cannot directly sue his debtor's debtor. Lord Shand has mentioned some of the reasons why that is the law. It is equally clear that if such a person wishes to recover sums of money due to his debtor he must proceed by arrestment and furthcoming. Then much less can a direct action be allowed where the pursuer only alleges himself to be a creditor, and his claim, as in this case, has never been sustained or adjudicated upon. It is simply a case of an alleged creditor of A suing B, an alleged debtor of A. I must say I think that such an action is contrary to all principle. If that is so, how does the fact of the debtor's estate being under cessio give that creditor a right to sue a debtor which he had not before? I think it would require something very clear to bring about that result, whether it is in a sequestration or in a cessio. The bankrupt estate is vested in the trustee, and he is the only person who has a title to sue a debtor to the estate.

If the trustee refuses to take action there are quite well-known means by which the creditor should proceed. He can demand the use of the trustee's name, and if the trustee refuses to give it he can be compelled to do so on condition of being kept *indemnitas* as regards the expenses by the creditor who

No. 63. desires to sue the action. How far that entered into the consideration of the course pursued by the creditor here I do not know. The creditor's other course is to get an assignation.

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Now, where you have two such well-recognised courses, which the pursuer might have known, although I regret the expense which has been incurred, I entirely concur that to sustain his title to sue would be *pessimi exempli*.

THE COURT recalled the interlocutor appealed against, sustained the first plea in law stated by the defenders, and assoilzied them from the conclusions of the action.

FODD, SIMPSON, & MARWICK, W.S.—IRONS, ROBERTS, & Co., S.S.C.—Agents.

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MRS HANNAH GOW STEWART, Pursuer (Reclaiming).—*C. S. Dickson*.

MRS ANNE CAMPBELL AND OTHERS, Defenders.

DUNCAN BUCHANAN, Defender (Respondent).—*Watt*.

Jan. 19, 1889.  
Stewart v.  
Campbell.

*Lease—Obligation to repair buildings—Retention of rent—Liquid and illiquid—Acquiescence.*—A farm was let from year to year under a lease, which was terminable on either side by written notice six months before the term of Whitsunday, and in which the landlord undertook to put the existing buildings into complete repair. The landlord spent a considerable sum on repairs on the entry of the tenants, who continued in occupation for five years, when the lease terminated. In the third year they asked for certain new buildings, but the request was refused. They paid the rent for four and a-half years without reservation of any claim against the landlord, and left the farm at the end of five years. In an action by the landlord to recover the last half year's rent, the tenants maintained that they were entitled to an abatement of that rent or compensation for loss sustained by them during the whole of the currency of the lease from the pursuer's failure to put the buildings into complete repair. The Court *repelled* the defences, and *granted* decree.

*Munro v. M'Geoch*, Nov. 15, 1888, *ante*, p. 93, *distinguished*.

1ST DIVISION.  
Lord Fraser.  
M.

BY minutes of lease, dated 4th June 1883, Mrs Hannah Gow Stewart, proprietrix of the island of Little Colonsay, Argyllshire, let to Mrs Anne Buchanan or Campbell and her son, Duncan Campbell, All and Whole the island of Little Colonsay, at a rent of £55, beginning the first term's payment at Martinmas 1883, under, *inter alia*, the following conditions:—  
"1st, The lease is to be for the period of one year from Whitsunday 1883, and from year to year thereafter, unless terminated by written notice on either side six months before the term of Whitsunday." "3d, The proprietrix agrees to put the whole buildings on the island let into a thorough state of repair, and subject to this obligation on her part,—the tenants accept the whole buildings as in good and sufficient repair." "5th, The tenants bind themselves to remove from the said subjects hereby let at any term of Whitsunday on receiving at least six months' previous notice either from the proprietrix or from her factor or agent." "6th, Duncan Buchanan binds himself and his heirs, executors, and successors as cautioners for the rent."

The tenants entered into possession under the lease at Whitsunday 1883, and continued to possess till Whitsunday 1888, when they voluntarily removed from the farm. They paid the rents for the period to Martinmas 1887, but at Whitsunday 1888 they refused to pay the last half year's rent on the ground that Mrs Stewart had failed to implement her obligation under the 3d condition of the lease—to put the buildings into a thorough state of repair.

Mrs Stewart raised this action against the tenants and the cautioner under the lease for payment of £27, 10s., as the last half year's rent, and averred that she had, at the entry of the tenants, spent between £100

and £105 in the complete repair of the only dwelling-house on the island. She further denied that the tenants had at any time complained to her regarding the condition of the buildings.

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The defenders having assigned their claims to Duncan Buchanan, their cautioner, he defended the action, and averred;—"The dwelling-house was not habitable at the beginning of the lease, and the steadings and other buildings on the island were, from the commencement of the lease, and throughout its continuance, in a very bad state, the barn, stable, byre, and cart-shed being roofless. Mrs Campbell and Lachlan Campbell (her husband) therefore repeatedly called upon the pursuer to implement her obligation under the lease, by having the steadings and other buildings put into a thorough state of repair. The pursuer, however, notwithstanding these requests, failed to have these repaired in any way. The said repairs were necessary and indispensable for the beneficial occupation of the farm, and were to have been executed before the tenants took possession, but pursuer did not give the tenants full possession, and did not deliver the subjects in the state agreed on. In consequence of the pursuer's failure to have the whole buildings put in a thorough state of repair, the tenants suffered loss and damage during their occupancy to an extent of not less than £80, no part of which has ever been made good by pursuer. . . . They have assigned their claims against pursuer to the defender. The defender is entitled to plead all defences competent to the tenants."

The pursuer pleaded;—(2) The objection regarding the state of the buildings not being open to the cautioner, the defences should be repelled as irrelevant.

The defender pleaded;—(2) The obligation by the pursuer in the lease "to put the whole buildings on the island let into a thorough state of repair" being an inherent condition of the lease under which the defender Buchanan signed as cautioner, and the same not having been implemented, the said defender is not liable. (3) The defender Buchanan, as cautioner, being entitled to plead all defences pleadable by the principal debtors, is entitled to set off against the claim for rent the loss and damage sustained by the tenants through the pursuer's failure to implement her obligations in the lease; *et separatim*, in virtue of the assignation in his favour by the tenants, he is entitled to set off the said loss and damage against the rent claimed. (4) The pursuer having failed to implement her agreement with the tenants to put the steading and other buildings in repair, whereby the tenants were deprived of the beneficial use and enjoyment of the subjects let to an extent exceeding the sum sued for, the defender is entitled to absolvitor.

On 13th December 1888 the Lord Ordinary (Fraser) allowed to the pursuer and the defender Duncan Buchanan a proof of their averments.

The pursuer reclaimed.

The pursuer lodged a copy of correspondence with Lachlan Campbell, from which it appeared that on 25th August 1885 the latter had written demanding that new houses should be erected for him. There was also lodged a certificate of repairs executed on the dwelling-house of the farm by the pursuer in 1883 amounting to £112.

Argued for the pursuer;—The defences fell to be repelled. The defender was here pleading an illiquid claim of damages as against a liquid claim of rent. The lease being from year to year, the tenants might have quitted the farm at the end of any year, or they might have done what was done by the tenant in *Munro v. M'Geochs*,<sup>1</sup> who protested from

<sup>1</sup> Nov. 15, 1888, 16 R. 93.



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the outset against the condition of the buildings, and only paid the first half year's rent on protest until the question should be settled. Here, however, the tenant had, without such protest, and without reserving the present claim, paid the rent for four and a-half years. The only request which appeared from the correspondence to have been made to the pursuer was one for new buildings, which was quite outside the landlord's obligation in the lease.

Argued for the defender;—In respect the pursuer had not fulfilled her obligation to put the whole buildings into proper repair, the tenants had suffered damage in excess of her claim for rent. At all events, they are entitled to set off the proportion of loss suffered during the last year against the claim for the last half year's rent.<sup>1</sup>

LORD PRESIDENT.—This is a case of a lease for one year, but the parties contemplated that it should be prolonged from year to year. That is to say, the tenant may continue as a yearly tenant according as both he and the landlord agree. Either of them may give notice to the other of the termination of the lease, and the right of the other is at an end, and the tenant binds himself “to remove from the said subjects hereby let at any term of Whitsunday, on receiving at least six months' previous notice from the proprietrix, or from her factor or agent,” and so forth.

Now, the tenant voluntarily removed from the farm, having been in possession for five years from Whitsunday 1883. Of course, there had become due during that period the rent for five years, or ten half years' rent, and nine of these were paid by the tenant quite regularly, and apparently without any objection that he had not been given possession of the entire subjects, or that they were not in the condition in which it was promised by the landlord they should be. Now, however, after the tenant has left the farm, and after his occupation is at an end, the defender for the first time sets up the plea that the farm buildings were not properly repaired, in terms of the landlord's obligation. I think, in these circumstances, the plea cannot be sustained.

In the case of *Munro* (*ante*, p. 93), which is the last of the cases on this subject, the facts were all the other way. In the first place, it was a nineteen years' lease, and the tenants were not entitled to put an end to it. But then the tenant protested from the outset against the condition of the buildings, and did not pay the first half year's rent, but only a sum to account, and that went on till the question came to be tried here. There was nothing there like acquiescence or abandonment of the claim. On the contrary, there was a continuous demand by the tenant on the landlord from the time he paid the rent that the buildings should be put into repair.

I can hardly conceive two cases more in contrast than that case and the present.

But further, if we glance at the correspondence, it is plain that the demand was not justified by the terms of the lease. It is not made until 25th August 1885, and then the demand is for new houses. But the lease contains no obligation except one to repair existing buildings. The demand, then, such as it was, was during the currency of the lease, and was not in terms of the landlord's obligation. I am of opinion then, on the whole matter, that we cannot sustain the defences.

<sup>1</sup> *Graham v. Gordon*, June 16, 1843, 5 D. 1207, per Lord Fullerton; *Munro v. McGeochs*, *supra*.

**LORD MURE**.—This is a very special case. The lease is practically one from year to year, with a power to either party to put an end to it on six months' notice. The tenant entered into possession of the subjects in 1883, and continued in possession till 1885, paying rent during that time apparently without objection, and without giving any notice of his intention to leave the farm. In 1885, however, he writes to his landlord demanding, not that the buildings should be repaired, but that new buildings should be put up. This is refused, but notwithstanding he continues to occupy the farm, and goes on paying rent for two and a-half years more, when he leaves the farm, and hands over to his cautioner any right he may have to demand damages for the loss he may have sustained through the buildings not being repaired and renewed, in order that this claim may be founded on in defence to any action which may be brought for payment of the rent due at the termination of the lease. I am of opinion that this demand, in the admitted facts of this case, cannot now be maintained. The certificate produced shews that repairs were made on the offices at a considerable cost at the time this tenant entered upon the lease. The rent is paid apparently without objection, and without the tenant making any reservation in the receipts of his alleged right to recover damages, which he ought unquestionably to have done, under such a lease as the present, if he intended to endeavour to raise up a claim of that description.

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**LORD SHAND**.—The third head of the lease is in these terms :—"The proprietrix agrees to put the whole buildings on the island let into a thorough state of repair." That is an obligation which fell to be implemented by the landlord at the beginning of the lease, and I cannot doubt that the tenant would have been entitled to retain the rent, or at least a part of the rent, until his landlord did so. Now, if either a portion of the subjects of a lease is withheld, or the buildings are not put into the condition stipulated, so that the tenant in effect really does not get the full use of the subjects let, the tenant may retain a portion of the rent, and claim for abatement. In the latter case, and it may be in both cases, the mode of making the claim may be by stating the amount of damages. The claim is substantially a claim for abatement, although the damage caused to the tenant may be the measure of the claim. I cannot doubt therefore that, if in the first year of the lease the tenant in this case had intimated, as was done in the case of *Munro*, that the repairs were insufficient, and this was the fact, he would have been entitled to retain part of the rent, and so for the second, third, and fourth years.

The peculiarity of the case, however, appears to be that a large sum was expended by the landlord during the first year, and the tenant paid the rent down to the end of the ninth half year without making any claim for an abatement. The only writing which we have indicates that the claim made in regard to buildings was a request for new buildings, with a view to the tenant's going on with his lease for a period of some endurance. There is no retention by the tenant of part of the rents, and no indication that he considered that the terms of the lease had not been fulfilled. I am quite clear that the notion of sustaining a claim of damages for the whole period is out of the question.

The only point of any nicety is, whether in lieu of £80 the tenant can now claim an abatement of £16, and make it applicable to his occupation of the subjects for the last year. With reference to that the obligation is peculiar. The lease is one from year to year, and by tacit relocation the obligations of the

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parties to each other may be the same in the last as in the first year of the tenant's occupation. But this particular obligation is of a peculiar kind. It is plain that five years before there was an obligation to put the subjects in order. It seems to be also clear that in the first year there was outlay by the landlord on the buildings. In these circumstances, and no objection having been made to the payment of the rent for four years, it would have required very clear notice on the part of the tenant that he held the obligation to have been unfulfilled by the landlord in order to raise a claim now. The tenant now says the obligation should apply to the fifth year of the lease, but I think he is barred by his actings and the absence of any earlier demand from demanding any abatement even on the last year.

The result is that I think that the Lord Ordinary's interlocutor should be recalled, and the defences repelled.

LORD ADAM.—It does not appear to me that this claim on the part of the defender is one of abatement of rent at all. It is a claim that the tenant shall not be called upon to pay any portion of the last half year's rent in respect of loss and damage sustained during the whole of the currency of the lease. If the claim was one of abatement of rent, the loss for each previous year would have been set off against the rent for that year. That would have been the proper way of stating the claim. But that is not so here, for each portion was paid without reservation, and no claim for abatement was made, and so matters went on until the last half year, and, as I have said before, no claim is set up to retain the portion of rent corresponding to that extent of the farm of which the tenant was not in possession in that half year. The claim is that the whole loss incurred during the whole currency of the lease shall be set off against that which is, I think, a proper claim for rent for the last half year. It is an attempt to set off an illiquid claim of damages against a liquid claim for rent. That being in my opinion the meaning of the record, I am of opinion that we must recall the interlocutor reclaimed against, repel the defences, and grant decree against the defender.

THE COURT recalled the interlocutor reclaimed against, repelled the defences, and decerned against the defender Duncan Buchanan in terms of the libel.

D. MACLACHLAN, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

## No. 65.

Jan. 24, 1889.  
Mollison v.  
Noltie.

HUGH MOLLISON, Pursuer (Respondent).—*J. C. Thomson—Orr.*  
JAMES NOLTIE, Defender (Appellant).—*C. J. Guthrie.*

*Contract—Gaming—Stocks—Contract to sell stocks to be purchased.*—Two persons entered into a joint adventure to sell stocks in name of one of them. They did not possess the stock in which they intended to deal, but they sold it, intending to buy it in before delivery should be required by the purchaser. The market rose, and the account was continued for some time, and then closed at a loss. *Held* that the contract was not as between the joint adventurers a gaming transaction, and that one of the joint adventurers, who had paid the whole loss, was entitled to recover payment of half of it from the other.

2D DIVISION.  
Sheriff of  
Aberdeen-  
shire.

ON 16th January 1886, Hugh Mollison and James Noltie, both residing in Aberdeen, agreed to enter into a joint adventure in the sale and purchase of Grand Trunk Railway of Canada First Preference Stock, and they instructed Alexander S. Sutherland, stockbroker, to sell five hundred

shares of that stock for them on the Aberdeen Stock Exchange. Neither Mollison nor Noltie was then possessed of such stock. Sutherland sold it for them at 54 $\frac{1}{4}$  per cent, the transaction being done in the name of Mollison. Thereafter the market for that stock rose, so that it could not be bought in and transferred to the purchaser at the settling day with profit to the joint adventure, and the account was "continued" till June 1886, when Mollison told the broker to close the account, and stock was bought in to be transferred to the purchaser. The price at which it was bought in was 63 $\frac{3}{4}$  per cent. The loss on the transaction amounted, including both commissions and differences, to £49, 15s. 11d., which sum Mollison paid to the broker.

Mollison sued Noltie in the Sheriff Court at Aberdeen for £24, 17s. 11d., as his share of this loss.

The defender stated that he and the pursuer had been in the habit of making joint adventures, and speculating on the rise and fall of the market; further, that he had told Sutherland to close the account at a time when no loss would have been caused—namely, March 1886—but that the account had been continued without his knowledge.

The pursuer pleaded;—(1) The defender having agreed to enter into said joint adventure with the pursuer, and having done so, defender is bound to bear his share of the loss arising therefrom. (2) The pursuer having paid the whole of said loss is entitled to recover the half thereof from the defender.

The defender pleaded, *inter alia*;—(5) The transaction being of the nature of a gambling transaction the action should be dismissed.

After proof, the Sheriff-substitute (W. A. Brown) sustained the defender's fifth plea in law, and dismissed the action.\*

On appeal, the Sheriff (Guthrie Smith) recalled the interlocutor of the Sheriff-substitute, found "it proved that on the joint employment of the pursuer and defender, A. S. Sutherland, stockbroker, sold on their account certain railway stocks, with the result that they became indebted to him in the sum of £49, 15s. 11d. for commission and differences," and found in law "that the pursuer having paid this sum to the said A. S. Sutherland, is entitled to recover from the defender his share thereof, being the sum sued for; therefore repels the defences, and decerns in terms of the conclusions of the summons."

\* "NOTE.—It appears to me that there is no room for doubt as to the nature of the transaction or joint adventure on which the parties embarked, and indeed no attempt was made to conceal that. They were simply speculating on the rise or fall of the market, and the broker whom they employed put things in shape to admit of that purpose being carried out as he had done before. It is not suggested that as between the seller and purchaser of the stock in question the transaction was not perfectly genuine, for that was not made fictitious by the person to whom the stock originally fell to be transferred again selling for delivery at next settling-day. One side, indeed, only of the transactions is produced, but there is no room for doubt that the other would have been forthcoming had it been called for. The broker had established complete privity of contract, rendering himself liable to his constituent on the one hand and entitling him to recover differences and commission so long as he did not mix himself up as principal. But *inter se* the pursuer and defender were engaged in a purely gambling transaction, and it is a well-settled rule of law that Courts will not interfere in such circumstances to give either of them redress when they fall out. Nor do I think that this doctrine is in the least affected by the fact that under the joint adventure the right to profit and the liability to loss were precisely ascertained, and that in these respects the parties were on an equal footing, for nothing but chance lay at the root of the bargain which is sought to be enforced. . . ."

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The defender appealed, and argued;—(1) The transaction was clearly of a gambling nature, and the pursuer's case was that one of the losers in a wagering speculation was entitled to recover half his loss from another. Money advanced or deposited for gaming purposes could not be recovered by an action,<sup>1</sup> for there was no right of relief among wrong-doers.<sup>2</sup> In the case of *Higginson*,<sup>3</sup> a "tipster" was held to have no action to recover part of the defendant's winnings on a horse-race in which he had advised him as to the winning horse. That case was decided on the Act 8 and 9 Vict. c. 109, sec. 18, but that statute merely expressed what was the common law of Scotland. (2) On the proof, the defender had directed the account to be closed, and it was continued against his will. He could not therefore be made liable for the loss. The case was distinguishable from *Newton v. Cribbes*,<sup>4</sup> because in that case the customer got accounts shewing that the account was being continued and that loss would fall upon him.

Argued for the respondent;—The transaction was not a bet, but a *bona fide* joint adventure. There was a true purchaser, to whom the broker was bound, and to whom the stock had been delivered. There was no good reason why the parties who had, through the broker, become bound to him, should not divide the loss. But it was sufficient that there was nothing illegal in a joint adventure to sell stock, purchasing it, if need be, before the day of sale. The case of *Foulds*<sup>5</sup> settled that the employment of a broker to sell stock merely in the hope that the market would fall was not gaming and wagering. The law was the same in England.<sup>6</sup>

LORD JUSTICE-CLERK.—There are two points in this case; one as to the evidence, the other as to the law. With regard to the former of these points, the Sheriff says in his note that the defender has failed to make out the allegation that he gave the broker instructions to close the account in March, and that he was not aware that the account had been continued, as it afterwards turned out to have been. On this point I agree with the Sheriff.

The other question is the important one as to the law. It is the question whether the defender is justified in resisting payment of his share of the sum paid to the broker by the pursuer, on the ground that the transaction was a gambling transaction, and that the Court will not listen to a party who comes forward asking powers to enforce an alleged right arising out of such a gaming transaction. Now, having given the subject the best consideration I can, I think that the Sheriff is right on this point also. The broker, Sutherland, was instructed to sell a certain number of shares for both Mollison and Noltie. It is not disputed that at that time neither Mollison nor Noltie possessed the scrip, and that the transaction was a speculation. They both hoped that the market would fall, and that they would therefore make money by purchasing the stock at a lower price before it required to be delivered. In this they were

<sup>1</sup> Wordsworth v. Pettigrew, 1799, M. 9524; O'Connell v. Russell, Nov. 25, 1864, 3 Macph. 89; Calder v. Stevens, July 20, 1871, 9 Macph. 1074; Risk v. Auld and Guild, May 27, 1881, 8 R. 729 (Lord Young); M'Kinnell v. Robinson, 1838, 3 M. & W. 434.

<sup>2</sup> Bell's Prin. (8th ed.) sec. 550, cf. secs. 36, 37; Merryweather v. Nixon, 8 T. R. 186.

<sup>3</sup> Higginson v. Simpson, 1877, L. R., 2 C. P. D. 76.

<sup>4</sup> Newton v. Cribbes, Feb. 9, 1884, 11 R. 554.

<sup>5</sup> Foulds v. Thomson and Burn, June 10, 1857, 19 D. 803.

<sup>6</sup> Addison on Contracts, p. 1157 (8th ed.); Thacker v. Hardy, 1878, 4 Q. B. 685.

unfortunate, for the market rose. Now, I think this transaction was an ordinary and *bona fide* one on the Stock Exchange, whereby a broker was instructed to sell, and did sell, the shares to a third party. Mollison and Noltie were bound to deliver the stock, and did, after the transaction had been continued over, procure and deliver it. I cannot hold that that is a transaction struck at as a gaming contract. There were not two parties wagering, and a wager requires two parties. It cannot be said that the two speculators, Mollison and Noltie, were wagering with the purchaser, for he was an ordinary purchaser offering to buy stock and intending to obtain it, and not in any sense engaged in a wager. Was the broker then engaged in wagering about the stock? He was not, for his whole interest in the matter was to obtain his commission, and to be kept by his employers free from personal liability to the purchaser.

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We have, then, only Mollison and Noltie left, and they could not be wagering with each other, because under no circumstances could the one be better or worse off by the event than the other. I think the transaction comes within the rule of the case of *Foulds*, and a passage in the opinion of Lord Wood in that case is entirely applicable to this one. Lord Wood says (19 D. 816)—“To wagering or gaming there must be two parties” (and of course he means two opposing parties.) “The provisions of the statute are all framed on that footing. The parties must come together directly or through their brokers. In contracts within the statute there must be opposite parties, and there can be no innocent ignorant third parties. If a party or his broker go to another party or his broker and arrange or make a contract for the sale and purchase of shares, but where they are merely to pay the differences according to the rise and fall of the market, that would be gaming within the statute. But in the present case there is no evidence that any one of the contracts forming the transaction in the account libelled was a contract for payment of differences, and to be implemented by such payment. On the contrary, it appears that the transactions were with a great variety of brokers, acting for an equal variety of constituents, and, as far as seen, every transaction was a real *bona fide* onerous purchase or sale from or to a party to whom a personal obligation was undertaken to fulfil the contract, which he was entitled to enforce, and in which the responsibility of the pursuer as broker for the defenders did not terminate until the stocks bought or sold were either delivered or paid for.” I think that with the single difference that in that case there was a variety of different transactions, which is not the case here, that paragraph of Lord Wood’s opinion exactly applies. I have no hesitation in agreeing with the Sheriff.

LORD YOUNG.—I am of the same opinion. I think that the Sheriff-substitute has somewhat misapprehended the case, not the facts so much as the law, for I see that he says—“It is not suggested that as between the seller and purchaser of the stock in question the transaction was not perfectly genuine, for that was not made fictitious by the person to whom the stock originally fell to be transferred again selling for delivery at next settling-day.” No doubt the parties to this action were both speculating on a fall of the stock. That was because they were both selling it. But, unfortunately for them, the stock rose and they could not buy in the stock save at a loss, which, as to them both, is only £49, for to that extent, taking into account the commission of the broker, the stock rose before they bought it. I think it was a genuine transaction. The purchaser of the stock demanded it and was entitled to get it. Well, he

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obtained the stock, and one of the adventurers had to pay the whole £49 which they lost. Why should not the other pay his share? It was a genuine transaction. The buyer would, if the broker had not bought in the stock, have been entitled to sue for the difference of the price between the price at which it had been sold to him and the price he would have had to pay for it, and the broker had involved himself in liability. Now, the pursuer has paid to the broker both his own share and the defender's. The speculation might have been one about any other property—a house, for example—as much as about stock. The buyer, if it was not delivered to him, would have been entitled to acquire it at the expense of those who undertook to sell it to him. I think that if one of the sellers paid that loss, it is clear that the other must pay him his share. I think the matter is well expressed in the opinion of Mr Justice Lindley, in the case of *Thacker v. Hardie*, 4 Q. B. D. 685, which was a case of pure speculation. His Lordship held,—“Firstly, that the defendant was a speculator, and the plaintiff knew him to be so. Secondly, that the defendant employed the plaintiff to speculate for him on the Stock Exchange. Thirdly, that the defendant knew or must be taken to have known that in order to carry out the transactions the plaintiff would have to enter into contracts to buy or sell as the case might be.” Now, I think there was here no wagering. It was reprehensible speculation no doubt, but it was carried on (and there was no other way of carrying it on) by real contracts, which the buyer could and did enforce against the joint speculators to their loss. I think the pursuer is entitled, having paid the whole of that loss, to recover the half of it from the defender.

On the question of fact as to the broker's instructions to carry over, I agree that the Sheriff's judgment should not be altered.

LORD RUTHERFURD CLARK.—I agree.

LORD LEE.—The question is whether the ground of the pursuer's action is *sponsio ludicra*? I do not think it clear that that question is answered by the mere consideration that the purchaser from the pursuer and defender was a real purchaser. I go upon this consideration, that according to the statements of both parties upon record, the transaction in which they were engaged was a real and lawful joint adventure in stocks, and not a joint adventure in gaming or in staking money upon a chance.

THIS interlocutor was pronounced:—“Find in fact (1) that on the joint employment of the pursuer and defender, Mr A. S. Sutherland, stockbroker, on 16th January 1886, sold on their account five hundred shares of the Grand Trunk Railway Company of Canada First Preference Stock, and that the said stock was subsequently purchased in order to implement said contract of sale, and was delivered to and paid for by the purchaser: (2) That in respect of said transaction the pursuer and defender became indebted to the said A. S. Sutherland in the sum of £49, 5s. 11d. for commission and differences on said contract of sale: Find in law that the pursuer, having paid the said sum to the said A. S. Sutherland, is entitled to recover from the defender his share thereof, being the sum sued for: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff appealed against, . . . and decern.”

STUART & STUART, W.S.—R. C. GRAY, S.S.C.—Agents.

MISSSES JANET AND HELEN CURROR, Pursuers (Reclaimers).—

*D.-F. Mackintosh—Low.*

MRS MARGARET WALKER AND OTHERS (Walker's Trustees).—Defenders  
(Respondents).—*Balfour—Muirhead—Blair.*

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*Trust—Agent and Olient—Liability of law-agent.*—Held that it was no part of the duty of a law-agent appointed to be factor and law-agent to the trustees under a trust-disposition and settlement to volunteer his advice to the trustees that a loan made by the testator on personal security was not such an investment of the trust funds as they were entitled to retain, and that therefore he was not liable for loss resulting from their retaining the investment.

On 30th January 1888 Miss Janet and Miss Helen Curror, the representatives of Mr John Curror of Nivingston, raised an action against Mrs Margaret Walker and others, as trustees of Mr John Walker, W.S., concluding for payment of £5479, 18s. 10d.

1st Division.  
Lord Fraser.  
M.

The pursuers stated that they were sole representatives of Mr John Curror. They then averred;—(Cond. 2) "The late William Kennedy, W.S., Edinburgh, died on 23d April 1877, leaving a trust-disposition and settlement dated 10th June 1876, and codicil thereto dated 20th April 1877, by which he conveyed his whole estate, heritable and moveable, to the late Adam Curror, Esq. of the Lee, and his brother, the said John Curror, in trust for the purposes therein mentioned. He also nominated and appointed his said trustees to be his executors." (Cond. 3) "By his said trust-disposition and settlement, which is holograph, Mr Kennedy conveyed his whole estate and effects to the said Adam Curror and John Curror," in trust for certain purposes, which necessitated the trust being kept up for a considerable time. "The testator further recommended his trustees to employ John Macara, solicitor, who was then his clerk, to act as agent in the management and winding up of his affairs. By the said codicil, the testator, after expressing his wishes in regard to the place of his interment, and the retention of his house in Edinburgh for five years, gave the following directions in regard to the agency of the trust:—'I wish John Walker, W.S., to be factor and agent for my trustees and executors, and I recommend him to employ my present assistant, Mr John Macara, solicitor, . . .'" (Cond. 4) "After Mr Kennedy's funeral, Mr Walker took possession of all his papers, and he also had possession of his house in Edinburgh, in which his business had been conducted, retaining the services of Mr Macara and Mr Kennedy's staff of clerks for the purpose of winding up his business. Mr Adam Curror and Mr John Curror accepted the trust, and a meeting of trustees (the first meeting) was held on 1st May 1877, when Mr Walker was formally authorised to act as factor and law-agent to the trust, to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor. An inventory of the estate (amounting to £91,918, 15s. 1d.) was then given up, and confirmation of the executors was obtained on 12th June 1877. Thereafter, the affairs of the trust were entirely conducted by Mr Walker, who only called a meeting of trustees when it was necessary for him to obtain their signatures. The Messrs Curror having full confidence in Mr Walker, and especially looking to the fact that he had been specially nominated law-agent of the trust by Mr Kennedy, trusted to him, as they were entitled to do, to advise them and keep them right in all questions of law connected with the administration of the trust." (Cond. 5) "The Messrs Curror were upon terms of the greatest intimacy with Mr Kennedy, and he was their



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law-agent. Mr Kennedy had frequently, during the fifteen or twenty years prior to his death, advanced considerable sums of money to Mr Adam Curror, and in December 1876 the latter was indebted to him in the sum of £4000. Accordingly Mr Adam Curror granted to Mr Kennedy, on 13th December 1876, a bond and assignation in security for the sum of £4000, whereby he bound himself to repay the said sum to Mr Kennedy, and in security thereof assigned to him £2400 City of Glasgow Bank stock, then of the value of £5472, and £1000 Union Bank of Scotland stock, then of the value of £2800. It was, however, arranged that Mr Kennedy should not intimate the assignation of the said bank stock, and he wrote a letter to Mr Adam Curror, dated 11th December 1876, undertaking not to do so." (Cond. 6) "At the date of Mr Kennedy's death the said loan of £4000 to Mr Adam Curror was secured only by his personal obligation, contained in the said bond, and by the unintimated assignation of the said bank stock. Mr Adam Curror was then possessed of very considerable means, and if Mr Walker had advised the trustees that it was their duty as trustees to obtain payment of the debt of £4000, Mr Adam Curror would have made payment thereof, and he was then in a position to do so without difficulty. Mr Walker, however, through gross and culpable recklessness, or in gross neglect and breach of his duty, failed to advise Mr Adam Curror or Mr John Curror that it was their duty as trustees to obtain payment of the said loan, or that the security upon which the money stood was not such as trustees were entitled to hold as a trust investment. The Messrs Curror believed that the security for the said loan was ample (and in fact it was ample until the failure of the City of Glasgow Bank in October 1878, when Mr Adam Curror was ruined, as after mentioned), and as Mr Adam Curror was paying 5 per cent upon the money, it is believed and averred that it did not occur either to him or to Mr John Curror, that there was any necessity for calling up the loan, especially as Mr Kennedy had himself been satisfied with the security. The Messrs Curror were not lawyers, and they trusted, as they were entitled to trust, to Mr Walker to keep them right in matters of law. Mr Adam Curror paid the interest upon the said loan up to and including Whitsunday 1878 to Mr Walker, as factor for the trust. Mr Walker gave receipts to Mr Adam Curror for the said interest, but never advised that the loan should be paid up. Mr Walker also in 1877 paid Mr Adam Curror a legacy of £500, left to him by Mr Kennedy in his said trust-disposition and settlement." (Cond. 7) "The City of Glasgow Bank stopped payment in October 1878, and in consequence of the assignation to Mr Kennedy of the stock of the bank held by Mr Adam Curror not having been intimated to the bank, Mr Adam Curror's name remained on the register as a shareholder. Shortly after the stoppage of the said bank, Mr Walker, on behalf of Mr Kennedy's trustees, intimated to Mr Adam Curror's agent, that it would be necessary to have the £1000 of Union Bank stock, assigned to Mr Kennedy as already mentioned, transferred to the trustees, to enable them to realise the stock. Mr Adam Curror, however, advised by Mr Kirk Mackie, his agent, declined to grant any transfer in the then situation of his affairs, and shortly afterwards his estates were sequestrated. He died on 11th February 1879." (Cond. 8) "In March 1879 Mr Walker, on behalf of Mr John Curror, as sole trustee of Mr Kennedy, took the opinion of counsel as to the advisability of lodging a claim in Mr Adam Curror's sequestration for the said sum of £4000, and counsel advised that no claim should be lodged, in case it should give rise to a claim by the liquidators of the City of Glasgow Bank against the trust-estate in respect of the said assignation of stock of the bank by Mr Adam

Curror to Mr Kennedy. Accordingly, no claim was lodged in the sequestration, and the said sum of £4000 was totally lost to the trust-estate. No. 66.  
 Mr Adam Curror's estate ultimately yielded a dividend of 3s. 3d. per £." Jan. 25, 1889.  
 They further stated that Mr John Curror, after having assumed Mr C. Curror's v. Walker's Trustees.  
 J. T. Dunlop as a trustee under Mr Kennedy's trust-settlement, died on 8th July 1885.

Mr Walker died on 27th November 1879, leaving a trust-disposition, under which he appointed the defenders in this action his trustees. Shortly after John Curror's death Mr Dunlop, as sole trustee under Mr Kennedy's trust-deed, recovered from the pursuers, as John Curror's representatives, payment of the above-mentioned sum of £4000, with interest, amounting in all to £5479, 18s. 10d.

In the present action they sought to recover that sum from Mr Walker's trustees.

The pursuers pleaded;—(1) The said John Walker having, in gross violation and neglect of his duty as law-agent and factor for said trust, failed to advise the said Adam Curror and John Curror that it was their duty as trustees to obtain payment of said loan, the defenders, as representing the said John Walker, are bound to make good to the pursuers and relieve them of the loss sustained by them as representatives of the said John Curror, through payment of the said loan not having been obtained.

The defenders pleaded, *inter alia*;—(1) The pursuers' statements are not relevant or sufficient to support the conclusions of the summons.

On 9th June 1888 the Lord Ordinary (Fraser) pronounced this interlocutor:—"Finds the averments of the pursuers irrelevant; dismisses the action, and decerns." \*

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\* "OPINION.—This is an action of a kind which the Lord Ordinary has had occasion to deal with several times during the last two years. The law-agent is here once again sought to be made liable in damages for failure in duty. The ordinary case is where the law-agent bungles a title, omits to intimate an assignation, neglects to make proper inquiries in reference to investments which he recommends. But the present case is one which goes far beyond any precedent in this branch of the law. The liability for damage in the present case is sought to be enforced, not on account of any blunder which the law-agent committed, but on account of his not having ultroneously given advice as to the risky character of an investment which had been made by the testator himself. The facts are simple enough. William Kennedy, W.S., Edinburgh, who died in 1877, had lent to his friend, Adam Curror, Esq. of the Lee, £4000 upon Mr Curror's personal bond. Mr Curror was a shareholder in the City of Glasgow Bank, and by the failure of that bank he was ruined, while the £4000 remained unpaid. Mr Kennedy, by a codicil to his will, said, 'I wish John Walker, W.S., to be factor and agent for my trustees and executors.' And the trustees and executors, at the first meeting after Kennedy's death, nominated Mr Walker as factor and law-agent to the trust, 'to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors, and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor.' Mr Walker accepted this employment, and performed the various pieces of business thus confided to him. He died on the 27th of October 1879, and now, nine years after his death, an action is raised against his executors, claiming damages against them by reason of the fact that he did not advise the two trustees, Adam and John Curror, to compel payment from Adam Curror, one of the trustees, of the debt he owed to Kennedy's trust. The pursuers say that they have been 'advised that Mr Walker, in respect of his said failure of duty, became liable to relieve Mr John Curror, or his representatives, of any loss sustained by them in consequence of non-realisation of Mr Kennedy's estate, and that the same liability rests upon the defenders as Mr Walker's representatives.' The representatives

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The pursuers reclaimed, and argued ;—Trust funds which were invested at the truster's death fell into two classes, those invested in securities which trustees could legally hold, and those invested in securities which they could not legally hold.<sup>1</sup> The distinction was clearly marked, and the question of sufficiency did not enter into the matter. It would be no answer to an action against trustees for having lent on personal security, that the person to whom they lent was a very rich man at the time of the loan.<sup>2</sup> That being so, it was the duty of the trustees in this case to have realised within a reasonable time. They were not, however, lawyers, and were entitled to rely, and did in point of fact rely, on Mr Walker to keep them right in points of law. He was bound when it came to his knowledge that the trust funds were invested in such securities to advise the trustees that they were bound to sell. It was admitted that the law-agent was not bound to advise on the point of the sufficiency of the security,<sup>3</sup> but he was bound to advise the trustees to obtain payment of the loan, and that it was illegal for them to hold the stock. Mr Walker was employed to do what was right in ordinary course, and he ought to have seen that the security was realised. The matter must have been brought before his notice in making up the inventory of the estate, and when he paid the legacy to Mr Curros. It was the duty of Mr Walker to go over all the securities, and to advise the trustees whether they could legally hold them. The question was not one of prudence or imprudence in the trustees in keeping on the security, but of legality. It was not here averred that Mr Walker was asked for his advice, but the question must have come up at every meeting of the trust, and it was his duty when it did to volunteer his advice, and not to sit silent and see the trustees doing an illegal act. The trustees would, in such a case, be entitled to assume that everything was right unless the

of John Curros, the co-trustee of Adam Curros, were called upon to pay up the debt owing by Adam Curros, and did pay it with principal and interest, amounting altogether to £5479, 18s. 10d. John Curros's representatives were thus made liable, because he, John Curros, had not compelled his brother Adam Curros to make payment of the debt he owed to the trust ; and now these representatives seek to make Mr Walker's executors liable for the sum of money that they have so paid, because he did not advise the trustees to proceed against one of their number for recovery of the money. There are no means of ascertaining now whether he gave such advice or not ; nor are there any means of ascertaining whether, if he had given it, it would have been followed. But these points are of no importance, because there is no such duty laid upon an agent for trustees, to watch over their investments, and to give them good counsel when the investments become dangerous. That is the duty of the trustees themselves, which they are not entitled to delegate to their agent, and for the due performance of which he is not responsible, unless, indeed, he agrees to perform work which is properly that of the trustees. If an agent for trustees is bound to be for ever looking around, in order to ascertain whether any of the debts owing to the trust, or the investments upon which the trust moneys are laid out, are in an insecure condition, then in like manner an agent for any client would lie under the same responsibility. There is nothing special in the position of trustees in regard to this matter.

"It was admitted that there was no precedent for such an action as this, nor any dictum from the bench or by a writer of authority, and consequently the only course with this action is to dismiss it."

<sup>1</sup> Maclaren on Wills, ii. 230 ; Lewin on Trusts, pp. 290 *et seq.*

<sup>2</sup> Raes v. Meek, July 20, 1888, 15 R. 1033—see Lord Mure, p. 1049, Lord Shand, p. 1051 ; Wyllie Guild v. Glasgow Educational Endowments Board, 'y 16, 1887, 14 R. 944.

Knox v. Mackinnon, August 7, 1888, 15 R. (H. L.) 83.

agent warned them to the contrary. He had failed in that duty, and was therefore liable for any loss incurred by his neglect. There was no distinction between taking and retaining a security in such circumstances, and none between giving wrong advice, and by keeping silence allowing the trustees to retain an illegal security.<sup>1</sup>

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Argued for the respondents;—The duty here condescended on did not arise from the relation between agent and client, which was the only relation averred on this record. There was no special employment averred on record which made Mr Walker liable for not telling the trustees that they could not hold these stocks legally. It was not averred that he was even asked for his advice on this point of law, and it would take very specific averments of special employment to enable the Court to hold that he was bound to volunteer advice (which might not be acceptable). There was no authority for the demand here made, and if law-agents to trustees were to be held liable for every mistake made in the carrying on of a trust, whether their advice had been asked on the point or not, it would make the position of such agents an intolerably dangerous one.

**LORD PRESIDENT.**—In this case I agree with the Lord Ordinary. The trustees of the late Mr Kennedy were Mr Adam Curror of the Lee and his brother, the late Mr John Curror. The brothers were very intimate friends of the testator, and in compliance with a wish expressed in Mr Kennedy's settlement, they appointed the late Mr John Walker, W.S., to be their factor and law-agent. The duties of a factor and law-agent on a trust-estate are perfectly well defined and known in law, and they are accurately expressed in the 4th article of the condescendence. Mr Walker was authorised to make up the trustees' title to the estate, and to do whatever might be necessary for the confirmation of the executors; and in regard to the general management of the estate to make all necessary payments and disbursements therefor. The estate consisted of a large sum of money invested in a number of different securities, and it was to be upheld by the trustees for a considerable period—until the beneficiary, the truster's grand-nephew, who was in infancy, attained the age of twenty-one years. One of the assets of the trust-estate was a sum of £4000 owing to Mr Kennedy by Mr Adam Curror, one of the trustees. It is explained by the pursuers that Mr Kennedy had frequently, during the fifteen or twenty years prior to his death, advanced considerable sums of money to Mr Adam Curror; and in December 1876 Curror was indebted to Mr Kennedy in £4000. He granted Mr Kennedy a bond for that amount, dated 13th December 1876, and he gave him also an assignation in security of certain shares in the City of Glasgow Bank, and of certain shares in the Union Bank of Scotland. It is further stated in cond. 5 that it was arranged that Mr Kennedy should not intimate the assignation of the bank stock, and he wrote a letter to Mr Adam Curror, dated the 11th December 1876, undertaking not to do so. That, therefore, was an unsecured debt, standing upon the personal credit of the debtor, Mr Adam Curror, and there can be no doubt that it was not a proper investment for the trust-estate. In the first place, it was dependent entirely upon the personal security of the debtor, and in the second place it was a debt due by one of the trustees to the trust-estate. In both of these particulars it was not an investment which should have been kept up. Notwithstanding, the two trustees, Mr Adam Curror being

<sup>1</sup> *Brownlie v. Brownlie's Trustees*, July 11, 1879, 6 R. 1233.

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himself a debtor and the other trustee being his brother, thought fit to keep up that debt as a proper investment for the estate; or, at all events, they did not call it up or interfere with it. The money was lost in consequence of Mr Adam Curror being a partner in the City of Glasgow Bank, and being ruined by the failure of that bank. At the time the trustees entered upon the management of the estate it was not disputed that Mr Adam Curror was a perfectly solvent man, and quite able to meet all his liabilities. In consequence of the loss of the money, Mr John Curror's representatives have been obliged to replace the sum lost, which, with interest, amounted to £5479, 18s. 10d., the sum sued for; and they have brought this action for the purpose of making the representatives of Mr John Walker liable to the trustees for his failure of duty towards them.

The pursuers, of course, represent the last solvent trustee who made that investment, or, rather, who kept up that investment. Therefore, if there is any ground of liability on the part of Mr Walker to his clients, the trustees, it is not disputed that the pursuers are quite entitled to avail themselves of that, and to enforce liability against Mr Walker's representatives. But the question comes to be, what is the nature of the liability, or does such liability exist at all in the circumstances. The trustees, according to the statement of the pursuers in the 6th article of the condescendence, applied their minds to the question whether that money should be called up or not, because they say that "the Messrs Curror believed that the security for the said loan was ample (and, in fact, it was ample until the failure of the City of Glasgow Bank in October 1878, when Mr Adam Curror was ruined as after mentioned), and as Mr Adam Curror was paying 5 per cent upon the money, it is believed and averred that it did not occur either to him or Mr John Curror that there was any necessity for calling up the loan, especially as Mr Kennedy had himself been satisfied with the security." That was not a matter in which the two trustees did absolutely nothing, or failed to take the matter into consideration. On the contrary, that averment shews that the trustees had considered the matter, and believed the security to be ample, which, indeed, it was at the time, and therefore they came to the conclusion that there was no necessity for calling up the loan. There cannot be any doubt, I suppose, that the trustees in so acting acted quite wrongfully and in breach of their trust. But, then, how did Mr Walker come in as a party liable for that proceeding? The averment is this:—"The Messrs Curror were not lawyers, and they trusted, as they were entitled to trust, to Mr Walker to keep them right in matters of law. Mr Adam Curror paid the interest upon the said loan up to and including Whitsunday 1878 to Mr Walker, as factor for the trust; Mr Walker gave receipts to Mr Adam Curror for the said interest, but never advised that the loan should be paid up. Mr Walker also, in 1877, paid Mr Adam Curror a legacy of £500 left to him by Mr Kennedy in his said trust-disposition and settlement." Of course, it fell to Mr Walker as factor to ingather the annual payment of interest, and therefore it was necessary to receive from Mr Adam Curror the interest upon that £4000. The fact that Mr Walker paid £500 to Mr Adam Curror came to no more than this, that that was a legacy which the trustees had to pay to Mr Adam Curror. The payment, therefore, was a payment by the trustees, although, as a matter of fact, the cheque may have come through the hands of Mr Walker. There is another passage which I ought perhaps to read—"Mr Walker, however, through gross and culpable recklessness, or in gross neglect and breach of his duty, failed to advise Mr Adam Curror or Mr John

Currer that it was their duty, as trustees, to obtain payment of the said loan." No. 66.  
 Now, was Mr Walker in such a position that he was bound, without his advice  
 being asked, to volunteer the statement that these two trustees were bound to call Jan. 25, 1889.  
 up the loan? I think Mr Walker was not under any such obligation to volun- Currors v.  
 teer his advice. The law-agent of a trust is the law-agent of the trustees, no Walker's  
 doubt. They employ him to advise them, but if upon any point they do not Trustees.  
 want advice they are not bound to take it; and if they do not ask advice the  
 law-agent is not bound to volunteer it. These gentlemen may have been quite  
 conscious that they ran considerable risk in allowing that loan to lie, but still  
 they probably thought the risk a small one, and resolved to run it. They were  
 men of understanding and men of business, and quite capable of judging on a  
 matter of that kind. They did not ask Mr Walker's advice. If they had,  
 that would have been stated as a matter of course, but Mr Walker was not  
 bound to volunteer it.

We cannot help looking forward to see what sort of case could be made out  
 if proof were allowed here. It so happens that both the Currors are now dead,  
 Mr Walker is dead, and the clerk who acted under Mr Walker in the manage-  
 ment of the estate is also dead. If there were to be a proof, it would be in the  
 absence of every human being who could have spoken to the facts. There could  
 only be a proof by writings, and as the pursuers have had, as is stated in the con-  
 descendence, access to the accounts, papers, and minutes of the trust in a former  
 case, and do not now aver anything relevant in support of this claim, I cannot  
 help feeling some confidence in the safety of the judgment we are about to  
 pronounce. Upon these grounds, I am for affirming the Lord Ordinary's inter-  
 locutor.

**LORD MURE**.—I concur. There is not on this record, as I read it, any rele-  
 vant ground of liability set forth as against Mr Walker's trustees. It is not in  
 my opinion any part of the duty of a law-agent for trustees, unless under in-  
 structions to that effect, to put the trust-estate to the expense of his examining  
 the various securities in which the trust funds have been invested, with a view  
 to his advising the trustees whether those investments should be continued.  
 And there is nothing in the special circumstances of this case, as alleged, to  
 lead to the conclusion that the late Mr Walker was neglectful of his duties in  
 that respect. I therefore agree in thinking that this action should be dis-  
 missed.

**LORD SHAND**.—I concur in the result at which your Lordships have arrived.  
 Even if inquiry were to be allowed, I greatly doubt whether the pursuers would  
 take any benefit. The evidence which they could adduce would labour under  
 two great difficulties, namely, that ten or eleven years have elapsed since the  
 events condescended on took place, and that all the parties immediately con-  
 cerned with those events are now dead. Thus, even if the case got to the stage  
 of inquiry, there would necessarily be a great deal of groping in the dark before  
 any knowledge of the facts could be arrived at. The question in the case comes  
 to be whether there was any conversation about the matter between the trustees  
 and their law-agent, and even if there were, and Walker explained the law  
 applicable to the security in question, there might be circumstances clearly  
 tending to shew that the trustees would have preferred to run any risk there  
 was in holding on the security.

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Jan. 25, 1889.  
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Trustees.

I take the case now, however, on the footing that the pursuers would succeed in proving their averments that Mr Walker failed to advise the trustees that their duty was to get rid of this investment.

That being so, the question comes to be whether the pursuers have stated a relevant ground to support their claim. I am of opinion that they have not. I have no difficulty in saying that, in my opinion, the investment in question was one of a class which is not allowable in the management of trust funds, being a loan (1) on personal security only, and (2) on the security of one of the trustees themselves, and there being no power given in the trust-deed to make or hold such a security. I assume, therefore, that the trustees were bound to realise within a reasonable time, and that if they did not do so, they acted in breach of their duty or obligations as trustees, and so became personally responsible for any loss which might result. In assuming this I go farther than the Lord Ordinary has done, as he has dealt with the investment as being merely imprudent and risky. I assume, further, that if Mr Walker's advice had been asked, it was his duty as their law-agent to tell the trustees of the illegal character of the investment.

But there is no suggestion on this record that Mr Walker ever was asked for his advice on the matter, and the question comes to be whether there arises, from the mere relation of agency which is averred, a duty and obligation on the part of the agent to volunteer advice on such a matter on which advice was never asked. All that is said is that he was appointed agent to the trust (or, I would prefer to say, to the trustees) to make up the trustees' title, "to do whatever was necessary for the confirmation of the executors and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor." I do not read those words as meaning anything more than that he was appointed agent for the trustees. That being so, was Mr Walker, because he was law-agent, bound to go over the trust securities and volunteer his advice as to which must be realised? I do not doubt that many a careful law-agent might do so, though in the case of this particular investment, about which the trustees had the fullest knowledge, even a careful law-agent might think it unnecessary to say anything. But the question is whether there was a legal obligation on the agent to do so, and I think there was not. I do not think his responsibility went that length. To make a relevant case circumstances must be averred which clearly shew that from some particular conversation or occurrence that duty was imposed on him—some meeting at which the question was duly raised, or some conversation during which the agent's advice was directly or impliedly asked on the point.

Some illustrations have been suggested as being analogous to the present case, e.g. where trustees wish to invest trust funds, and propose to do so in an illegal security. I do not think that such an analogy is useful, for where such a question is raised, and the duty of a law-agent as to whether some investment should have been made is before the Court, everything must depend on the particular circumstances, as I endeavoured to explain in the recent case of *Rad's Trustees* (15 R. 1051). The parties must be brought together, and it must be proved that the subject was duly tabled at their meeting, and that in some way by what occurred the duty of giving advice arose. Here nothing of the kind is averred. All we have is an averment that though the matter was never the subject of conversation between the trustees and their agent, the latter was bound to volunteer his advice upon it. I cannot carry his responsibility so far.

Such a responsibility does not necessarily arise out of the relation of agent and client, and nothing beyond this is here averred. No. 66.

LORD ADAM.—I concur, and have nothing to add to what your Lordship has said.

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THE COURT adhered.

A. P. PURVES & AITKEN, W.S.—BLAIR & FINLAY, W.S.—Agents.

ROBERT M'MEEKIN, Pursuer (Respondent).—*Balfour—Salvesen.*  
DAVID EASTON (Easton's Executor) AND OTHERS, Defenders (Reclaimers).  
—H. Johnston.

No. 67.

Jan. 25, 1889.  
M'Meevin v.  
Easton.

*Bill of Exchange—Personal liability—Signature in representative capacity.*—A, B, and C, signed a promissory-note in the following terms:—"We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," &c. Held that A, B, and C, were personally liable for payment of the note.

On 17th March 1882, the Rev. Thomas Easton, minister of the Reformed Presbyterian Church, Stranraer, Peter Lusk, farmer, Inch, and David Easton, M.D., Stranraer, granted to Robert M'Meevin, farmer, Inch, a promissory-note in the following terms:—"Stranraer, 17th March 1882. —One day after date, we, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay to Mr Robert M'Meevin, or Miss Agnes M'Meevin, Culgrange, or order, within the British Linen Bank, Stranraer, with interest, at a rate not exceeding four per cent per annum, the sum of £300 sterling, value received. (Signed) T. EASTON. PETER LUSK. DAVID EASTON."

2D DIVISION.  
Ld. Kinnear.  
M.

The Rev. Mr Easton died on 12th March 1887, and Dr Easton died shortly thereafter.

On 16th March 1888, M'Meevin raised an action against Lusk and against the respective executors of the Rev. Thomas Easton and Dr Easton, for payment of £290, as the balance due on the note.

The pursuer averred that he had agreed to advance the £300 at the request of the Rev. Mr Easton, and that "the promissory-note was granted on the representation that Mr Easton was the debtor, and the other two (Mr Lusk and Dr Easton) his cautioners." He further averred that the purpose for which the £300 was advanced was to enable Mr Easton to pay to a bank a debt of that amount for which he had undertaken responsibility; and that the debt to the bank had arisen from a loan to meet the cost of repairs on the Reformed Presbyterian Church at Stranraer, for the balance of which loan the Rev. Mr Easton had undertaken liability.

The defenders stated that in order to meet a debt which had been incurred to a bank by the managers of the church they had borrowed £300 from the pursuer. They further stated that in security of this loan the managers authorised Mr Easton, the defender Lusk, and Dr Easton, to grant the note to the pursuer in the name and on the behalf of the congregation, and that it was not the intention of parties that the note should import the personal obligation of the persons signing it; but on the contrary, that, like the debt to the bank which it was to replace, it should be the obligation of the congregation.

The pursuer pleaded;—(1) The late Reverend Mr Easton, the defender Peter Lusk, and the late Dr David Easton, having granted, and being personally liable for the sums due under, the said promissory-note, and the sums sued for with interest being due, the pursuer is entitled to decree, as concluded for, with expenses.



No. 67. The defenders pleaded ;—(2) The promissory-note sued on is not the personal obligation of the defender Peter Lusk and of the now deceased Reverend Thomas Easton and David Easton, and the defenders are therefore entitled to be assoilzied.

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The Lord Ordinary (Kinnear) decerned against the defenders in terms of the conclusions of the summons.

The defenders reclaimed, and argued ;—The terms of the note imposed no individual liability on the persons who signed it. The undertaking was made in name and on behalf of the Reformed Presbyterian Church. Where the undertaking in a contract was in a representative character the Court would not enforce it personally.<sup>1</sup> The Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), was not yet in force when the note was granted, but it was a codifying statute, and in many points merely declared what was the former law. Thus, sec. 26 provided that a person signing a bill and adding words to his signature, shewing that he did so in a representative character, was "not personally liable thereon," and sec. 89 made that applicable to promissory-notes.

Counsel for the respondent were not called on.

LORD YOUNG.—The persons who signed this promissory-note, two of whom are now dead, were connected with the congregation of the Reformed Presbyterian Church at Stranraer. Money had been borrowed from a bank for purposes of the congregation, and when it was paid up to the bank the pursuer M'Meekin stepped in and advanced it. When he did so he received this promissory-note signed by the three gentlemen whose names it bears, Mr Easton, David Easton, and Peter Lusk.

Is this a worthless document, and did he receive it as such? The idea that this Reformed Presbyterian Congregation was the proper debtor in a personal obligation is, of course, absurd. A congregation could not be debtors on a promissory-note, and there is therefore no personal obligation on them. Well, did not these three gentlemen become the debtors? They were legally capable of being so, and they signed it. They refer on the face of it to its being signed in the name and on behalf of the congregation. That is, it was a debt which the congregation would feel it to be their duty to provide for. They can do that, though they are not capable of being the debtors or creditors on the note, out of good feeling and the conviction that they are morally bound to relieve those who became debtors for their behoof. On the face of the note, then, that is the position of the debtors. It is the only thing that could be meant, unless we suppose they meant to give and M'Meekin meant to take a worthless document. The only legal view of M'Meekin's position is that he must be taken as saying to those who signed the note that he could not take the congregation as his debtors, but would look to them, and they on their part would look to the congregation for their relief. That is the view of the Lord Ordinary, and it is unanswerably right.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—I come to the same conclusion, but not without some difficulty. That difficulty arises from the allegations, not of the defenders, but of the pursuer. His action is not brought simply on the promissory-note as a document

<sup>1</sup> Gadd v. Houghton, 1876, L. R., 1 Ex. Div. 357; Alexander v. Sizer, 1869, L. R., 4 Ex. 103; Brown v. Sutherland, March 17, 1875, 2 R. 615.

of debt. His condescendence shews that he is not in his own view in a position to lay his action upon it alone. He makes allegations that the Rev. Mr Easton was the principal debtor, and that the other obligants were truly cautioners for him, and explaining the history of the transaction in his view of it. Now, on the document all the obligants are in the same position. No. 67.  
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M'Meehin v. Easton.

But, on the whole, while I am clear that there could have been no summary diligence on this document, and have doubts whether it is sufficient to instruct the pursuer's allegations, I concur in thinking that *prima facie* it instructs an undertaking by the defenders personally to pay the sum contained in it.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Young, and have nothing to add.

THE COURT adhered to the Lord Ordinary's interlocutor.

P. ADAIR, S.S.C.—GILL & PRINGLE, W.S.—Agents.

MES MARY JANE JACKSON OR GRANT AND OTHERS (Tutors and Curators of James William Hamilton Grant and Others), Petitioners.—*Macfarlane*. No. 68.  
Jan. 26, 1889.  
Grant.

*Nobile Officium—Minor and Pupil—Tutors and Curators—Power to grant bonds and dispositions in security on pupil's estate to pay younger children's provisions.*—Where the pupil proprietor of a landed estate, who had no moveable funds, was under a personal obligation to pay certain provisions to his younger brothers and sisters, and was paying 5 per cent of interest on these provisions, power was granted to his tutors-nominate to grant bonds and dispositions in security over the pupils' estate in order to pay off the provisions, on the ground that money could be borrowed on such security at 3½ per cent, and that thus a large saving of interest would be effected.

HENRY ALEXANDER GRANT, heir of entail in possession of the lands and estate of Wester Elchies and others in the counties of Elgin and Banff, granted a bond of provision, dated and recorded 26th January 1878 and 25th January 1888 respectively, in terms of the Aberdeen Act (5 Geo. IV. cap. 87), in which he bound himself to pay his younger children provisions up to three years' free rental of his estates. 2d Division.  
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Thereafter he obtained the authority of the Court to disentail these lands, and by a disposition, dated and recorded 14th June and 31st July 1884, he disposed the lands to and in favour of himself in liferent, for his liferent use alienably, and to James William Hamilton Grant, his eldest son, and the heirs whatsoever of his body, in fee, with and under, *inter alia*, the declaration that he should have power to grant a bond or bonds of provisions in favour of his children in the manner prescribed by the Aberdeen Act, and that any such bond of provision already granted by him should be as valid and effectual as if it had been granted after the execution of the disposition.

By trust-disposition and settlement, dated 3d June 1879, he appointed his wife, Mrs Mary Jane Jackson or Grant, Mrs Isabella Charlotte Grant, and Alexander Cameron, solicitor, Elgin, to be his trustees and executors, and also to be tutors and curators to his children. Mr Grant died on 7th July 1886, survived by his widow and by seven children, all of whom were in pupillarity at his death. He was succeeded by his eldest son, James William Hamilton Grant, who was born on 3d April 1876.

The provision of three years' free rental of the estates of Wester Elchies, &c., to which the six younger children were under the bond of

**No. 68.** provision entitled, amounted to £13,790, 18s. 3d. This sum was, in terms of the bond, with interest at the rate of 5 per cent per annum, payable to them by their brother one year after their father's death, viz., on 7th July 1887. The interest on this sum at 5 per cent amounted to £689, 10s. 11d. per annum.

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Grant.

In these circumstances the tutors-nominate of J. W. H. Grant, on 29th October 1888, presented this petition to the Court craving authority "to borrow the sum of £13,790, 18s. 3d. for the purpose of paying the provisions to younger children, . . . and to grant on the security of the estates of Wester Elchies and others, . . . or any part or portion thereof, a bond or bonds for the said amount in favour of the lenders thereof, at such rate of interest as may be agreed on, such bond or bonds containing a disposition or dispositions in security of the said estates, . . . with power of sale and other usual and necessary clauses." The petitioners averred that their ward was not possessed of any moveable estate from which he could pay the provisions. "As money could now be borrowed at a less rate of interest if the tutors and curators of J. W. H. Grant could grant bonds and dispositions in security over his estates for the amount of the provisions, a large saving of interest would in this manner be effected."

On 9th November, after intimation of the petition, the Court remitted to Mr George M'Intosh, W.S., to inquire and report as to the circumstances set forth in the petition.

On 19th January 1889 Mr M'Intosh reported, *inter alia* :—" Assuming that the petitioners, on obtaining authority to grant bonds and dispositions in security over their ward's estate, could borrow the amount of the younger children's provisions at 3½ per cent, which is the current rate of interest on first-class landed securities in Scotland, the interest on £13,790, 18s. 3d. would amount to £482, 13s. 8d. per annum, and the annual saving to the ward would therefore be £206, 17s. 3d.

"So far as the reporter is aware, the Court has not hitherto granted authority to tutors-nominate of a pupil proprietor in fee-simple to borrow upon the security of their ward's estate, except on being satisfied that there was necessity or high expediency.

"The reporter respectfully refers the Court to the case of *Bellamy and Others*,<sup>1</sup> where the Court authorised tutors-nominate to borrow money on the security of the heritable property to pay off debts of the testator. In that case it was stated that it was of great importance that the debts and provisions should be paid off, in order that the creditors might not proceed to do diligence to attach the estate and accumulate expenses, with accumulated interest at the highest legal rate. The reporter in that case stated that there was no reason to doubt that the raising the sum required on the security of the heritable property of the ward would be a proper and necessary act of administration on the part of the petitioners.

"The reporter further respectfully refers the Court to the case of *Sinclair-Wemyss*,<sup>2</sup> where an application by a tutor-nominate for power to build a mansion-house on the estate of the pupil was refused, as being neither a matter of necessity nor of high expediency. In the present petition it is not set forth, and the reporter understands that there is no ground for supposing, that the younger children require immediate payment of their provisions.

"The reporter therefore begs respectfully to report that the circumstances set forth in the petition do not indicate any such urgency as to

<sup>1</sup> Nov. 30, 1854, 17 D. 115.

<sup>2</sup> July 8, 1882, 9 R. 1131, per Lord President, 1133.

render it a necessary act of administration on the part of the petitioners to borrow on the security of their ward's heritable estate. If this view is correct, the question for your Lordships' determination comes to be, No. 68.  
Jan. 26, 1889.  
Grant. Whether, in the circumstances above set forth, the saving, or probable saving, of £206, 17s. 3d. per annum, for about eight years, to the ward, is sufficient to make it highly expedient, in the interests of the ward, that the petitioners should be authorised to grant heritable securities over his estate?

"From section 11 of the Entail (Scotland) Act, 1882,<sup>1</sup> it appears that tutors-nominate of a pupil heir of entail in possession would now be authorised by the Court to borrow on the security of the pupil's entailed estate, provided the Court was satisfied that it would be for the benefit of the pupil that such authority should be granted."

Argued for petitioners;—It was highly expedient in the interests of the ward that the power should be granted. The saving of interest effected before he came of age would amount to more than £206 a-year. A positive advantage would thus be secured to the ward. Provisions to younger children were in the same position as the debts of ordinary creditors. The younger children here might at any time proceed to do diligence to recover the principal sums due to them, as these were payable one year after their father's death, and they were in no way secured. The present case was more favourable than those in which power to sell or feu was craved.<sup>2</sup> In them a part of the estate was being disposed of, and yet the authority craved was granted because the advantage to the pupil was clear. In *Morison's*<sup>3</sup> case tutors had been authorised to grant leases for nineteen years, in order to secure larger rents than were obtainable under shorter leases. The Court had granted similar applications to the present.<sup>4</sup> The *dicta* in *Somerville's*<sup>5</sup> case exactly applied. Further, the tutors of a pupil heir of entail in possession could now obtain power to borrow on the security of their ward's estate on satisfying the Court that it would be for the benefit of the pupil.<sup>1</sup> There could be no doubt that it was for the benefit of the pupil here that the petition should be granted, and a pupil proprietor in fee-simple ought not to be in a worse position than a pupil heir of entail.

LORD YOUNG.—I think it would be deplorable if the tutors had not the power to save expense to the estate by borrowing money at 3½ per cent, and of thus satisfying the provision to the younger children, instead of continuing to pay 5 per cent on these provisions, as at present. I think we should grant the powers craved.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD LEE concurred.

THE COURT granted the prayer of the petition.

TAIT & CRICHTON, W.S., Agents.

<sup>1</sup> Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), sec. 11.

<sup>2</sup> Mackenzie, Jan. 17, 1855, 17 D. 314; Lord Clinton, Oct. 5, 1875, 3 R. 62; Campbell, Feb. 26, 1881, 8 R. 543.

<sup>3</sup> Morison, July 19, 1861, 23 D. 1313, 33 Scot. Jur. 664.

<sup>4</sup> Crawford, July 6, 1839, 1 D. 1183, 14 F. 1203; Threipland, June 7, 1848, 16 D. 1234, 20 Scot. Jur. 450; Bellamy, Nov. 30, 1854, 17 D. 115.

<sup>5</sup> Somerville's Factor, Feb. 6, 1836, 14 S. 451.

No. 69.

REV. JOHN JAMES BROWNE AND OTHERS, Pursuers.—*M'Kechnie—**J. H. Stevenson.*Jan. 29, 1889.  
Browne v.  
M'Farlane.JOHN M'FARLANE, Defender.—*J. C. Thomson—Shaw.*

*Reparation—Slander—Newspaper—Circumstances in which slander uttered—Mitigation of damages.*—Where an action of damages is directed against the publisher of a slander, who is not the writer, he will not be allowed to prove in mitigation of damages circumstances which might have affected the writer, but of which the defender was ignorant, and this rule applies to the publisher of a newspaper who publishes a slander and refuses to disclose the name of the writer.

In an action of damages against the publisher of a Scottish newspaper for slander contained in a paragraph published in it, the defender stated in evidence that he received the paragraph from his regular correspondent in Ireland, whose name he refused to disclose. He proposed to lead evidence with a view to mitigation of damages (there being no counter issue of *veritas*) in proof of an averment as to the circumstances in which the paragraph was written, of which admittedly he knew nothing. The evidence was disallowed. In a bill of exceptions, *held* that the evidence was not admissible.

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Ld. President,  
Presiding  
Judge.  
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IN an action of damages for slander at the instance of the Rev. John James Browne, county Antrim, Ireland, and his three sons, against John M'Farlane, publisher of the *Scottish Leader* newspaper, the following issue was adjusted and sent to trial before a jury, for the Rev. Mr. Browne,—“It being admitted that the defender is the printer, proprietor, and publisher of the *Scottish Leader* newspaper, published in Edinburgh: It being also admitted that in the number of the said newspaper which was published on 16th November 1887 there was printed the paragraph set forth in the schedule annexed hereto: Whether the said paragraph, or part thereof, is of and concerning the pursuer, the Reverend John James Browne, and falsely and calumniously represents him as having been guilty of attempting to impose upon and deceive the public, to the loss, injury, and damage of the said pursuer? Damages laid at £500.”

The first issues for the other pursuers were in the same form, but there was also this second issue applicable to each of the three sons,—“Whether the said paragraph, or part of it, is of and concerning the said pursuer, and falsely and calumniously represents him as having been charged with a criminal offence, and as having admitted or been found guilty of said offence?”

There was no counter issue of *veritas*.

The article set forth in the schedule was as follows:—“A very interesting and amusing episode has just come to light, which illustrates the growing tendency of the North toward Home Rule, and the desperate shift to which foolish people of ‘Unionist’ leanings are sometimes driven to alarm the Protestant population when they begin to manifest any signs of fraternising with the people of Ireland in prosecuting their just claim to self-government. Toome is a small place where the river Baun receives the waters of Lough Neah before entering Lough Beg. It is a railway station, and the place is famous for its fishery. It is still more famous, perhaps, because here is a building called ‘The Temple of Liberty,’ erected by a Mr Carey, a wealthy man, who found that very often in bigoted neighbourhoods well-meaning people could not get a hall to have a meeting in. Here, accordingly, the Protestant Home Rulers have held several successful meetings, and it is plain the seed there sown is bearing fruit. At one of these meetings a Protestant rector attended, named Brown, and gave some little trouble, but declared himself a species of Home Ruler. Now there is much fun over Rector Brown, whose sons have been brought up before the magistrates at Toome Petty Sessions charged with throwing

stones at a police patrol. When charged, the boys, who are young in knavish tricks, very artlessly let the cat out of the bag. They had been posted there by their father to throw stones at him by way of getting up an outrage for the papers, and for the Loyal and Patriotic Union, and had in the darkness mistaken the police for their reverend parent, who had that evening invited a Roman Catholic gentleman of the village to accompany him to the site of the forthcoming outrage, by way of protection. The affair was, of course, hushed up, and the boys let off with a caution by the magistrates. As it has not yet been, and could not be, reported in our local 'Unionist' papers, I thought it better to let it see the light in the *Leader*. I am sure your readers will appreciate it as they did the Dolamon incident."

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Before the trial certain evidence was taken on commission in Ireland.

On 24th December 1888 the cause was tried before the Lord President and a jury.

In the course of the trial the defender deponed that the paragraph was furnished by his regular correspondent in Ulster, whose name he did not, however, disclose, but that he personally knew nothing of the circumstances in which it was written.

Counsel for the defender then proposed to read evidence, taken on commission as above mentioned, to prove the following statement in his defences:—"Not far from pursuers' residence two police-constables were attacked with stones. The police pursued their assailants, whom they secured, and discovered to be the pursuers Arthur Molyneux Browne and George Capel Browne. On being challenged for their conduct, they stated that they had mistaken the police for their father."

It was stated that it was proposed to read that evidence with a view to mitigation of damages only.

The presiding Judge rejected the proposed evidence, and thereupon counsel for the defender excepted to his ruling.

The jury thereafter returned a verdict for the pursuers, assessing the damages at £100 for the Rev. Mr Browne, and at one farthing for each of the other pursuers.

The defender presented a bill of exceptions.

Argued for the defender in support of the bill;—The evidence in question was proposed to be read solely in mitigation of damages, and the statements proposed to be proved did not amount to proof of *veritas*, which would be incompetent in the absence of a counter issue. The facts set forth in the statements were part of the *res gestæ*, because if they had not taken place the report, to which currency was given in the article complained of, would never have arisen. This evidence having been excluded, the jury might have taken the view that the whole story was a fabrication of the defender or of his correspondent, whereas, had the evidence been admitted, the fact that the occurrences sought to be proved actually took place, coupled with the words of the slander, would have satisfied the jury that the matter was the subject of general talk in the country, and one which the correspondent was justified in noticing. The circumstances in which the slanderer uttered the slander had always been recognised as part of the *res gestæ*,<sup>1</sup> and the facts averred and offered to be proved were very important in that respect in the present case. When the publisher of a paper has assumed the responsibility for statements

<sup>1</sup> Ogilvie v. Scott, March 19, 1836, 14 S. 729; Bryson v. Inglis, Jan. 15, 1844, 6 D. 363; M'Neill v. Rorison, Nov. 12, 1847, 10 D. 15, 19 Scot. Jur. 662—see Lord Medwyn's opinion; Craig v. Jex Blake, July 7, 1871, 9 Macph. 973, 43 Scot. Jur. 363—see Lord Deas' opinion, p. 980; Paul v. Jackson, Jan. 23, 1884, 11 R. 460—see Lord President's opinion, p. 463.

No. 69. appearing in it, he places himself in exactly the same position as an anonymous correspondent, therefore the state of mind of the correspondent when he wrote the article was relevant in this case. impossible to say the facts stated in the article were invented by a correspondent, if the statement offered to be proved were true, it would very properly weigh with a jury in mitigation of damages.

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Argued for the respondent;—The proposal to prove these facts was in reality an attempt to get in, in mitigation of damages, a statement of the verity of part of the slander. The only part of the libel statement omitted was that in the article it was stated that the pursuer had told his sons to throw stones at him. It was settled that it was incompetent to lead any such proof where there was no issue. The cases of *Paul v. Jackson* (11 R. 460) and *Craig v. Johnston* (9 Macph. 973) were the most recent and most authoritative cases on this point. Further, the proposed evidence was not proof of any particular *res gestæ*. It would not enable the jury to get at the circumstances which the slander was uttered by the defender, for admittedly it was nothing about the alleged facts. He and the anonymous correspondent were not in the same position.<sup>1</sup> If the action had been against the respondent the proof might have been relevant.

LORD MURE.—This case raises an important but a very short and simple question, namely, whether the presiding Judge was wrong in refusing to admit certain evidence taken on commission in Ireland to be laid before the jury in order to prove the following statement:—"Not far from pursuers' two police-constables were attacked with stones. The police pursued the assailants, whom they secured, and discovered to be the pursuers Arthurs Browne and George Capel Browne. On being challenged for their names they stated that they had mistaken the police for their father."

Now, it appears to me that if evidence of that statement had been admitted it would have amounted to the admission of proof of the truth of a particular slander in a case where the truth of the slander was not put in issue. On that ground I think the evidence was properly rejected. The article which contains the slander was published in a newspaper in this country, and contained the following sentences:—"When charged, the boys, who are young in knavish tricks, artlessly let the cat out of the bag. They had been posted there by their father to throw stones at him by way of getting up an outrage for the papers. The boys of the Loyal and Patriotic Union, and had in the darkness mistaken the pursuer for their reverend parent, who had that evening invited a Roman Catholic priest, a man of the village to accompany him to the site of the forthcoming outrage by way of protection. The affair was of course hushed up, and the boys were warned with a caution by the magistrates." That is the libel complained of, the purport of the complaint is set out in more distinct language in condensed form in the record, where the paragraph is stated falsely and calumniously to represent the pursuer, "on purpose to deceive and falsely alarm members of the public, and specially those of his own religion, against his political opponents, and guilty of planning an outrage on himself in a manner which would tend to make falsely appear that these political opponents had been guilty of a crime. In pursuance of this design he one night posted his sons, the said Arthurs Browne, George Capel Browne, and John James Browne, with instructions to throw stones at him as he passed."

<sup>1</sup> *Brims v. Reid & Sons*, May 28, 1885, 12 R. 1016.

These averments are denied by the defender, and he then goes on to make, by way of explanation in his answer, the statements which he wished to prove at the trial. Those statements, however, amount substantially to an averment of the *veritas* of part of the slander, and it has for long been well settled that a party cannot in mitigation of damages proceed to prove the truth of a part of the slander, any more than he can lead evidence to prove the truth of the whole, unless he has taken a counter issue. No. 69.  
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In the case of *Paul v. Jackson* I see that I referred to the opinions of the late Lord Moncreiff and of Chief Commissioner Adam, as quoted by Lord Moncreiff in his opinion in *M'Neill v. Rorison*, where they lay down the law most distinctly to the above effect. In the case of *Craig v. Jex Blake*, in which several rather difficult questions were raised, I acted on the same rule. For while I admitted all the evidence of surrounding circumstances, and as to there having been a riot at Surgeons' Hall, and even that the pursuer had been there on that day, I refused to allow evidence of the pursuer's participation in the riot as tending to prove the *veritas* without an issue, and that ruling was sustained. On the same general grounds I think that the evidence tendered in this case was properly rejected.

**LORD SHAND.**—During the argument for the defender any intention to prove *veritas* has been disavowed, and indeed any proof of *veritas* of a material part of the libel without a counter issue would be incompetent. The argument in regard to the rejected evidence is rested on this ground alone, that, if admitted, it would or might have had effect in the mitigation of damages. We may lay the cases of the three younger pursuers out of account, because in their cases damages were assessed at one farthing, and mitigation of that amount cannot be suggested. The question for determination is, Was the evidence competent in the case with the leading pursuer?

It is essential to bear in mind that though the article complained of emanated from a correspondent in Ireland, the action is not directed against him, but against the publisher of the paper in which it appeared.

During the trial the defender said nothing as to who his correspondent was, but being examined as a witness, he accepted responsibility for the article, stating that he knew nothing of the circumstances in which it was written. All that he knew was that he received it in due course from his correspondent, and had no reason to doubt the truth of the statements. Keeping that in mind, it is to be observed that there is no room for admitting any evidence of special circumstances of the kind referred to in the article complained of as affecting the state of mind either of the defender or of the author of the article. The defender knew no more of the article than its terms disclosed, and the claim is not made against the author.

In this state of matters we must consider the terms of the issue before determining whether the statement proposed to be proved is relevant to mitigate damages.

The issue is in these terms:—"Whether the said paragraph, or part thereof, is of and concerning the pursuer, the Reverend John James Browne, and falsely and calumniously represents him as having been guilty of attempting to impose upon and deceive the public, to the loss, injury, and damage of the said pursuer? Damages laid at £500." The point of the slander is that Mr Browne, in order to pose as a martyr because of his political views, had arranged with his sons that they should throw stones at him. It is not disputed that this was a false



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charge, and there is no doubt that it was calumnious. Now, to meet the of damages because of that statement, it was proposed to prove that—"from pursuers' residence two police-constables were attacked with stones police pursued their assailants, whom they secured, and discovered to pursuers Arthur Molyneux Browne and George Capel Browne. On challenged for their conduct, they stated that they had mistaken the person their father." Supposing that to be proved, I am unable to see why it mitigate the damages to which the father is entitled. The pursuers damages because he is represented as having attempted to impose upon deceive the public. The proof offered could have no bearing on that. The alleged acts or statements of the boys—with which he was not connected could not affect or diminish his claim of damages, and on that ground that this evidence was rightly excluded.

The only way in which such evidence could have been used in mitigation damages (as was, I think, latterly admitted in the argument for the defence) would have been to prove that the writer or the publisher, whichever was the offender in the action, was aware of the circumstances proposed to be proved at the time when the letter was written or published as the case might be. If the defender might have said, I may have gone further than my information warranted, but I can at all events prove that the whole article was not the product of imagination; it originated partly from facts communicated, and is therefore not of so malicious a nature as it might otherwise appear to be. Here, however, the publisher says he had no knowledge of the circumstances in which the paragraph was written. The state of his mind in publishing the article is not therefore to be affected by the alleged facts offered to be proved, and no proof in this view again could have no effect in mitigation of damages. If the defender had shewn that the knowledge of the facts sought to be proved had weighed with him in admitting the article, then it might have gone in mitigation, but there was no averment of that kind made, and no proof offered.

A different question would have arisen if the action had been directed against the writer of the paragraph. Even then I should have been of opinion that the defender would have had to state as matter of fact on record that the circumstances sought to be proved had weighed with him when he wrote the paragraph, and I should have had great difficulty in admitting the evidence in support of such an averment.

I adhere to my view, as stated in the case of *Paul v. Jackson*, that in an action for damages for slander the jury should have the whole circumstances in which the slander was uttered fully before them. Where the pursuer has laid the case open by his conduct to a charge short of that complained of, and this in some extent influenced the defender in writing or publishing the alleged slander, I think the proof should be allowed. But here there is nothing of that kind. The proposed proof did not relate to any conduct of the pursuer, and the alleged circumstances in which the slander was published could not affect the defender's mind, for he knew nothing of them. I think the bill of particulars must be refused.

LORD ADAM.—I am of the same opinion, and I rest my judgment on that. We have here only the publisher of the newspaper, we have not the writer of the slander before us. I confess that if the defender of the action had

the writer of the article, and if he had put the state of his mind when he wrote it in issue, and had submitted himself to examination and cross-examination, and if in those circumstances such evidence as was here disallowed had been tendered, I should have had considerable difficulty in refusing to admit it. The evidence in question would, in such circumstances, have been relevant; but if he had kept out of the box, and had proposed to prove this isolated fact, I rather think I should not have admitted the evidence. That question is, however, not before us, and I say no more about it.

With regard to the matter as it is now before us, I have no doubt that it would be quite competent for the publisher of this newspaper to prove the state of his own mind when he admitted the article to the paper and sent it out to the public, but I do not think it is competent for him to prove the state of mind of the anonymous correspondent who sent him the article, and that by proving one fact which may or may not have affected his mind at all.

I think, therefore, the evidence was properly rejected.

LORD PRESIDENT.—I think this question is concluded by authority. The reason which induced me to reject the evidence has been very shortly and concisely stated by Lord Adam, and I have nothing to add.

THE COURT refused the bill.

W. B. WILSON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

THOMSON, JACKSON, GOURLAY, & TAYLOR, Pursuers (Appellants).—*Ure*. No. 70.  
ROBERT LOCHHEAD, Defender (Respondent).—*J. Wilson*.

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*Contract—Employment—Implied contract—Recompense.*—At a meeting of creditors called by a debtor to consider the state of his affairs and an offer of composition, an accountant, who appeared for two creditors, was instructed by the whole creditors present to prepare a state of the debtor's affairs. After considerable negotiation a composition settlement was carried through by the accountant, who prepared a scheme of ranking and the promissory-notes for the instalments of the composition. The debtor had a separate agent. In an action brought by the accountant against the debtor for his services in carrying through the composition settlement, the defender pleaded that he had never employed the pursuer. *Held* that the defender was not liable,—Lord Rutherford Clark *dissenting*, on the ground that all the expenses necessarily incurred in carrying through the composition arrangement ought to be borne by the defender.

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In October 1887 Robert Lochhead, manufacturer in Alva, finding himself in difficulties, consulted a law-agent in Stirling, who prepared a state of affairs, and called together Lochhead's creditors. Mr Gourlay, C.A., Glasgow, attended the meeting for two creditors. The creditors present were not satisfied with the state of affairs laid before them, nor with an offer of composition made by Lochhead, and resolved that Mr Gourlay should "be appointed to make an investigation into the affairs of the bankrupt, and report to a future meeting of creditors," to be called when he should be in a position to report.

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A second meeting was called, at Mr Gourlay's request, by the agent for Lochhead, in order to consider the state of affairs which Mr Gourlay had prepared. Prior to this meeting Mr Gourlay exhibited the state of affairs to Lochhead and his agent. They then prepared an offer of 13s. 4d. per pound. The meeting was held in Gourlay's chambers on 11th November 1887. He laid before it the statement of affairs which he had pre-

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pared. Lochhead with his agent attended the meeting, and objected to certain of the items in the state. The offer of 13s. 4d. per pound as a composition was made, but the creditors did not accept it.

On the 14th November Mr Gourlay wrote to the agent, stating that he had had an interview with certain of the creditors, as the result of which he enclosed an offer to be signed by Lochhead, which, he believed, would be accepted.

Lochhead then offered a composition of 14s. per pound, payable by certain instalments, the last instalment to be secured to the satisfaction of Mr Gourlay.

The creditors again met on 16th November, at which meeting, as the minute bore, "Mr Gourlay, on behalf of Mr Robert Lochhead," submitted the offer of composition of 14s. per pound, and the creditors agreed to accept it, provided payment of the second instalment was made at an earlier date than the offer bore. Mr Gourlay then wrote to Lochhead's agent, stating that the creditors agreed to recommend acceptance of the composition of 14s., and saying, "If your client agrees to this, let me have name of security at once."

Lochhead's agent replied, sending the offer (duly signed by Lochhead), and also stating the arrangement he proposed as to security for the last instalment.

The offer was then accepted by the creditors, and Mr Gourlay thereupon had the promissory-notes for the composition prepared, and they were duly signed and delivered to the creditors, according to a scheme of ranking which Mr Gourlay also prepared.

In May 1888 Mr Gourlay's firm raised an action against Lochhead in the Sheriff Court at Stirling for £58, 9s. 9d., for Mr Gourlay's services. The sum was made up of a charge of £52, 10s. as a "professional fee for preparing states of affairs, submitting same to creditors, carrying through composition arrangement, preparing scheme of division, drawing promissory-notes, delivering same to creditors, convening and attending meetings of creditors and committee of creditors, correspondence," and of small sums for outlays.

The pursuers averred;—(Cond. 1) "The defender is due to the pursuers, for outlays and fees for professional services incurred by him, the sums contained in the account dated 31st January 1888, herewith produced, amounting to the sum of £58, 9s. 9d."

They pleaded;—(1) The defender being justly indebted and resting owing to the pursuers the sum sued for, decree should be pronounced as craved. (2) The defender having employed the pursuers, or at all events availed himself of their services, he cannot now refuse to pay for same, and decree should be granted in terms of the prayer of the petition.

The defender stated that he had never employed the pursuers, that Mr Gourlay had represented the creditors' interest and not his, and that he himself had been advised only by his own agent. He tendered £30 in full.

The Sheriff-substitute (Buntine), after a proof, from which the facts already narrated appeared, on 17th August 1888, found "that the pursuer Mr Gourlay has failed to prove either that he was employed by the defender or that the latter has made himself liable in payment of his professional account," and therefore assoilzied the defender.\*

\* "NOTE.—It is admitted by the pursuer the said Mr Gourlay, that he was originally employed by two creditors of the defender to attend the first meeting of creditors, and that the creditors then assembled employed him to make an investigation into the affairs of the defender, and report to a future meeting of creditors.

"It is true that defender assented to this investigation, and gave every facility

The pursuers appealed to the Court of Session, and argued ;—From the actings of parties employment of Mr Gourlay by the defender was to be inferred. He had at first acted for two creditors no doubt, but it was clear that he had come to act in the course of the subsequent negotiations for the defender. For him, and in his interest, he had made up the scheme of division of his estate. To frame a scheme and to lay it before his creditors was a duty incumbent on a debtor if he wished to avoid sequestration, and the defender had availed himself of Mr Gourlay's services to perform this duty for him, when the offer made by himself had been refused. The case was even more clear as to the outlays for bill stamps, &c, which Mr Gourlay had incurred in preparing the composition bills. The pursuers had a just claim to recompense for the value of those services of which the debtor had availed himself.

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Argued for the defender ;—No direct employment was proved, or even averred. It was not easy to imply it from the circumstances, for the defender had a man of business acting for him, and it was unlikely that he would employ a second to do the same business. Admittedly Mr Gourlay's services were in the interest of the creditors at first. They never ceased to be so. It would require strong proof to shew that he changed his employer in the course of the negotiation, and no such proof had been led.

Lord Young.—This action is put either on the ground of employment or on that of recompense for services rendered to and taken advantage of by the defender without employment. Employment indeed is not averred on record, the pursuers' averment being merely that the defender is "due to the pursuers for outlays and fees for professional services incurred by him," the sum sued for. The second plea in law, however, comes nearer a case of employment, for it runs,—"The defender having employed the pursuers, or at all events availed himself of their services, he cannot now refuse to pay for same, and decree should be granted in terms of the prayer of the petition." The Sheriff-substitute states in his note that before him it was "admitted that at no time did defender employ the pursuers, but it is contended that the defender, having availed himself of the professional services of the pursuer, is entitled in payment therefor."

Now, the pursuer Gourlay was employed, and very properly employed, as he explains in his evidence, at first by two creditors. There were other creditors who did not employ him, or indeed employ anyone. The defender employed a man of business of his own. I say a man of business, and he was not less such or less qualified to act because he was no otherwise an accountant than all men of business are. On the advice of this man of business the defender called together his creditors, and laid before them a state of his affairs. I cannot enter on the question whether it was a satisfactory state or one to which there existed objections. The creditors I have mentioned employed the pursuer, sending him to the meeting to attend to their interests, and to see that they did not suffer wrong in any arrangement with the defender. That was very proper. The result was that the creditors who were at the meeting desired the pursuer Mr Gourlay to examine into their debtor's affairs, and see his books and papers

to the pursuer in carrying it out. But it cannot be said that it was conducted on defender's employment, or that it was carried out in defender's interests.

"It is further admitted that at no time did defender employ the pursuers, but it is contended that the defender, having availed himself of the professional services of the pursuer, is entitled in payment therefor.

"The Sheriff-substitute is unable to concur with this proposition. . . ."

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so far as necessary, and he on his part, with his man of business, under give every facility for the examination.

In the absence of anything further, I think Mr Gourlay attended employment he had received, which was to act in the interest of the c and to see that the debtor and his man of business acted justly by them prevent them from accepting an offer which was not satisfactory. Th was that a composition was ultimately effected by means of a correspo between the pursuer Gourlay and the defender's man of business, a high position being obtained than had formerly been offered. Here there is of the employment of a man of business by the debtor, and another creditors, each of these gentlemen with the interest of his own employ care, the result being an arrangement for a compromise by which the d his discharge.

Now, I think it would be a fair matter of arrangement that the should stipulate that the debtor should pay the expense incurred by looking into his affairs. But I do not think that was done here. How posal would have been received if made we do not know. In the ab any such bargain I think Mr Gourlay must look for payment to th employed him for their interest. They might have been satisfied examination of the debtor's affairs by his own man of business, and if would have had no other expense. It is no blame to them that they v and they seem to have got a better composition because they were not. concur with the Sheriff-substitute in thinking that the person they empl no action against anyone but them, and that he cannot maintain an actio the defender on the suggestion that but for his services no composition have been arrived at.

**LORD RUTHERFURD CLARK.**—I have felt a good deal of hesitation in and all the more because I know that I stand alone. I incline to think, that Mr Gourlay is entitled to our judgment on the simple ground tha expenses necessarily incurred in carrying through the composition arra should be paid by the defender. In my opinion, such expenses shoul charged against the creditors.

It appears to me that the composition contract was effected by mean Gourlay's services, and by means of them alone. Being services wh necessary to the end which the defender had in view, and which was fully attained, I think that he should pay for them. He has had th of them, and in such a case, when he obtains a discharge on a composition that it may be fairly said that he alone has had the benefit of them.

It is said that the defender employed another person. It is true th he did, but the services of this person were of no use, and gave no aid ing the composition contract. The chief if not the only thing whic was to prepare a state of affairs, but it was so defective that the credit not consider it.

**LORD LEE.**—I do not doubt that in the general case it is reasonable expenses properly incurred in carrying through a composition arra should fall on the debtor. But I think the question here is whe arrangement to that effect has been proved? Mr Gourlay was employ creditors and not by the defender. In that state of the facts, I think

it was intended to throw the expenses incurred under that employment on the defender, the debtor, this ought to have been intimated to him, and should have been made a condition of the acceptance by the creditors of the composition. That might have been quite a reasonable arrangement, and my impression is that it is quite a common one, but in this case I find no trace of such an arrangement. I concur in the opinion of Lord Young. I think there is no proof of the ground of action.

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**LORD JUSTICE-CLERK.**—I concur in the opinion of Lord Young. It is unfortunate that the pursuers did not accept the offer of £30, which appears to have been made in the defences. Mr Gourlay, it is certain, was in the first place employed not by the defender but by the creditors. I cannot find evidence to shew that he afterwards became the agent of the defender, or that it was ever suggested to the defender that he was to be held liable to pay for Mr Gourlay's services. It would have been easy to bring to the defender's knowledge that Mr Gourlay's services were to be understood as rendered to him, and I think it would be dangerous to hold that a professional man who was originally employed for one party should, without some clear change in his position, obvious to the other party, be held to have become entitled to claim remuneration from the other, whose interest is altogether different from that of the original employer.

The very fact that Mr Gourlay was employed by the creditors leads to the inference that he was to endeavour to come to an arrangement as favourable as possible to them. Now, if he was afterwards to act for both, or for the debtor, Lochhead, alone, the change ought to be made perfectly clear. Lochhead ought, if he was to be expected to pay for two professional men—both his own agent and Mr Gourlay—to have had that put before him. It is quite clear that if we gave the pursuers decree, the result would be that the defender would have to pay for the services both of Mr Gourlay and of his own agent, and there is no ground for supposing he intended to incur double costs. On these grounds I agree with Lord Young.

THIS interlocutor was pronounced:—" . . . Find in fact that the pursuer Mr Gourlay was employed by creditors of the defender, and not by the defender: Find in law that the defender is not liable in payment of the sum sued for: Therefore dismiss the appeal; affirm the judgment of the Sheriff; of new assoilzie the defender from the conclusions of the petition . . ."

DAVIDSON & SYME, W.S.—WISHART & MACNAUGHTON, W.S.—Agents.

THE SCHOOL BOARD OF ECKFORD, First Parties.—*Sym.*

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THOMAS RUTHERFORD AND OTHERS, Second Parties.—*W. E. Fraser.*

*School — Schoolmaster — Retiring allowance — School Board — Parochial teacher's house — Education Act, 1872 (35 and 36 Vict. c. 62), secs. 23, 60, 61.* Feb. 2, 1889. School Board of Eckford v. Rutherford.

A parochial teacher appointed prior to 1872 agreed with the school board that in consequence of age and infirmity he should resign office, on condition of receiving during life a certain annual sum, and the free use of the teacher's house and garden, which he had occupied for many years.

Certain ratepayers objected to the arrangement as *ultra vires* of the board, in respect (1) that the school board were not entitled to allow a larger money allowance than that to which the teacher would have been entitled on removal for inefficiency without fault under sec. 60 of the Education Act, 1872; and



No. 71. (2) that they were not entitled to divert the teacher's house from its proper use. Held that the school board had acted within their powers.

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HENRY RICHARDSON LAWRIE became teacher of the parish school of Eckford on 1st October 1831. At the passing of the Education Act, 1872, his emoluments consisted of a salary of £50, the whole of the school fees, amounting to £32 or £33 per annum, and the use of the dwelling-house and garden provided for the parochial teacher under the provisions of the Acts dealing with education prior to 1872.

He continued after the passing of the Education Act, 1872, to receive these emoluments, and he also received four-fifths of the Parliamentary grant. His emoluments amounted in all to about £120 per annum, exclusive of the house and garden.

In December 1886 the School Board of Eckford asked Mr Lawrie, who was in his seventy-eighth year, and from old age and partial blindness had become inefficient for the duties of his office, to resign. He agreed with them that he should resign office, receiving a retiring allowance of £60 from Christmas 1886, and the use for life of the dwelling-house and garden. This arrangement came into effect, and a new teacher was appointed, to whom the Board, in addition to his salary, made an allowance for house-rent, on the understanding that he should get possession of the dwelling-house and garden when Mr Lawrie ceased to occupy them.

Thomas Rutherford and others, ratepayers of Eckford, having objected to these arrangements, a special case was stated for the opinion and judgment of the Court. The School Board were first parties to the case, and Rutherford and others second parties.

The questions asked were,—“(1) Whether the first parties, in granting Mr Lawrie a retiring allowance, were (a) restricted to a sum not exceeding the gross amount of his salary? or whether (b) their power in fixing the amount was entirely discretionary? (2) Whether the first parties (a) were entitled to grant to Mr Lawrie, in addition to the retiring allowance in money, the free use of the schoolmaster's house and garden during his life? or whether (b) they were bound to make them over to the person actually discharging the duties of schoolmaster?”

The second parties maintained (1) that the arrangements as to the retiring allowance of Mr Lawrie were *ultra vires* of the Board, in respect that the retiring allowance granted by the Board was in excess of the amount to which Mr Lawrie was entitled, such amount being that to which he would have been entitled if removed from office for inefficiency, but without fault,\* viz., a sum not less than two-thirds and not

\* The Education Act, 1872 (35 and 36 Vict. c. 62), enacts by sec. 60,—“Any teacher of a public school appointed previously to the passing of this Act may be removed from his office in manner following, that is to say, . . . (2) If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector charged with the duty of inspecting such school; and on receiving such report the school board may, if they see cause, proceed to remove such teacher from office, . . . provided also that in the case of teachers of parish schools appointed previously to the passing of the Act who may be so removed, the school board shall have the same power of granting retiring allowances, and the teachers shall have the same rights to retiring allowances as were vested in heritors and ministers and in parish schoolmasters respectively by sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861, in the case of parish schoolmasters permitted or required to resign or dismissed from office as therein provided.”

Sec. 19 of the Parochial and Burgh Schoolmasters Act, 1861, which Act was

exceeding the whole of his salary of £50. They maintained (2) that the house and garden, at least so long as the Board were owners of them, must be applied by the Board to the use of the person actually discharging the duties of schoolmaster.

The first parties contended that the arrangement they had made with Mr Lawrie was within their powers, and was in the circumstances a proper exercise of their discretionary power.

Argued for the first parties ;—(1) As to the retiring allowance of £60.—Mr Lawrie had resigned his office. It followed that the provision of the Act of 1872 which was applicable to the case was section 61.\* That section provided that where a teacher resigned the board might pay him such retiring allowance as they might think fit. Section 60, on which the second parties relied, applied to the case of a teacher who was removed from office. (2) As to the house and garden.—The first parties were under the statute† vested in the house and garden, and had a discretion to take them into account in settling the allowance on which Mr

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repealed by the Education Act, 1872, provided,—“In case it shall be found on a report by one of Her Majesty’s inspectors of schools made on the application of the heritors of the parish, and concurred in by the presbytery of the bounds, that the schoolmaster of any parish is disqualified because of infirmity or old age for the due performance of the duties of his office, or that from negligence and inattention he has failed efficiently to discharge such duties, it shall be lawful to the heritors and minister at any meeting . . . to permit and require such schoolmaster to resign his said office, and in case of his refusal so to do, to dismiss or suspend such schoolmaster . . . and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance payable during the remainder of his life ; provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster. . . .”

Section 20 of the same Act provided,—“In all cases in which the minister and heritors are by this Act empowered to provide a retiring allowance for a schoolmaster who shall resign or shall be removed from his office, it shall be lawful for them, if they shall see fit, to provide for such schoolmaster in addition to such allowance a further yearly sum equal in amount to the annual value of any dwelling-house and garden to which he may be entitled as such schoolmaster, as the same shall be valued by the assessor for the county.”

\* The Education Act, 1872, provides (sec. 61),—“A school board may permit any teacher of a public school to resign his office upon the condition of receiving a retiring allowance, and the school board may award and pay to such teacher out of the school fund such retiring allowance as they shall think fit, provided always that nothing herein contained shall affect the right under the existing law to a retiring allowance of any teacher appointed under the recited Acts, or any of them.”

† The Education Act, 1872, provides (sec. 23),—“The parish and other schools which have been established and now exist in any parish under the recited Acts, or any of them, together with teachers’ houses and land attached thereto, shall be vested in and be under the management of the school board of such parish, . . . and the said school board shall thereafter, with respect to school management and the election of teachers, and generally with respect to all powers, obligations, and duties in regard to such schools now vested in or incumbent on the heritors qualified, according to the existing law, and the minister of the parish, supersede and come in place of such heritors and minister. . . .”



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Lawrie would agree to retire. It was for the public interest that they should do so. Being fully vested in the schools and teachers' houses, with power to discontinue the use of them, and if so, to sell "any land and buildings connected" therewith (sec. 36), and to acquire new schools, houses, and gardens (sec. 37), the Board had a discretion conferred upon it by the statute with which the Court had no jurisdiction to interfere, or at least with which the Court would not interfere unless the Board were acting without due regard to the public interest. At one time, viz., from 1861 to 1872, it appeared that the heritors were bound to allow no one but the teacher actually in office to occupy the teacher's house,\* but the Legislature had repealed that provision, while, by inference, re-enacting the immediately following sections (19 and 20) of the same Act. The teacher's house was now just as much in the control of the board as any part of the school fund, and the price of buildings sold by them, or the rent obtained for such, might be added to the school fund. There was no interest on the other side to raise this question, for the Board had power under section 61 of the Act of 1872 to increase the retiring allowance to Mr Lawrie by the annual value of the house and garden.

Argued for the second parties;—(1) As to the retiring allowance.—The case was one to which the provisions of section 60 were applicable. The teacher had been asked to resign, and had agreed to do so. It was a case of removal without fault, for it was clear that if he had not resigned at the request of the Board, they would have been bound to remove him. If so, they would have been entitled to give him only the allowance which he could have received under the Act of 1861, viz., a sum not exceeding the gross amount of his salary of £50. (2) As to the house and garden.—The policy of the law was that the parochial buildings were to be used for parochial purposes only. It was true that the board might discontinue a school and sell the buildings. But that was not here proposed. The first parties were keeping the buildings and using them for a purpose unconnected with the interests of education, and in order to do so were providing the new teacher with another house elsewhere. That laid a double burden on the rates, and was therefore objectionable, and indeed *ultra vires*. The case was one for sympathy, but the first parties were not entitled from motives of sympathy to favour one who had become unconnected with the educational interests of the parish, and had no more right to free occupation of the teacher's house than a member of the public. By section 23 of the Education Act of 1872 the school board of a parish were vested in the schools and teachers' houses, with all the "powers, obligations, and duties" formerly incumbent on the heritors. Now, the heritors would have had no title to alienate the school buildings for an indefinite time, as was here done by the first parties.

LORD JUSTICE-CLERK.—I think this is a clear case. The first parties, the

\* The Parochial and Burgh Schoolmasters Act, 1861, which was repealed by the Education Act, 1872, enacted (sec. 18),—"Nothing in this Act shall be held to interfere with any arrangement which may have been concluded between the heritors and schoolmaster of any parish for the retirement of such schoolmaster, except as regards the house and garden and premises attached thereto, which shall in every case be made over at the term of Whitsunday next after the passing of this Act to the person actually discharging the duties of schoolmaster, and where the use of such premises may have formed part of a retiring allowance, the heritors shall make reasonable compensation to the ex-schoolmaster."

School Board of the parish of Eckford, have made an arrangement by which the aged schoolmaster is to retire. The Board propose, in the language of section 61 of the Education Act of 1872, "to award and pay" to him "out of the school fund such retiring allowance as they shall think fit." In the exercise of the discretion which this section confers upon them they have fixed the retiring allowance at so much money, viz., £60, and they have agreed to give him, rent free for life, the use of the teacher's house and garden, which he has so long occupied in connection with the school.

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Now, the first question raised is whether the School Board are restricted in fixing the retiring allowance to observe the limits which were laid down by sections 19 and 20 of the Parochial and Burgh Schoolmasters Act of 1861, which sections are kept in force by section 60 of the Act of 1872, for the purpose of being applied to cases of "removal" of teachers who are "incompetent, unfit, or inefficient." The amount of retiring allowance which these sections contemplate is a sum which "shall not be less than two-third parts of the amount of the salary pertaining to such office at the date of such resignation thereof, and shall not exceed the gross amount of such salary."

The second parties, who are ratepayers in the parish, say that Mr Lawrie's salary was only £50, and that the school fees and other emoluments must not be taken into account in fixing the retiring allowance, which, therefore, they maintain, cannot in any view exceed £50. I think it unnecessary to decide the question which they thus seek to raise on section 60, because the School Board are not giving the allowance under section 60. That section refers, as I have mentioned, to removal of a teacher. But this case is under section 61, which applies to a resignation arranged and agreed on between the schoolmaster and the board. Section 60 is appropriate to removal, against the teacher's will, for bad conduct or inefficiency, while section 61 contemplates such a case as the present—a resignation. It is meant for cases in which the school board, very probably, could not remove the teacher, but in which notwithstanding they think that for the interest of the parish, and in fairness to him, such arrangements should be made as will induce him to resign. Such arrangements will certainly not be lightly interfered with by the Court. I do not think the Court would interfere with them unless they appeared to be so outrageously contrary to the interests of the parish as to amount to malversation by the board in their office as trustees for the interests entrusted to them.

On these grounds, I think that the first question which is raised ought to be answered in favour of the School Board.

The other question in the case is whether the School Board have acted beyond their powers in regard to the house and garden, in respect that they have thought fit, instead of giving the new teacher the house attached to the school, to give to the aged teacher, in consideration of his long services to the parish, the use of it for the rest of his life. The second parties say that the Board had no power to do that.

Now, I do not think that even under the law prior to the Act of 1861 it would have been illegal for the heritors to arrange in the interest of all concerned that the old teacher should remain in the house, and the new teacher be properly provided for elsewhere in the neighbourhood. But however that may have been, I think that under the new system which the Act of 1872 has introduced it is in the discretion of the school board to say whether a teacher's house is or is not to be part of the educational equipment of the parish. The question truly is

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whether the use of house and garden is to form part of the retiring allowance. So far as appears, the new teacher is quite satisfied that they should, and is quite satisfied with the arrangement that he should have provision made for his residing elsewhere. It is by certain ratepayers that the objection is taken. They maintain that the Board are not entitled to keep on the house unless it is to be occupied by the teacher who is discharging the duties of teacher in the parish. Now, I do not see what real interest these ratepayers have to raise that question. They are only interested in preventing any illegal application of property which improperly adds to the rates. But here if this question were answered in their favour no benefit would accrue to the ratepayers, for the Board would simply change the allowance as regards house and garden into a money allowance in addition to the £60 already given. I could even conceive circumstances in which the course the second parties contend for would be against the interest of the ratepayers.

I am clearly of opinion in law that the School Board may make such an arrangement as they have done with Mr Lawrie, and that no misuse of office has been substantiated which calls upon this Court for interference with their action. They have acted within their powers, and we have no power to control them in a reasonable exercise of the discretion vested in them by the Act.

LORD YOUNG.—I am of the same opinion. I think the second parties have no title and no interest to maintain the objections they have stated to the action of the School Board.

As to the first question, I think that retiring allowances are under the present law governed by section 61 of the Act of 1872. The amount of the retiring allowance is entirely in the discretion of the School Board. I do not assent to the view that the retiring allowance here is the £60, and that the rent free use of the house and garden is something over and above that. I think the proper way to state the matter is, that the School Board in their discretion have given the aged teacher, as a retiring allowance, £60 and the occupation of the house and garden. Instead of that they might have increased the money allowance. They might, for example, have fixed it at £75 so as to give the retiring teacher £15 wherewith to get a house for himself. That could not have been objected to on the ground of want of power, and we would hardly have entertained the objection to it on the score of discretion, that it was an outrageous use of power. They did not take that course, but yielded to the suggestion made to them in dealing with this aged man, that he should not be turned out of the house he had so long occupied, but that an arrangement should be made with his successor to take a money allowance and to provide himself with a house in the meantime. I think they acted wisely in so doing, and, at all events, they acted within their discretion. Even supposing they had put the new teacher in possession of the house they would not have been bound to restrain him from letting it, so long as he was not neglecting his duties. He might have let it to the old teacher for such a sum as would have enabled him to rent another. It is a new idea to me that a teacher may not let the teacher's house. Of course he cannot do so to the prejudice of his duties, but where no such prejudice is suffered schoolmasters often do let them. Schoolhouses situated near the sea are often let in summer; and so also the manses of parish clergymen are often let in summer. That is quite lawful, though no doubt the presbytery would interfere if the thing were done to the prejudice of the parish.

I think that we should answer the questions to the effect of finding that the arrangement made between the Board and Mr Lawrie with regard to retiring allowance, both as to money payment and house and garden, was lawful and within their discretion. No. 71.  
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LORD RUTHERFURD CLARK.—I concur.

LORD LEW.—The objections stated seem to be that the arrangements as regards both the £60 and the house and garden are *ultra vires* of the School Board. I cannot say that I share the opinion that the ratepayers have not a good title to state their objections, as the arrangement may affect the rates.

On the objections themselves, however, I agree that, as regards the first, the School Board is entitled to fix the retiring allowance in accordance with section 61 of the Act of 1872. As regards the schoolhouse and garden, my only doubt has been whether a school board, as long as they retain the schoolhouse, are not bound to use it for the accommodation of the schoolmaster. They may change the site or sell the building, but I do not think they are entitled to deal with it as if it were private property. While expressing this doubt, I have nothing to add to the opinions of your Lordships on the merits of the objections themselves.

THIS interlocutor was pronounced :—"The Lords . . . are of opinion that the School Board in granting the allowance specified in the case and the free use of the teacher's house and garden to Mr Lawrie on his retiring from the office of schoolmaster, acted within their powers under the Education Act of 1872: Find and declare accordingly, and decern."

J. & J. ROSS, W.S.—JAMES P. SYM, W.S.—Agents.

WILLIAM CUNNINGHAM, Pursuer (Reclaimer).—*J. G. Smith—Wilson.*

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DUNCAN & JAMIESON, Defenders (Respondents).—*J. C. Thomson*

—*J. A. Reid.*

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*Reparation—Slander—Issue—Aggravation of Damages—Newspaper—Disclosure of anonymous correspondent.*—In an action of damages for slander, it is competent for the pursuer as well as for the defender to prove the circumstances in which the slander was written where the defender is the writer,—or published where the defender is the publisher,—as affecting the amount of damages.

A town-councillor of a royal burgh raised an action of damages against the publishers of a newspaper for slander contained in an editorial article, and in a series of letters signed with various pseudonyms, published in their paper, and charging him with dishonest conduct in his office. He averred that the letters and article were part of a systematic plan to destroy his character, and that the defenders "either wrote the said letters or procured them to be written for publication in their said newspaper." An issue was adjusted "whether the said letters and article were of and concerning the pursuer, and falsely and calumniously" represented him as having been guilty of the dishonest conduct in question. Held that he was not bound to put in issue whether the letters were written by the defenders, but was entitled to lead evidence upon that point, on the issue as adjusted, with a view to aggravation of damages, and that therefore he was entitled to a diligence to recover documents relating to the authorship, composition, or publication of the letters and article, though their recovery might lead to the disclosure of the names of anonymous correspondents who were not represented in the cause.

*Low v. Taylor*, 5 D. 1261, and *Brims v. Reid & Sons*, 12 R. 1016, distinguished.

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*Observations per Lord Shand and Lord Adam on the case of Cooley v. Edinburgh and Glasgow Railway Co.* 8 D. 288.

WILLIAM CUNNINGHAM, a member of the Town-council of Stirling, raised an action of damages for alleged slander against Messrs Duncan & Jamieson, printers and publishers of the *Stirling Observer* and the *Stirling Saturday Observer* newspapers—damages laid at £1000.

The alleged slanders were contained in a series of eight letters of various dates, the first being dated 6th September and the last 20th October 1888, and in an article dated 20th September of the same year. All the letters and the article in question were published in one or other of the newspapers above mentioned. The letters were signed with various pseudonyms "Trader," "Another Trader," "Still another Trader," "Bow Street," &c.

The pursuer stated that the letters and article in question represented, "that the pursuer was a dishonest and dishonourable person, and that being a member of the Town-council of Stirling, he took advantage of his position to make money to the town's great hurt; that he had been bribed by the Caledonian Railway Company to betray the interests of the burgh in favour of the said Caledonian Railway Company; that he was a two-faced man, and a Judas, and ought to be shunned."

It was ultimately admitted that the above statement was a fair summary of the effect of the accusations made in the letters and article.

The pursuer further averred;—(Cond. 14) "The whole of the said letters and articles published by the defenders as aforesaid not only contain the false, calumnious, and malicious passages before cited, but, whether taken together or separately, were calculated and intended to hold up and expose, and did calumniously and injuriously hold up and expose, the pursuer to public contempt and ridicule. They were part of a systematic plan to destroy or injure the pursuer's respectability, reputation, character, and usefulness as a public man; and they have had the effect of lowering and degrading the pursuer in the eyes of the public." (Cond. 16) "On 22d October 1888, Mr D. W. Logie, solicitor, Stirling, the pursuer's agent, wrote to the defenders with regard to the foreshaid letter signed 'Bow Street,' which had appeared in the *Stirling Saturday Observer* of 20th October, and to the charges previously made against the pursuer in the defenders' papers. He requested the defenders to furnish him with the name and address of the writer of the 'Bow Street' letter, and called on the defenders for an apology. The pursuer believes and avers that the defenders either wrote the said letters or procured them to be written for publication in their said newspaper. The defenders have declined to give the pursuer any information or any satisfaction, and in these circumstances the present action has been rendered necessary." (Ans. 16 for the defenders) "The said letter is referred to. *Quoad ultra* denied."

The defenders averred;—"The writings complained of having been made in the public interest, and being only fair comments on the pursuer's public conduct, he has suffered no damage from them, and is not entitled to sue upon them."

The following issue was adjusted for the trial of the cause:—"Whether the said statements, letters, and article printed in the appendix hereto, or any of them, or any part of them, are of and concerning the pursuer, and falsely and calumniously represent that the pursuer being a member of the Town-council of Stirling took advantage of his position to make money to the town's great hurt, that he had been bribed by the Caledonian Railway Company to betray the interests of the burgh in favour of the said Caledonian Railway Company, that he was a two-faced man, and a Judas, and ought to be shunned; or make similar false and calumnious

representations of and regarding the pursuer, to his loss, injury, and No. 72.  
damage?"

On 9th January 1889 the Lord Ordinary (Fraser) granted diligence to the pursuer against havers for recovery of the books and writings mentioned in the specification for him as amended.

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The original specification contained, *inter alia*, the four articles quoted *infra*.\* The first three articles were disallowed by the Lord Ordinary.

The pursuer reclaimed, and argued;—The articles which had been struck out of the specification ought to be restored. There was here a specific averment that the defenders were the writers, directly or indirectly, of the letters in question. They denied that, and proof on the matter should be allowed. The proof would go to aggravate the damages, and on that ground the inquiry was relevant. It was admitted that in the ordinary case an editor was not bound to give up the name of his correspondent.<sup>1</sup> There was no privilege on the part of a newspaper editor,<sup>2</sup> and if it could be proved that the defenders concocted and carried out a plot by which it was made to appear that the conduct of the pursuer was regarded as disgraceful by a large body of the public, that increased his fault, and was relevant to be placed before the jury, and ought to be taken into consideration by them in assessing damages. The measure of fault might be put in issue.<sup>3</sup> It was as competent to prove the circumstances in which the slander was uttered with a view to the aggravation, as with a view to the mitigation of damages.<sup>4</sup> It was competent to lead this proof on the present issue, because notice was given on record that it was intended to be proved that the defenders were the writers as well as the publishers of the slander, and further because that fact was merely an aggravation of the original offence and not a totally distinct one, which would require an issue to itself. The Lord Ordinary in disallowing these articles had been influenced by the case of *Lowe v. Taylor*,<sup>1</sup> but that case had no application here, as all the parties as well as the Court took the argument on the footing that the letters were *bona fide*, and had been written to the editor, for insertion, by members of the public. Here there was a distinct averment to the contrary. That averment also differentiated this case from

\* "(1) The manuscripts of the various letters referred to in the 5th, 6th, 8th, 9th, 10th, 11th and 12th articles of the condescence, and the manuscript of the newspaper article mentioned in the 7th article of the condescence, or the manuscripts of the writings or documents embodying the said letters or article. (2) The business-books of the defenders for the period between 1st August and 5th November 1888—including diaries, journals, memoranda-books, note-books, letter-books and cash-books—that excerpts may be taken therefrom of all entries therein relating to the said letters or article, or any of them, or to the authorship, composition or publication thereof, or to payments made by the defenders on account thereof, or in connection therewith. (3) All letters received by the defenders during the foresaid period relating to the letters or article in question, or to the authorship or publication thereof, and all receipts received by the defenders for payments by them on account of, or in connection with, the said letters or article. (4) All letters received by the defenders during the months of September and October 1888, from the pursuer and his law-agent regarding the publications in question."

<sup>1</sup> *Brims v. Reid & Sons*, May 28, 1885, 12 R. 1016; *Lowe v. Taylor*, Nov. 16, 1844, 5 D. 1261.

<sup>2</sup> *Merivale v. Carson*, 1887, L. R., 20 Q. B. D. 275.

<sup>3</sup> *Rogers on Libel and Slander*, 2d edit. p. 309; *Cooley v. Edinburgh and Glasgow Railway Co.*, Dec. 13, 1845, 8 D. 288, 18 Scot. Jur. 134; *Scotland v. Thomson*, 1781, 2 Hailes, 716; *Auld v. Shairp*, July 14, 1875, 2 R. 950.

<sup>4</sup> *Browne v. M'Farlane*, Jan. 29, 1889, *ante*, p. 368.

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*Brims'* case, and those two cases were the authorities for saying that an editor who took the responsibility of an anonymous letter on himself was not bound to disclose his correspondent's name. It might be that the correspondent's name would probably be disclosed if these articles and the proposed line of proof were allowed, but in the absence of direct authority on such a case as this, where an elaborate plot was averred, the Court should not be very tender in protecting slanderers who wished to remain concealed.

Argued for the respondents;—It was admitted that there was no case of privilege, but if the articles in question were allowed it would necessarily lead to the disclosure of the defenders' correspondents' names. That was contrary to the rule in such cases as laid down in *Brims v. Reid & Sons* (12 R. 1016) and *Lowe v. Taylor* (5 D. 1261), and the editor need not answer a question as to whether he himself was the author of the letters, as that would give up his own name, which might weigh with the jury in regard to damages. The diligence here should be considered with respect to the issue, and there was no hint that the question of authorship was to be gone into.

LORD PRESIDENT.—This is a very important case, in my view of it, and it raises a question of some novelty. The series of letters which appeared in these newspapers during the months of September and October last was certainly in the highest degree calumnious, particularly as they were directed against the reputation of a man in a public position. There is no defence of *veritas*, but the publishers of the paper propose to take the whole responsibility not only of the editorial article in question, but of the series of letters, which *ex facie* appear to have been written by different people. All the letters are pseudonymous, and are signed "Trader," "Another Trader," and so forth, and bear to have been written by various people who are interested in the affairs of the town of Stirling. So far the matter is quite in a condition to go to trial, and an issue has been taken which is directed against the defenders, as printers and publishers of the newspapers in question. The complaint is, that in the editorial article and in the various letters there are most calumnious statements made regarding the conduct and reputation of the pursuer.

In ordinary circumstances I should certainly say that, having the defenders as the responsible parties to answer this claim of damages, the pursuer is not entitled to make the demand which he does, namely, to ascertain by diligence or by direct evidence who is the real writer of these letters. But this is not an ordinary case, for the pursuer has on record two very important statements. He says in article 14 of his condescendence, speaking of these letters and the article,—"They were part of a systematic plan to destroy or injure the pursuer's respectability, reputation, character, and usefulness as a public man; and they have had the effect of lowering and degrading the pursuer in the eyes of the public." In connection with that, he avers in the 16th article that "the defenders either wrote the said letters or procured them to be written for publication in their said newspaper."

Now, if it is true that this was a systematic plan concocted and carried out for the purpose alleged, and if in prosecution of that plan the defenders wrote this series of letters as well as the editorial article, and thus gave the appearance that this opinion of the pursuer's conduct came from several distinct and independent sources, they certainly took means to deceive the public as to facts which were taking place, for, as the matter was stated, the public were naturally

led to believe that many people entertained a very bad opinion of the pursuer, and thought him guilty of corruption and malversation in office, and that that opinion was by no means confined to the editors of these papers. Such an idea was calculated largely to increase the damage to the reputation of the pursuer, for if it was only the opinion of the editor that was concerned the public might have thought—this is only scandal, and we will wait and see what happens before we believe the story; whereas if various people wrote to the same effect the slander necessarily and naturally became much more serious.

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Now, in my opinion, it is competent to prove at the trial, when we have such distinct averments as we have here, that the aggravated damage thus produced arises entirely from the actings of the defenders themselves, and that they falsely represented that others concurred in the view of the pursuer's character which they stated.

The only difficulty raised by the defenders is that if the pursuer means to prove that the publishers were really themselves the authors, directly or indirectly, of these letters, they must take an issue on the question, and that the issue as it stands will not enable them to prove that part of their case. That is a technical objection, but it must be carefully considered.

I have come to be of opinion that it is not necessary to put the question of authorship in issue—that is, either to insert it in the present issue or to take a second issue on it. If it were put into the issue as adjusted the pursuer would run this risk, that unless he proved both authorship and publication he could not get a verdict. That objection would not apply, of course, to a second issue on the point, but I do not see the necessity of such an issue, for the only purpose for which the evidence is sought is to shew what was the state of mind of the writers of the letters and of the mind of the writer of the editorial article when they were written, because the defenders were themselves the authors of them.

If that fact is established, it will probably aggravate the damages very considerably, and I think it is a good ground for aggravating them, just as it is a good ground for mitigation if it could be shewn that the editorial article was written under such circumstances as to lead the editor to the belief that the statements in the letters were true. It would I think be difficult to reconcile the rule we have laid down as to the mitigation of damages by proving all the circumstances in which the libel was written, with a refusal to allow the same sort of evidence to be led in aggravation of damages. If we admit circumstances to be proved in mitigation of damages, I think we must allow them to be proved in aggravation; and this case appears to me to be one of those in which proof of the circumstances alleged will be most important.

I was a little struck at first sight by Mr Thomson's argument that if this diligence is granted it may result in the disclosure of the authorship of letters written by third parties who are not represented in the cause. It is not desirable that that should be so, but at the same time the Court cannot have much sympathy with the writers of anonymous letters containing very calumnious statements, and such writers will have no great reason to complain if, to further the ends of justice, it may be necessary to drag them from their lurking places. I am, therefore, for disregarding that consideration in disposing of the case, and think that this diligence should be allowed.

**LORD MURE.**—The only difficulty I have found is with regard to the word



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The general rule in such cases as the present is that the editor of a newspaper, where he takes the responsibility for anonymous correspondence published in his paper, is not bound to disclose the author. I do not wish to trench on that rule, but, as your Lordship has remarked, this is not an ordinary case, for in articles 14 and 16 of his condescendence the pursuer makes a specific averment that these letters were part of a plan to damage his character, and that they were in reality not written, as they bear to be, by different persons, but by the defenders themselves.

I think that proof of those facts is competent evidence on the question of damages, and I agree with your Lordship that upon the same principle as you may prove, in mitigation of damages, the circumstances in which the slander was written, in order to shew that the writer was not acting through any malicious intention towards the pursuer, so the pursuer may be allowed to prove all the circumstances of the case in aggravation of damages.

It is clear that if the defenders had been in the witness-box they would have been subject to examination on the allegations in the two articles of the condescendence which I have mentioned; and that being so, I see no ground for holding that the pursuer can be prevented from obtaining access to documents which may tend to prove those allegations. I therefore agree in thinking that these articles of the specification should be allowed.

LORD SHAND.—If this were a question to be determined on strictly logical principles, much might be said in favour of refusing to allow such an inquiry as the production of the letters and documents in question will open up. According to principles of strict reason, it appears to me that assuming the publication of such calumnious statements as those complained of in this action, the only question left is one of the amount of damages, and it may fairly be said that if that be the only question, then all that the jury require to have before them is the articles complained of, and the fact of publication. The nature of the false and calumnious charges and the nature and extent of the publication give full materials for the assessment of damages. The amount of the injury done will not strictly speaking be affected, so far as I can see, by proof of what was the state of mind of the writer when the slander was written. The damage done by the anonymous publication in the paper is the same whoever may have written the libel, or whatever was the state of his mind when he did so. But although this be true, I am satisfied at the same time that our law has allowed evidence directed to these matters from the earliest date at which cases of this class have arisen. One element in the question of damages is *solatium* to the person calumniated, and it may be that it is on that ground that the amount of damage has in fact been to some extent determined according to the degree of malice by which the writer was actuated, or the circumstances, extenuating or the reverse, in the position of the libeller, whether author or publisher, in which the slander was uttered or the libel issued.

Mr Guthrie Smith has pointed out that as early as 1781, in the case of *Scotland, 2 Hailes, 716*, evidence of that kind was admitted. In that case it was said that evidence was admissible to shew whether the slander was written "of suddenity" or deliberately. The damage done would be the same in either case, but the Court would allow evidence on the point. So in practice evidence has been, I think, always admitted as to whether the slander was uttered or written, not only under

provocation, but also under misapprehension to any extent, or under other extenuating circumstances, or again whether it emanated solely as a malicious invention of the writer, or on any information which he might reasonably believe to be true. And in the most recently decided case of *Browne v. M'Farlane*, the principle was clearly recognised that the parties are entitled to lay before the jury the whole circumstances in which the slander or libel was uttered, including the state of mind of the author or publisher. The rule is I think analogous to that which was sanctioned in the case of *Morton, Cooley's Factor* (8 D. 288). There a person was killed in a railway accident, and his representatives sued for damages. Now, on strict principles of reason in that case, the proper measure of damage would have been the extent of the injury, but the Court rejected an attempt to put in issue only "what is the amount of the said loss, injury, and damage," preceded by an admission that the death was caused by the company's fault, and decided that the jury should be in possession of the whole circumstances, in the view that these circumstances might affect the amount of damages to be awarded by them. The view which prevailed was that if the case were one where everything was systematically done to avoid accident, and the accident only happened through some slight error, the company should have the benefit of this, but if on the other hand, the accident occurred through gross carelessness, this fact should be admitted to proof as not without bearing on the question of damages. I do not for myself say that I should recommend a jury to make the nature or extent of the company's fault an element in determining the amount of damages to be awarded. But whatever may be said as to the legal principles involved in that decision, it was so decided, and has settled the practice ever since, so that there is, so far as I know, no case in which proof of fault has been excluded, though fault has been unqualifiedly admitted, except where parties have by consent agreed that the question should be tried on the pure question of damages, and I have little if any doubt that in practice juries do have regard to the degree of fault of the company to some extent in the assessment of damages.

Here if we refuse to allow the proposed evidence, the defenders would be in a position to go to the jury and say—you must assume that all these letters came from *bona fide* members of the public, who greatly disapproved of the conduct of the pursuer. They might admit through their counsel that they were wrong in publishing the slander, and state that they regretted having done so, but that they had yielded to pressure; and plead successfully that on that ground smaller damages should be awarded than would otherwise have been the case. That would be an injustice to the pursuer if, in point of fact, the letters were in reality or in effect the production of the publishers themselves. That is, however, the averment here made by the pursuer. I am not prepared to say that had there been no special averment to that effect on record, I should have been for admitting this line of evidence, but, with a record like this, I think we are bound to do so.

The case is quite distinguishable from that of *Lowe v. Taylor* (5 D. 1261). In that case there was no suggestion that the letters had not been received by the editor from *bona fide* third parties. The case was argued on that footing, and it was therefore held that as the editor, who was not the writer of the letters, took all the responsibility of publication on himself, the pursuer had no interest to go behind the publication which was the only matter complained of, and so to learn the name of the correspondent. Here, however, there is a distinct aver-

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ment that the letters were written, or caused to be written, by the defenders themselves.

The only other question is whether there is any necessity for a separate issue as to the authorship of the letters. I agree that that is a question which must be looked at closely, but, giving it the best consideration, I have come to be clearly of opinion that the issue that has been adjusted is sufficient and proper for the trial of the cause. It seems to me that the question comes simply to be one of more or less damages according to whether the defenders wrote these letters themselves or not, in so far as the jury may think fit to give weight to that consideration. If the defenders got the letters from an ordinary correspondent, the damages may be smaller; if they wrote the letters themselves, the measure of damages may be enlarged. It is merely a question of aggravation of damages, and not a matter for a separate issue, and therefore I do not think a separate issue is required. I agree in thinking that the diligence originally sought is not too wide, and see no reason for limiting its terms in the interest of parties other than the defenders, who may have been anonymous slanderers, and on the whole, I am of opinion that the Lord Ordinary's interlocutor should be recalled, and the diligence granted in the terms asked.

LORD ADAM.—In actions of damages for libel it is competent by the law of Scotland to prove the state of mind of the publisher, or of the writer of the libel, as the case may be, when it was written or published. In the case of the publisher he may shew all the circumstances in which he made the publication. We had an example of that in the recent case of *Browne v. M'Farlane* (*ante*, p. 368), where the publisher was allowed to shew that he received the letter complained of from a regular correspondent, and he might have gone on to shew that he made all due inquiry as to the correctness of the statements made in it. Now, if such evidence is allowed in mitigation of damages, I think a similar inquiry must be allowed in aggravation of them. One is just the counterpart of the other. It will not do for the defender to say—I propose to inquire into the surrounding circumstances, but you, the pursuer, must not do so. On that ground, I am for allowing these articles of the specification. If we did not do so, the effect would be to put a publisher in a better position than the public, for all he would have to do would be to write anonymous letters to himself, and publish them, and then to say, I accept responsibility as publisher, and refuse to give up my correspondent's name.

I am not moved by the fact that this line of evidence may lead to the disclosure of the name of the actual writer of these letters, because I agree with your Lordship in thinking that the Court can have little sympathy with that class of persons. I quite see, however, that if, as in the case of *Lowe v. Taylor* (5 D. 1261), no legitimate interest can be shewn for the disclosure of the anonymous writer's name, such an inquiry as this may not be allowed, but where, as here, there is a clear interest averred on record, I do not think we should stand in the way of its being made.

I do not wish to rest my opinion in this case on the case of *Cooley* (8 D. 288),<sup>1</sup> because I think actions of damages for libel are exceptional in this respect, and the admission of such evidence does not require to be supported by the doctrines advanced in that case. My recollection of the practice in such cases differs from

<sup>1</sup> Followed in *Dobie v. Aberdeen Railway Co.*, May 23, 1856, 18 D. 862.

that of Lord Shand. No doubt the question of fault is laid before the jury, but in my experience a jury is never asked to enlarge or to diminish the amount of damages on the ground of the extent of fault on the part of the defender. That has not been in my experience the nature of the inquiry in actions of damages for fault or negligence.

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THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to grant the diligence in the terms originally proposed by the pursuer.

ANDREW NEWLANDS, S.S.C.—WILLIAM DUNCAN, S.S.C.—Agents.

GEORGE SIMPSON, Petitioner.—*C. S. Dickson*.  
HENRY M. HORSBRUGH (Liquidator of the Boson Oil Company, Limited),  
Respondent.—*G. W. Burnet*.

No. 73.  
Feb. 5, 1889.  
Simpson v.  
Boson Oil Co.  
Limited.

*Company—Voluntary liquidation—Rectification of register by Court—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 138.*

On 15th August 1888 it was resolved, at an extraordinary general meeting of the shareholders of the Boson Oil Company, Limited, that the company should be voluntarily wound up in terms of the Companies Act, and Mr Henry M. Horsbrugh, C.A., was appointed liquidator.

On 20th October 1888 George Simpson, a shareholder of the company, presented a petition to the Court for rectification of the register of the company by deleting therefrom his name as the holder of 1440 shares.

The liquidator lodged answers in which he stated that with regard to 1391 of the shares he was willing that the register should be rectified as craved, on the ground that they had not been properly allotted, but with regard to the remaining 49 “he conceives himself not entitled to consent to the rectification without the authority of the Court.”

On 23d January 1889 the liquidator presented a note to the Court in which he stated that all questions with regard to the remaining forty-nine shares had been settled, and praying the Court “to order the rectification of the register of the members of the Boson Oil Company by deleting the name of the petitioner as a shareholder of the company, so far as the said 1440 shares are concerned, and to order the register of the said company to be rectified by deleting therefrom the said shares.”

He relied on section 138 of the Companies Act, 1862,\* and cited the under-mentioned authorities<sup>1</sup> with regard to the intervention of the Court in voluntary windings-up.

THE COURT, without giving opinions, pronounced an interlocutor in terms of the prayer of the note of 23d January 1889.

RICHARDSON & JOHNSTON, W.S.—GEORGE ANDREW, S.S.C.—Agents.

\* Section 138 of the Companies Act, 1862, provides,—“Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court in . . . Scotland . . . to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.”

<sup>1</sup> Buckley, 5th edit. p. 307; Sdeuard v. Gardner, March 10, 1876, 3 R. 577; Sdeuard, June 6, 1878, 5 R. 867; Clark v. Wilson, June 7, 1878, 5 R. 867.

No. 74. GEORGE SMITH & CO. AND ANOTHER, Pursuers (Appellants).—*Asher—Ure.*  
HUGH FARRIES SMYTH, Defender (Respondent).—*Goudy.*

Feb. 5, 1889.  
Smith & Co.  
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*Bankruptcy—Deed of Arrangement—Illegal Preference—Right to challenge.*  
—Held that a deed of arrangement in a sequestration conveying the sequestrated estates to a purchaser does not carry a right to challenge illegal preferences.

*Bankruptcy—Illegal Preference—Act 1696, cap. 5.*—A firm, within sixty days of their sequestration, assigned their book debts to the amount of £387, 15s., in security of an immediate advance of £330, and in exchange for a bill for £57, 15s. previously granted by them to the assignee.

Question whether this assignation was struck at by the Act 1696, cap. 5, to the extent of the £57, 15s.

*Opinion per Lord Young* that it was not.

2D DIVISION.  
Sheriff of  
Lanarkshire.  
I.

ON 6th May 1887, George Smith & Co., ironfounders, Sun Foundry, Kennedy Street, Glasgow, granted an assignation whereby, "in consideration of the sum of £330 advanced by Hugh Farries Smyth, 4 Main Street, Anderston, and a bill dated 31st March 1887, for £57, 15s. granted by us" [in favour of Hugh Farries Smyth], they assigned, conveyed, and made over "to the said Hugh Farries Smyth and his heirs, executors, and assignees whomsoever, the following book debts due and owing to us, and to be held and collected by him in security of the said advance and bill, *videlicet*," &c. Then followed a list of the book debts.

The bill, which was then current, was handed back by Smyth at the same time that he made the advance of £330.

On 25th May 1887, the estates of George Smith & Co. were sequestrated.

At a meeting of the creditors of the firm, on 11th July, it was unanimously resolved that the sequestrated estates should be wound up under a deed of arrangement, and accordingly a trustee was not appointed.

Thereafter, on 1st August, a deed of arrangement was entered into between George Smith & Co., Gavin Bell Millar, and the creditors of the firm, whereby Millar agreed "to purchase the whole estate property and assets constituting the said sequestrated estate as it stands, including the goodwill of the business and a right to use the firm's name, and to pay £3500 for a discharge of the heritable debts other than the feu-duty and whole arrears thereof and £3000 for division among the unsecured creditors"; and the creditors, "for all right and interest they have acquired by or through said sequestration," renounced and discharged the same, and reinvested, restored, and retrocessed the said George Smith & Co., their heirs, executors, and assignees, "in and to their whole estates, heritable and moveable, real and personal, wherever situated, belonging to them at the date of their sequestration or subsequently acquired or succeeded to; surrogating and substituting them and their foresaids in the creditors' full right and place in the premises."

In May 1888, George Smith & Co. and Millar brought an action in the Sheriff Court of Lanarkshire against Hugh Farries Smyth, the assignee under the assignation of 6th May 1887, and against David Prentice Menzies, to whom Smyth's rights under that assignation had been assigned, to have them ordained to grant a valid assignation to George Smith & Co.'s book debts, and to account for their intromissions therewith.

The defenders admitted liability to account, and proposed to take credit for £387, 15s., the sum in the assignation.

The pursuers denied the right to take credit for £57, 15s. of that sum, being the amount in the bill, on the ground that the assignation was to that extent a further security of an existing debt granted within sixty days of bankruptcy, and so struck at by the Act 1696, cap. 5.

On 20th July 1888 the Sheriff-substitute (Lees), after a proof, which related mainly to other branches of the case, found, after findings in fact, that the pursuers had no title to sue. This plea had not been taken by the defenders on record. No. 74.  
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The pursuers appealed, and argued;—(1) The assignation of 6th May 1887 constituted an illegal preference under the Act 1696, cap. 5, to the extent of £57, 15s., as having been to that extent granted in security of a prior debt within sixty days of bankruptcy. (2) The pursuers, one or other of them, had a title to reduce this illegal preference. The whole sequestrated estates under the 29th section of the Bankruptcy Act of 1856 belonged to the creditors for the purposes of the Act, and one of these purposes under the 35th section was a deed of arrangement, it being specially provided by section 38 that notwithstanding the deed of arrangement “the sequestration shall receive full effect in so far as may be necessary for the purpose of preventing, challenging, or setting aside preferences over the estate.” Either, therefore, the right of challenge had been purchased by Millar as part of the sequestrated estates, or it had passed to the bankrupts under the clause of retrocession. Where a composition contract was entered into it might be that there should be a special assignation of the right of challenge and notice to the creditor, but a deed of arrangement was different,<sup>1</sup> and the creditor had had sufficient notice through the *Gazette*. A trustee in the sequestration, had there been one, could undoubtedly have reduced, and Millar was in the place of a trustee.

Argued for the defenders;—(1) The assignation was not to any extent struck at by the Act 1696, cap. 5. The transaction was a *unum quid*, and so far as regarded the sum in the bill was a *novum debitum*. (2) The pursuers had no title to sue. The right to challenge illegal preferences was not part of the sequestrated estate, but was a privilege of the creditors and of the trustee in the sequestration as representing them. It might be expressly conveyed to the purchaser of the sequestrated estates under a deed of arrangement, but if it was not expressly conveyed it was not to be presumed that the creditors intended to convey a right which could be used only to their prejudice. The 38th section of the Act of 1856 was intended to meet the case of creditors desiring to keep up the sequestration in order to cut down preferences.

LORD YOUNG.—This case raises a question which is not without interest, although in my view it is not attended with much difficulty. In May 1887 Messrs George Smith & Company required an advance of £330. They applied for accommodation to Mr Farries Smyth, who held their bill, granted sometime previously for £57, and the agreement come to was that he should advance the sum of £330 to them, and give up the bill for £57 upon receiving security in the shape of an assignation to their book debts, entitling him to uplift these debts to the extent of £387, i.e., the £57 for which they were already indebted to him under the bill and £330 which they received from him on the spot. Shortly afterwards George Smith & Company became bankrupt, and their estates were sequestrated, but before a trustee had been appointed an arrangement was come to whereby the creditors transferred the bankrupt estate, including, of course, the book debts, to Mr Gavin Bell Millar for the price of £6500, and they arranged among themselves to divide that sum, which thus repre-

<sup>1</sup> Douglas, Mitchell, & Co. v. Hunter, Newall, & Co., July 14, 1859, 21 D. 1302; Bell's Comm. ii. 458.

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sented the bankrupt estate. There is no doubt of the validity of arrangement, and Millar, I presume, knew—we must at anyrate take upon the footing that he knew—that the book debts had been already to Smyth for the sum of £387. As the purchaser of the bankrupt estate was entitled to call on Smyth to account for the book debts, and as he has brought the present action, which is in substance an action of assumpsit against Smyth. In this action Smyth debits himself with the amount of the book debts which he has ingathered, and he credits himself with the sum of £387. Millar admits the correctness of this accounting except as regards the book debts, but he disputes Smyth's right to take credit for this sum on the ground that it represents the amount of a bill which was current within sixty days of the date of Smith & Company's sequestration, and is consequently struck at by the Act of 1696.

Now, I think it more than doubtful whether if this transaction was challenged by some one entitled to challenge it—by the trustee in the event if there had been one, or by prior creditors—it would have been valid as involving an illegal preference under the Act 1696. The inclination of my opinion is that it would not. It would, I think, have been quite legitimate according to the principles fixed by a series of decisions, for Smyth to assign to me a bill not only for the £330 which I am now advancing but also for the balance which you already owe me, and let me have an assignation of your book debts in security of the whole £387." I think that that assignation would have been challengeable under the Act, even at the instance of a trustee or of prior creditors, assuming that there are prior creditors.

That, I think would have been sufficient for the determination of the case, but passing by that, and assuming that this assignation would have been challengeable at the instance of prior creditors to the extent of £57 out of the £387, the question remains,—Did they convey that right of challenge to Millar by the arrangement by which they transferred the bankrupt estate to him for £6500? Now, I am of opinion that while the parties might have conveyed that right if they pleased expressly about that right, an assignation of it in favour of Millar is not to be raised up by implication. Such an assignation could be made only to the prejudice of the general body of creditors, and it is not to be presumed that they intended to transfer a right which could be exercised to their own prejudice. In the absence of express stipulation I think that it is to be presumed, and as there is no such express stipulation here, I am of opinion that Millar has no title to challenge the conveyance of the book debts to Smyth to any extent.

I am not much moved by the argument on which Mr Asher mainly founded on the words at the end of the 38th section of the Bankruptcy Act. I think the purpose of these words plainly is, where creditors agree to the sequestration, and have their claims satisfied by some other means, that they provide that the sequestration shall nevertheless continue to the effect of bringing down illegal preferences; but I think that has no bearing on the question before us.

I am of opinion, therefore, in the first place, that this assignation of the book debts is challengeable, either in whole or in part, at the instance of anyone, and if I thought the right of challenge existed at all, I think it belongs to the creditors alone in virtue of a peculiar and exceptional law, and is not to be presumed to have been transferred by them under such an assignation as

here. I should also wish to say that if I had thought otherwise—that the right of challenge had been transferred to Millar—I should have felt unable to decide the question in the absence of the creditors.

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LORD RUTHERFURD CLARK.—Upon the question whether this assignation of the book debts could have been reduced by anyone having a proper title to do so, I desire to give no opinion. I think it is a question of difficulty.

Upon the question whether under the deed of arrangement with the creditors Millar has a right to reduce the assignation under the Act 1696, I am of opinion that he has no such right. If he possessed such a right he could use it only to the prejudice of his cedents, and we are not entitled to presume that the cedents intended to convey a right which could be used only to their prejudice.

I am also of your Lordship's opinion that if we had taken another view, we could not have decided the question in the absence of the creditors.

LORD LEE.—I am of the same opinion. I only wish to say that I do not understand your Lordships to decide the question of the validity of the assignation, but only that of the title to sue.

LORD YOUNG.—The case may be decided on either ground. I decide it on both.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff-substitute appealed against: Find that on 6th May 1887 Messrs George Smith & Company, . . . in consideration of a sum of £330 advanced to them by the defender, Hugh Farries Smyth, and of a bill, dated 31st March 1887, for £57, 15s., granted by them to him, assigned to him certain book debts in security of the said advance and bill: . . . Find that by deed of arrangement the sequestration of the said George Smith & Company, which was awarded on 25th May 1887, was brought to an end, and George Smith & Company were reinvested in their estates: Find that by the said deed of arrangement the pursuer Gavin Bell Millar became purchaser of the whole estate, property, and assets constituting the sequestrated estate of George Smith & Company as they then stood: Find that the challenge of the said assignation by the pursuer has been departed from by them, except as regards the said bill for £57, 15s.: Find that by said deed of arrangement no special authority was given to the pursuers, or either of them, to challenge any preferences that may have been granted by the bankrupt: Find in law that the pursuers have no title to challenge the said assignation in respect of the said bill: Find that the pursuers are entitled to an assignation of the book debts enumerated in the said assignation, . . . so far as these are unpaid, upon payment to the defender David Prentice Menzies of the balance of the sums due to him, and interest thereon at 5 per cent from 3d May 1888 to the date of payment: . . . *Quoad ultra* dismiss the action," &c.

DOVE & LOCKHART, S.S.C.—J. W. & J. MACKENZIE, W.S.—Agents.



## No. 75.

Feb. 6, 1889.  
Murdoch &  
Co., Limited,  
v. Greig.

JOHN G. MURDOCH & COMPANY, LIMITED, Pursuers (Respondents)  
*Lord-Adv. Robertson—A. S. D. Thomson.*

JOHN GREIG, Defender (Appellant).—*C. J. Guthrie—Wilson.*

*Sale—Suspensive condition—Sale or hire—Contract.*—M. & Co. piano sellers, entered into the following contract with A:—"In consideration of M. & Co. (hereinafter called the owners) letting to the undersigned (hereinafter called the hirer) a harmonium (hereinafter called the goods) the hirer hereby agrees to pay to the owners the sum of £1, 10s. of the goods, as deposit, and a further sum of £1 every four weeks thereafter, as hire, until the full amount of £15, 15s. (including the deposit) have been paid, when the goods shall be the property of the hirer, without further payment whatever." A paid the deposit, and made one of the payments. She then left the country, and her goods were sold at auction. At the sale G. bought the harmonium, and obtained delivery in action for delivery of the harmonium at the instance of M. & Co. again. The Court granted decree of delivery as craved on the ground that the condition of sale under the suspensive condition that the property in the goods should not pass till the full price was paid, and that the condition was fulfilled, G.'s title to the instrument was bad.

*Observations per the Lord President on sale under suspensive condition.*

1ST DIVISION.  
Sheriff of  
Lanarkshire.  
M.

JOHN G. MURDOCH & COMPANY, LIMITED, pianoforte sellers, in December 1886 entered into a contract with Mrs Taylor, Glasgow, the terms of which were as follows:—"In consideration of John G. Murdoch & Co., Limited (hereinafter called the owners), letting to the undersigned (hereinafter called the hirer) a harmonium (hereinafter called the goods) on hire, the hirer hereby agrees to pay to the owners the sum of £1, 10s. on delivery of the goods, as deposit, and a further sum of £1 every four weeks thereafter, as hire, until the full amount of £15, 15s. (including the deposit) shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever. The following are the conditions of the hiring:—(1) The hirer undertakes for the continuance of the hiring, to keep the goods in the hirer's possession, tidy, and in good order, and to allow the owners, or their servants, to inspect the same at any time. (2) The hirer agrees that until the full sum be paid the hirer shall have no property in the goods, but only than as a hirer thereof only, and that if the hirer do not duly observe the agreement, the owners may put an end to the hiring, and retain possession of the goods; and in case they do so, that all payments made shall be in respect of the use and tear and wear of the goods only, and not for the purchase of the same. (3) Should through change of circumstances, be unable to continue such hiring, he may transfer his interests in the goods under this agreement to any responsible person (to be approved by the owners in writing), who shall continue the payments in the stead of the hirer. (4) After payment of three months' hire, the possession of the goods may be given to the hirer for a period not exceeding three months, during which period no payment shall be due, and on resuming the hiring the hirer shall be in the same position as if the hiring had not been interrupted."

Mrs Taylor paid the deposit of 30s., and a further sum of £1, one of the monthly payments contracted for, but made no further payments.

Early in 1887 Mrs Taylor left this country, and on 19th April 1887 her furniture, including the harmonium, was exposed for sale at public auction at her house in Glasgow.

At the sale John Greig bought the harmonium at the price of £15, 15s.

the price being paid to the auctioneer he received delivery of the instrument. No. 75.

In May 1887 John G. Murdoch & Company, Limited, raised an action in the Sheriff Court at Glasgow against Greig, concluding for delivery of the harmonium. Feb. 6, 1889.  
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The above facts were ultimately admitted.

The pursuers pleaded;—The said harmonium being the property of the pursuers, and being in the possession of the defender, decree should be granted as craved.

The defender pleaded, *inter alia*;—(1) The defender having in *bona fide* purchased the harmonium referred to at a public sale, by an auctioneer, instructed by the ostensible owner of the instrument, and having paid the price thereof, he is not bound to deliver it to the pursuers as craved.

On 4th July, the Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds the defender bought at a public sale, on 19th April last, a harmonium, said sale being a public sale of household furniture of a certain Mrs Elliot or Taylor: Finds this harmonium is claimed by pursuers as being their property; under reference to note, sustains the first plea in law stated by the defender, and assoilzies the defender."\*

On 31st May 1888, the Sheriff (Berry) pronounced this interlocutor:—

\* "NOTE.—Although it may be that certain cases of late years have impinged on the effect to be given to the doctrine of reputed ownership, I am still of opinion that this is a case where the doctrine of reputed ownership must be held to apply. A sale of household furniture is publicly advertised; the defender goes to the house, and in perfect good faith bids for the harmonium put up by the auctioneer; it is knocked down to him for the sum of £8, and now the pursuers come forward and say that in terms of the agreement between them and the lady whose furniture was exposed to sale, it was not the latter's property, but theirs, and in these circumstances they are entitled to delivery from the *bona fide* purchaser without paying him a farthing of the expense to which he has been put. Such a result, it appears to me, would be unjust. If loss is to fall upon anyone it should be upon the pursuers, who must be held, in supplying the article to Mrs Taylor, in a question with third parties at least, to have put her in a position of dealing with the article as her own property.

"Apart, however, from the doctrine of reputed ownership, I find the case of *Cropper & Co. v. Donaldson*, July 8, 1880, 7 R. 1108, has an important bearing on this case. In that case there was practically a transaction of the same nature as that under discussion, but the Second Division refused to give effect to the contract as one of hire. Lord Ormidale, who gave the leading opinion, said, *inter alia*,—"In short, without entering into further particulars, it appears to me to be sufficiently clear that the transaction in question was of the nature of a sale and not hiring, and that the form and terms of the agreement, so far as it has the colour and appearance of a contract of hiring, was a mere device, resorted to for the purpose of evading the operation of the bankruptcy laws in the event of Wood becoming insolvent, as he did before he had fully paid the price of the machine." That case, as indicated in the last clause, had reference to a question between a creditor doing diligence on the estate of the hirer of the machine and the suppliers of it. If any distinction falls to be drawn between the two cases, *a fortiori* the *bona fide* purchaser of the harmonium in this case is in a better position than the pouncing creditor in the case referred to. On these two grounds, therefore, viz (1) reputed ownership, and (2) that the transaction in question must be regarded as a sale to Mrs Taylor in a question with a *bona fide* purchaser from her, I am of opinion that the defender's first plea in law must be given effect to."

No. 75. "Recalls the interlocutor appealed against: Ordains the defender to deliver as craved, and decerns."\*

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The defender appealed, and argued;—The contract here was not one of hiring but of sale. The words of the contract were against that view,

\* "NOTE.—Two questions arise in this case—(1) whether the contract between the pursuers and Mrs Taylor was a contract of sale or of hire, and (2) whether the doctrine of reputed ownership applies to the case.

"In regard to the former question, namely, as to the nature of the contract, it is clear that the mere language which parties have used in describing their contract is not conclusive of its nature. It may be that the terms of their agreement are such as to shew that it has been a contract of sale, although they may have given to it the name of a contract of hire. This is shewn in particular by the case of *Cropper & Co. v. Donaldson*, 7 R. 1108, where a transaction bearing to be a hire was held by the Court to be truly a sale. In the present case the contract bears to be one of hiring, and a consideration of its terms leads me to think that that is its true nature. The terms differ materially from those in *Cropper & Co.'s* case, where a bill at three months was at once granted for £58, which was the price of the instrument, and that amount was to be payable by instalments at intervals of three months, the bill being renewable in each case for the instalments still remaining due. In effect, the ground of judgment was that there was an attempt to create a security over a moveable subject belonging to the debtor. Here a certain sum was to be paid every four weeks as hire; and, no doubt, when the sums paid amounted to £15, 15s., the harmonium was to become the property of the hirer; but it seems to me that the transaction is to be regarded as substantially, and in effect, one of hire, and that the rights of the parties are to be governed by the rules applicable to that contract. If the case is treated as one of hire, it follows that the hirer had no power by a sale to confer a valid title on a third party, without, at all events, that party being approved by the pursuers, in terms of the third condition attached to the contract.

"The question then arises, whether the doctrine of reputed ownership can avail the defender. I do not think that it can. On this point I may refer to the judgment of the Second Division in *Marston v. Kerr's Trustee*, 6 R. 898, where it was held that the principle of reputed ownership is not applicable where a subject is in the possession of a person on a limited title under a fair and ordinary contract; and again, to the judgment of the same Division in *Hogarth v. Smart's Trustee*, 9 R. 964, where the Lord Justice-Clerk said—'The cases of hire and purchase have all proceeded on this, that the title of possession was good without attributing it to purchase, and no one is entitled to attribute possession to a title which would carry the property, where there is a subordinate title to which it may be ascribed.' Here, on the assumption that the contract was one of hiring, there was a subordinate title to which Mrs Taylor's possession was attributable, and it is material that the defender admits that he had seen the hire purchase system advertised. He was therefore not ignorant of the existence of such a right of possession as that of possession under a contract of hire and purchase, and he has the less ground for complaining of having been deceived. At the same time, his good faith is not disputed, and the question is on which of two innocent parties, the pursuers or the defender, the loss must fall. It is said that *Brown v. Marr and Others*, 7 R. 427, justifies the view that the loss must be thrown on the pursuers, who enabled the fraud to be committed. That case, however, was materially different, in respect that the goods were placed in the hands of a retail jeweller for the express purpose of his selling them. Here there was never any intention on the part of the pursuers that Mrs Taylor should dispose of the goods in any way without their consent. The fact that the sale was by public auction does not seem to me to affect the rights of parties, inasmuch as it is not suggested that the pursuers were aware of the sale till afterwards. I regret, in these circumstances, to be obliged to take a different view of the case from that taken by the Sheriff-substitute."

the true nature of the agreement must be looked at. If the contract of sale, then the property passed at delivery to Mrs Taylor, and in a position to give a good title to the harmonium. The case was decided by the decision in *Cropper v. Donaldson*,<sup>1</sup> and the periodical payments stipulated for here were simply the price of the article payable in instalments. The amount of those payments was quite out of proportion to the amount which would have been exigible as hire for this instrument. £1 per month bore no proper relation, regarded as hire, to the value of the article, viz., £15, 15s. If Mrs Taylor had failed to pay the instalment, the pursuers could have sued her for the amount, and compelled her to go on paying each instalment as it became due. Whether the contract were taken as one of sale or hire, the defender would have the advantage of the doctrine of reputed ownership. The sale was effected at auction, and the defender was a *bona fide* purchaser. Those circumstances protected the purchaser unless the goods were stolen by the defender, unless, in short, there were some *vitium reale* attached to the property. That doctrine afforded an answer to the argument that the sale was a sale on a suspensive condition. If, in such cases as the present, that idea were to be carried out to its full extent, in all cases of sales of moveables all that would be required to protect the article would be to require the recipient's creditors would be to annex a condition to the sale that the property should not pass till the price was paid. It was contended that the law of England was contrary to the defender's contention,<sup>2</sup> but in such cases had no application in Scots law, as the English law with respect to property in moveables was essentially different.

The case for the pursuers;—This was a very common form of contract, technically as the hire-purchase system. Till the last instalment of the price was paid the contract was one of hire, but on the payment of the last instalment it grew into one of sale. The contract itself anxiously provided that the transaction should be looked on as one of hiring, and there was no doubt why it should not be taken according to its express terms. It had been recognised in England as one of hire ever since the decision in *Ex parte Crawcour* (9 Chanc. Div. 419). The decision in *Cropper v. Donaldson* (7 R. 1108) was undoubtedly adverse to the pursuers' contention, but they challenged the soundness of the law there laid down, and in making the law as good, there was this distinction between the present case and *Cropper v. Donaldson* the Court took the case as merely an attempt to create a security on moveables to defeat creditors, while here there was no suggestion of the kind. Assuming, however, that the contract was not one of hire but of sale, it was a sale under a suspensive condition. The law was that in such sales the property did not pass till the condition was purified, even though delivery had been given.<sup>4</sup> As the defender had a reputed ownership the defender must have known of this

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*Donaldson v. Donaldson*, July 8, 1880, 7 R. 1108; *Duncanson v. Jefferies*, March 4, 1881, 8 R. 563.

*Donaldson v. Kerr's Trustee*, May 13, 1879, 6 R. 898; *Hogarth v. Smart's Trustee*, 1882, 9 R. 964; *Sim v. Grant*, June 3, 1862, 24 D. 1033, 34 Scot. Rep. 1033; *Henderson v. Gibson*, 1806, M. App. Moveables, 1; *Bell's Prin. sec. 32*, on Sale, sec. 32, and cases there; *Bell on Sale*, p. 80; *Brown v. Brown*, 1880, 7 R. 427.

*Ex parte Crawcour*, 1878, L. R., 18 Chan. Div. 30; *Ex parte Hattersley*, 1878, L. R., 8 Chan. Div. 601; *Ex parte Hattersley*, 1883, L. R., 23 Chan. Div. 261.

*Donaldson v. Smart's Trustee*, 9 R. 964; *Stair*, i. 14, 4; *Ersk.* iii. 3, 11; *Bell's Prin. sec. 37*, 5th edn.; *Brown on Sale*, sec. 37.



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system of dealing with musical instruments, and was not entitled on mere possession.<sup>1</sup>

LORD PRESIDENT.—In this case Mrs Taylor obtained possession of a harmonium from the pursuers under a contract, the terms of which it is necessary to look at attentively. At the time at which she obtained possession of the harmonium Mrs Taylor made a deposit of 30s., and afterwards she made another payment of 20s., being the first instalment payable under the contract. Immediately after making that payment she disappeared from this country, and her property was sold by public auction. The harmonium was at the sale purchased by the defender. The pursuers now seek to recover the instrument, on the ground that it remained their property while it was in the hands of Mrs Taylor. In support of their contention they maintain that the contract was one of sale, and never was anything else, in consequence of the failure of Mrs Taylor to perform her part of the contract. If she had paid all the instalments she was bound for, the contract, they admit, would then have become one of sale.

The defender, on the other hand, says that the contract is one of hire, and nothing else, and in that, I think, he is right. No doubt the contract is in itself a contract of hiring, the words hire and hirer being constantly used. Notwithstanding that, I am of opinion that in substance and effect the contract is one of sale. The agreement is in these terms:—"In consideration of the sum of £15, 15s. paid by G. Murdoch & Co., Limited (hereinafter called the owners), to the undersigned (hereinafter called the hirer) a harmonium (hereinafter called the goods) on hire, the hirer hereby agrees to pay to the owners the sum of £15, 15s. on delivery of the goods, as deposit, and a further sum of £1 every four weeks thereafter, as hire, until the full amount of £15, 15s. (including the deposit) shall have been paid, when the goods shall be the property of the hirer, and no further payment whatever." Now, I consider that to be an under-lying contract on the part of Mrs Taylor to pay not only the deposit, but a sum of £1 every four weeks, from which she cannot resile, and under which she cannot get back the harmonium and put an end to the contract. She is bound to go on paying the monthly instalments. I do not see how such a contract can be one of hiring, more particularly when we consider that in a very short time the monthly payments amount to the full price. How can such payments, which in a short time exhaust the full price, be called hire? The payments of £1 monthly are said to be hire, but they are not—they are simply instalments towards the price. That is made clear if we look at the relation of the sum of £15, 15s. to the full price, which is £15, 15s. It is absurd to say that £1 per month is proper hire for an article worth £15, 15s. If, then, those payments are not hire, the only other purpose for which they can be paid is that under the contract the sale price is to be paid by monthly instalments, till, including the deposit, £15, 15s. in all has been paid. There is much to support that view, the "conditions of the hiring," but I think the obligation entered into by Mrs Taylor is enough to shew that the contract is one of sale.

This case is much stronger than that of *Cropper v. Donaldson* (7 M. & W. 100). I am not disposed to throw the slightest doubt on that decision, but

<sup>1</sup> *Robertsons v. M'Intyre*, March 17, 1882, 9 R. 772; Bell's Prin., s. 100; *Ex parte Watkins*, 1873, L. R., 8 Chanc. App. 520; *Brown on Sale*, s. 100, *et seq.*

this is a stronger case than that. I might have had more doubt in *Cropper's* No. 75. case, but here I have none at all.

Another question is, however, raised by the pursuers, namely, that if this be a case of sale, it is one of a sale with a suspensive condition, and that if that is so, the condition not having been fulfilled, the property did not pass to Mrs Taylor. That is a more serious question, but here, again, the contract speaks in unmistakable language, for the first and second conditions are in the following terms:—"1. The hirer undertakes, during the continuance of the hiring, to keep the goods in the hirer's own custody, and in good order, and to allow the owners, or their servants, to inspect the same at any time. 2. The hirer agrees that, until the said full sum be paid, the hirer shall have no property in the goods otherwise than as a hirer thereof only, and that if the hirer do not duly observe this agreement, the owners may put an end to the hiring, and retake possession of the goods; and in case they do so, that all payments that may have been made shall be in respect of the use and tear and wear of the goods only, and not for the purchase of the same."

It is there declared and provided that until the full price is paid Mrs Taylor shall have no property in the goods "otherwise than as a hirer." Those last words are of little consequence, because the main thing is that the property shall not pass till the full price is paid. Now, that, I think, is a suspensive condition in the proper sense of the term. It is very necessary to have a clear notion what a suspensive condition is, and what is its effect in a case of this kind. Lord Stair (i. 14, 2) says,—“Sale being perfected, and the thing delivered, the property thereof becomes the buyer's, if it was the seller's, and there is no dependence of it till the price be paid or secured, as was in the civil law, neither hypothecation of it for the price.” That is the ordinary case of sale and delivery. But in the fourth section of the same title he expresses himself thus,—“As to the other pactions adjected to sale, sometimes they are so conceived and meant that thereby the bargain is truly conventional and pendent, and so is not a perfect bargain till the condition be existent: neither doth the property of the thing sold pass thereby, though possession follow, till it be performed; as if the bargain be conditional only upon payment of the price at such a time, till payment the property passeth not to the buyer.” Lord Elchies commenting on that title, at p. 80 of his Commentaries on Stair, states this further proposition, which is a corollary from the text,—“If in bargains there be conditions or clauses suspensive of the bargain, till the existence or non-existence of which the property is not transmitted, no doubt such clauses will likewise affect singular successors, for the buyer could not transmit the property which he had not.” Mr Mungo Brown, a very high authority on this branch of the law, in his scientific treatise on sale sums up p. 43) the law on this point thus,—“When a sale is made under a suspensive condition the contract is not complete until the accomplishment of the condition. It is not to be supposed from this, however, that the agreement of parties produces no effect whatever in the intermediate period, or that no right whatever arises to either party from the imperfect contract. On the contrary, while the condition is yet pendent, neither party is at liberty to resile any more than in the case of an unconditional bargain, and if the condition happens to be accomplished the accomplishment of it has a retrospective effect to the date of the contract, so that if either party have died in the interim his rights under the contract will pass to his heir.” That is a very clear exposition of the principle of

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suspensive conditions, and has received effect in a great variety of cases. It must be observed that in most mercantile contracts where such conditions are found, they are overlaid and obscured by specialties, and so it is difficult in cases so clear an exposition of the law as we do in these institutions.

Here, however, the condition appears clearly, nothing is left to imagination. The contract declares in so many words that the property shall not pass till the full price is paid. Therefore while thinking that the contract is one of hire, and negating the idea of hire, I am still for deciding for the purchaser on the ground that Mrs Taylor never had any right of property in the harmonium, and therefore could not sell it or give a good title to it. The result will be the same effect to the Sheriff's decision, though I go on the separate ground which is now explained.

LORD MURE.—I agree with your Lordship in thinking that the judgment which you have now explained is safer than that on which the majority has gone. My main difficulty in the case was in the frequent use of the word "hire" in the contract, but I agree that when we come to read the terms of the agreement it is difficult to construe them consistently with the idea of hire. I think the contract is one of sale with a suspensive condition.

LORD SHAND.—I entirely concur in all that your Lordship has said in regard to the grounds of judgment in this case. The real question to be decided is whether Mrs Taylor had a right to sell the harmonium, or in other words whether she was the proprietor of it. If the instrument was her property she could give a good title to it to a purchaser. If not, the appeal must be allowed to restore it. The fact that the harmonium was sold at a public auction makes no difference in the case; the title of a purchaser is exactly the same whether he buys at a public or a private sale. The title of the purchaser can be no better than that of the seller, and in this case I agree that Mrs Taylor had no title to the harmonium, and consequently could give no title to the purchaser.

The undertaking in the contract is that the "hirer," as Mrs Taylor is called, is to go on paying £1 per month till the full sum of £15, 10s, is paid, and that then the harmonium is to become her property. That is the substance of the opinion, a contract of sale, whatever it may be called in the contract. We had had a contract to this effect, that there were to be monthly payments for "the hire" of the harmonium as here, but that the hirer was to be allowed to stop paying the hire when he liked, and to return the instrument, if he so wished. I had difficulty in holding the contract to be one of sale, for in such a case there would be no obligation to pay the full sum, which being paid is clearly a condition. Here, however, there is no suggestion of any such option. The contract compels the purchaser to pay up all the instalments as they fall due. On this ground I think the contract was one of sale,—not a contract of hire with a mere option to purchase.

I am, however, further of opinion that there is a suspensive condition attached to the sale—viz., that the property should not pass till the full price is paid—that is to say, that until the condition of payment was fulfilled the property was not completed so as to give the property to the buyer. That is as clear as a suspensive condition as could possibly be. Till it was fulfilled the harmonium was held by the purchaser only as deposited with her with a right to sell it, as it was not fulfilled I am of opinion that the property never passed.

Taylor. I therefore agree in thinking that as the defender here can have no right in the harmonium higher than that of Mrs Taylor, therefore decree for delivery must be pronounced.

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LORD ADAM.—Whether we regard this as a contract of sale or of hiring the result would, I think, be the same. The property did not pass to Mrs Taylor in either case. I am, however, of opinion that the contract is one of sale under the suspensive condition that the harmonium should not become the property of Mrs Taylor till the full price was paid. It appears to me that that is a clear suspensive condition, and unless we are to disregard all the law as regards such conditions laid down by the writers your Lordship has quoted, we must hold that in such sales as this the contract of sale is not completed till the last instalment is paid. Here the last instalment was never paid, and therefore I think the property of the harmonium was never in Mrs Taylor.

THE COURT pronounced this interlocutor:—"Adhere to the interlocutor appealed against, refuse the appeal."

WILLIAM OFFICER, S.S.C.—L. M'INTOSH, S.S.C.—Agents.

TRUSTEES OF SIR WILLIAM ALEXANDER MAXWELL, Pursuers and  
Real Raisers.

TRUSTEES OF CAPTAIN WALTER HENRY GILL, Claimants (Reclaimers).—  
*D.-F. Mackintosh—J. C. Lorimer.*

DAVID PATRICK AND HILL, THOMSON, & COMPANY, Claimants  
(Respondents).—*Asher—C. S. Dickson.*

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Others.

*Process—Multiplepinding—Direct claim—Riding claim—Title to sue—Creditor suing his debtor's debtor.*—A creditor has no title to claim in a multiplepinding funds to which his debtor has right except by way of a riding claim upon a claim lodged by his debtor.

A, by his settlement, left a share of the residue of his estate to B. B, in a deed of indenture, assigned his interest to trustees for behoof of himself and his daughter, and the assignation was intimated to A's trustees. B thereafter died, and A's trustees raised an action of multiplepinding for distribution of B's share of the residue. The trustees under the indenture claimed the whole fund. No claim was lodged by B's executor, but a claim was lodged by a creditor of B, who maintained that the indenture had no effect, in so far as regarded B's interest under it, against his creditors, and claimed to be preferred *primo loco* on the fund, and, alternatively, to be ranked to the extent of his debt as a rider upon the claim by B's trustees.

Held that B's creditor had no title to claim sums due to B either by A's trustees or by B's trustees, and claim *repelled* in both branches.

SIR WILLIAM ALEXANDER MAXWELL, Bart., of Calderwood Castle, 1st Division, Lanarkshire, died on 4th April 1865 leaving a trust-disposition and settlement, in which he directed his trustees in certain events, which happened, to pay the remainder of his whole estate, heritable and moveable, when realised, to his two stepsons, Walter Henry Gill and Dundas Reinhardt Gill, equally between them.

Lord M'Laren.  
M.

On 16th April 1877 a deed of indenture was executed between Walter Henry Gill, on the one part, and Frederick Augustus Gore, Esq., and others (thereinafter called trustees), of the other part. The deed proceeded on the narrative that Mr Gill was desirous of settling irrevocably the moiety of the trust-estate bequeathed to him by Sir W. A. Maxwell



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in his trust-settlement in the manner therein provided, and that frustrating such desire, and in consideration of his natural love for Mrs Elizabeth Saunder or Gill, and his only daughter, Mrs C Adeline Maxwell Gill or Lambart or Mahon, he and his trustees that they were to invest the moiety in their own names, and pay the fourth part of the dividends and income arising therefrom to C Adeline Maxwell Lambart, the only child of Walter Henry Gill during her life, for her sole and separate use; and the remaining three-fourths to Walter Henry Gill, and his assigns during his life, and after his death to the survivor of Walter Henry Gill and Mrs Elizabeth Saunder Gill, the trustees were directed to pay the dividends, and interest of the whole principal trust funds to Catherine Maxwell Lambart (now Mahon) as therein provided. This indenture was intimated to Sir William A. Maxwell's trustees on May 1877.

Walter Henry Gill died on 22d October 1887 survived by his wife by his first marriage, Mrs Mahon, and by his second wife, Mrs A. whom he appointed his executrix.

This action of multiplepointing was raised by the trustees of Sir William Alexander Maxwell, as real raisers, for distribution of his share of residue bequeathed by Sir William to Walter Henry Gill. The action was directed against Walter Henry Gill's trustees, and his wife, his executrix, his daughter, and certain other persons.

The object of the action was thus stated by the pursuers in their plea:—"The pursuers have been advised that doubts exist as to the validity of the said indenture of 16th April 1877 to convey the estate therein mentioned, and also as to the right of the defender the said C Adeline Maxwell Gill or Mahon to nominate new trustees without the consent and concurrence of the persons to whom she has claimed an interest in the funds under the said indenture by way of mortgage assignment. In order to determine who has right to the half of the residue . . . the present action has become necessary."

In cond. 16 they stated that they had paid to Dundas Reinhardt his share of residue, but as Walter Henry Gill's trustees, under the indenture of 16th April 1877, were not in a position to grant a discharge for any payments to account of his share of the residue, they had paid bank sums amounting to £9475, 16s. 5d., which they were to hand over to the persons entitled thereto on receiving a proper discharge. In cond. 17 they stated that the fund *in medio* consisted of the residue and also of the balance of the one-half of the free residue of the estate under certain deductions. They further stated that since 4th May 1887 they had realised portions of the estate amounting to the sum of £26,683, 11s.

A claim was lodged by F. A. Gore and the other trustees under the indenture of Walter Henry Gill of 1877. They claimed to be ranked as preferred to the whole fund *in medio* as conveyed to them by the said indenture.

On 22d May 1888 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"In respect no other claim has been lodged and no other has been stated, for aught yet seen, and on the motion of the claimants F. A. Gore and others (Walter Henry Gill's trustees), ranks and prefers their claim to the fund *in medio* in terms of their claim, and authorises and ordains the said pursuers and real raisers to indorse and deliver up to the said claimants by their agents the receipts for the sums which they had lodged for the payment of Walter Henry Gill's share of the estate."

On 5th June 1888 claims were lodged for Hill, Thomson, & Company, No. 76.  
wine merchants, Edinburgh, and David Patrick, solicitor, Hamilton.

Of that date the Lord Ordinary of consent recalled the interlocutor of 22d May, and allowed the additional claims to be received.

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Patrick in his claim stated that he was a creditor of Walter Henry Gill to the extent of £30, 2s. 4d., which he had advanced to Mr Gill on receiving his cheque, which was dishonoured. (Cond. 3) "The said Walter Henry Gill granted the indenture narrated in article 8 of the condescendence appended to the summons without any consideration, and the same was legally in fraud of his creditors, and the claimant is entitled to be ranked and preferred to the funds and estate thereby bearing to be conveyed as having a riding claim on the claim of the said trustees, or otherwise in preference and *primo loco* to the trustees of said settlement who have been ranked and preferred thereto for aught yet seen." (Cond. 4) "By said indenture the said Walter Henry Gill retained and reserved right to the income arising from the capital sums dealt with and transferred thereby, and the said income is liable in payment of his debts, and *inter alia* the debt due to the claimant amounting to £30, 2s. 4d., with interest thereon at five per cent per annum from 30th November 1877. The fund *in medio* consists of income due to the said Walter Henry Gill to an extent more than sufficient to pay the debt due the claimant."

The claim was in the following terms:—"The claimant claims to be ranked and preferred as a rider upon the interest the said Frederick Augustus Gore and others, as trustees foresaid, have been found to have in the fund *in medio*, but that only to the extent of the said sum due to him as aforesaid, principal, interest, and expenses, and the expenses of the present claim; or otherwise, to be ranked and preferred on the fund *in medio* to the extent foresaid preferably to the said claimants."

He pleaded;—(1) The said Walter Henry Gill having been indebted and resting owing to the claimant the sums claimed, and being entitled to the fund *in medio*, and the claimants Gore and others taking only as representing the said Walter Henry Gill, the claimant is entitled to be ranked and preferred as a rider upon their interest, or otherwise preferably to the said claimants. (2) In any event, the claimant is entitled to be ranked and preferred as a rider upon the fund *in medio* in so far as the same consists of income which accrued during the lifetime of the said Walter Henry Gill, or otherwise preferably as aforesaid.

Hill, Thomson, & Company's claim was as creditors for the sum of £22, 4s. 8d. for goods supplied and cash advanced to Mr Gill, for the greater part of which they held a bill by Mr Gill in their favour.

Walter H. Gill's trustees lodged answers, in which they explained that the indenture was an onerous postnuptial deed providing for his wife and daughter, duly intimated to Sir William Maxwell's trustees, and that Mrs Alice Gill, as sole executrix to her husband, was administering his estate in the Court of Chancery in England.

They further stated that three-fourths of the income of Walter Henry Gill's share of the residue of Sir W. A. Maxwell's estates, accruing prior to 22d October 1887, "will fall to be accounted for and paid by the claimants Walter Henry Gill's trustees to Mrs Alice Gill, as his executrix, to be administered by her. In addition to the two riding claimants, the Norwich Union Insurance Company claims to be a creditor of Walter Henry Gill for a sum of £350, and allege that they hold an assignation from him of his interest in Sir William Alexander Maxwell's trust-estate, which has been intimated to the claimants Walter Henry Gill's trustees. . . . The pursuers and real raisers state that the deposit-receipt of 16th August 1887 for £447, 10s. 3d.

No. 76. represents income. Further realisations are being made. The court submit that they should be authorised to uplift £9000 from deposits, and that the balance should be retained to meet the claims, and that before they are disposed of intimation should be given to Mrs Alice Gill, as executrix foresaid, and to the Norwich Insurance Company."

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Mrs Alice Gill, the executrix, did not lodge a claim.

On 19th June 1888 the Lord Ordinary pronounced this interlocutor: "Finds that the claimants Hill, Thomson, & Company and David are entitled to be ranked and preferred on the fund *in medio* the claimants on the claim of the claimants Frederick Augustus Gore and others (Walter Henry Gill's trustees), in terms of their claims, and prefers them accordingly, and decerns: Finds them entitled to the said fund in terms of their claims: . . . Further ranks and prefers the said claimants Gore and others to the balance of the said fund *in medio* the said fund; and authorises," &c.

Gill's trustees reclaimed, and argued;—The creditors' claim against the Lord Ordinary had sustained here fell to be repelled, regarded as made directly or as riding claims on that of Gill's trustees. (1) The real raisers were debtors either to the trustee under the indenture or to W. H. Gill's executrix. The creditors were not suing their debtor's debtor by direct action, which it was seen to be incompetent. Their real remedy was by arrestment and an order for furthcoming.<sup>1</sup> A general or residuary legatee could not direct against the debtor to the deceased,<sup>2</sup> and a beneficiary under a trust-deed was in the same position as regards a debt due to the trust-estate.<sup>3</sup> Unless these creditors had arrested in the hands of the real raisers, the creditors, not, either during W. H. Gill's life or after his death, have sued the real raisers by direct action, the principle being that the latter were not in a question with their creditor's creditor to try the question of the latter's debt. There was no different rule to be applied in a case of multiplepounding. (2) In order to admit a riding claim there must be a direct claim upon the principal claimant. Here, if W. H. Gill's trustees had claimed, his creditors might have had a riding claim. In the absence of that, however, the riding claims were incompetent.

Argued for the creditors;—(1) It was highly inconvenient that Scottish creditors should have to go to the Court of Chancery to recover their debts when the only opposing parties here were gratuitous trustees of W. H. Gill. His indenture was really a nullity in so far as it was in the behoof of himself, and it could not prejudice his creditors.<sup>4</sup> His creditors therefore had no right to the money at all, and the present claim of the creditors as a preferable one fell to be given effect to. (2) They were entitled to come in as riders on the claim of Gill's trustees. The trustees' competing claims, and it was admitted that the executrix might come in and take away the whole interest in the estate. If she had appeared in the process they could, beyond doubt, have claimed to be ranked as preferred to her claim.<sup>5</sup> There was no reason why they should not be ranked as preferred in her absence, on the claims of Mr Gill's trustees, who would have to

<sup>1</sup> Royal Bank of Scotland v. Stevenson, &c., Dec. 4, 1849, 12 D. 100, Lord Fullerton, 252, 22 Scot. Jur. 51.

<sup>2</sup> Hinton, &c. v. Connell's Trustees, July 6, 1883, 10 R. 1110, per Lord Fullerton, 1115.

<sup>3</sup> Rae v. Meek, July 20, 1888, 15 R. 1033, per Lord Shand, 1050.

<sup>4</sup> Miller v. Learmonth, Nov. 21, 1871, 10 Macph. 107, May 3, 1872, (H. L.) 662, 42 Scot. Jur. 418, Paters. Ap. 1777.

<sup>5</sup> Mackay on Court of Session Practice, ii. 114.

to her for the income due to her husband at the time of his death. The case of the *Royal Bank*<sup>1</sup> was inapplicable, as here the claims were duly constituted. No. 76.

At advising,—

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LORD PRESIDENT.—The raisers of this multiplepointing are the testamentary trustees of the late Sir William Maxwell of Calderwood Castle, under a deed of settlement dated 3d November 1862, and certain codicils. They sold the estate for various purposes, but according to the events which have happened they are now holding, or at least recently did hold, the entire residue of the estate for the benefit of two gentlemen of the name of Gill—Walter Henry Gill and Dundas Reinhardt Gill, who were the stepsons of the testator, and who, failing other purposes of the trust, are entitled to divide the residue of the estate between them. There is no question about the right of Mr Dundas Reinhardt Gill to get his one-half of the share of that residue, and the fund *in medio* consists of the half which is destined by the settlement of Walter Henry Gill. The condescendence of the fund *in medio* sets out these different facts, and also a certain deed of indenture, dated the 16th of April 1877, by which apparently Mr Walter Gill settled his share of Sir William Maxwell's estate by creating a trust in the person of Mr Frederick Augustus Gore and others, who are the reclaimers. The raisers say in the 15th article of the condescendence of the fund *in medio* that doubts exist as to the sufficiency of the indenture of April 1877 to convey the estate therein mentioned, and also as to the right of the defender Mrs Catherine Gill to nominate new trustees under that deed, and in consequence of these doubts they bring this multiplepointing calling the trustees under the indenture, and also the executrix of Mr Walter Gill, and some other parties, but the two parties who are of the most importance as defenders of the action are the executrix of Mr Walter Gill and the trustees under the indenture of 1877. They further set out that they have made payments to Mr Dundas Reinhardt Gill of his share of the residue of the estate, but as Mr Walter Gill and the trustees under the indenture of 1877 were not in condition to grant a discharge, they have paid corresponding sums into bank on their account, amounting in all to £9475. And then they go on to state that they have made further recoveries of the estate amounting to very large sums. In short, the succession is a very lucrative one, and there are ample funds apparently to meet every claim that can be brought against it.

In these circumstances, the only party who appeared as a claimant in the multiplepointing was Mr Frederick Gore, and the other trustees under the indenture of 1877, and there being no other claimant the Lord Ordinary pronounced an interlocutor on the 22d of May 1888, and "in respect no other claim has been lodged, and no objection stated, for aught yet seen," he ranked and preferred Frederick Augustus Gore and the other trustees of Mr Walter Gill on the fund *in medio* in terms of their claim, and authorised the pursuers to endorse and deliver up to them the receipts for the sums which had been lodged in bank to account of Mr Walter Gill's share of the estate. After that there appeared in the process two other claimants, viz., Mr Patrick, and Messrs Hill, Thomson, & Company. Now, these persons are creditors or alleged creditors of the deceased Walter Gill, and they claim alternatively to be ranked and preferred as a rider upon the interest of Frederick Augustus Gore

<sup>1</sup> *Royal Bank v. Stevenson*, *supra*, 12 D. 250.



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and the other trustees under the indenture of 1877, "or otherwise, to be and preferred on the fund *in medio* to the extent foresaid preferably to claimants"—that is, preferably to Gore and others, the trustees under the indenture. Now, upon the appearance of these claimants the Lord Ordinary consent recalls the decree of 22d May last. That appears to me to be a mistake in the course of this proceeding. In so far as regards the decree against the fund *in medio* as made by these parties preferably to Gore and others, there were ample funds I think to meet these claims without the authority which had been granted by the previous interlocutor to discharge the receipts for the £9400 that was in bank. There is one bond for £19,000 which has been realised since that date, and therefore in the funds to meet the direct claim of these now appearing claimants are complete there was no need to recall that part of it. And in so far as regards the claim which they state alternatively, it is quite a mistake to have recalled the ranking of Gore and others as trustees, because unless they were ranked against the fund *in medio* there could be nothing taken through them by a riding decree. Therefore it appears to me that the interlocutor of the 22d of May 1889 should have stood.

But that brings us to a consideration of what these claimants represent in the way of interests in this multiplepointing. If they claim directly against the fund *in medio*—that is to say, against the fund in the hands of the trustees, the question naturally arises—What have they got to do with the estate or funds of the late Sir William Maxwell? and the only answer they can make to that is to say that Maxwell's trustees are debtors to them. Now, that is by no means clear even if it were relevant. Maxwell's trustees are debtors to somebody on behalf of Mr Walter Gill, but the question is to be whether the trustees under the indenture of 1877 are not preferred to everybody. They are in the position, as they represent, of taking a right by an assignation which has been intimated to the holders of the fund, and certainly a creditor of Walter Gill with an unconstituted claim could not compete with an intimated assignation. That is altogether out of the question; indeed, they had brought an action against Walter Gill or his executor upon the dependence of that action had attached the fund *in medio* by judgment, I could quite understand their coming into competition with an intimated assignation. But they have done nothing of the kind, and, having done in any way to attach the fund *in medio*, their direct claim against the fund cannot possibly be entertained. And accordingly the Lord Ordinary has not entertained that claim. But what he has done is this—He has granted their riding claim, and upon this footing apparently that they are entitled to their claim as against Gore and others, trustees under the indenture of 1877, it appears to me that the very same objection arises there as in the case of the claim directly against the fund *in medio*, because neither of these parties, the creditors of the late Walter Gill had any direct right against Gore and others, trustees under the indenture. The indenture is not granted for their benefit. It is granted for other purposes altogether. If, indeed, they could show that the indenture is bad, which they have not attempted to do, or if they could shew that in any way whatever Mr Gill was really a party interested in the fund that fund which they claim, they would be in a different position, and even then they could not possibly have a direct right against the fund in the hands of the trustees under the indenture, because the parties who are

fited by that indenture have a direct claim against that fund, whereas the trustees under the indenture are in relation to these riding claimants nothing but debtors of their debtor. Therefore whether as regards the fund *in medio* or the fund belonging to the trustees under the indenture of 1877, there is no direct claim whatever in the person of these creditors.

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It must be kept in view that Mr Walter Gill had apparently no connection with Scotland except his interest in Sir William Maxwell's estate under his settlement. He lived in England, and the debts apparently incurred to those riding claimants were debts incurred in England. Now, the only course which a party can follow in these circumstances with the view to do diligence so as to attach a fund belonging to his debtor is to raise action against his debtor in the first place, or, Mr Gill being dead, to raise action against his executrix, and that is just the course which these creditors have not adopted. That is the only competent course by means of which they could have access either to the fund *in medio* or to the fund to be obtained in this process of multipleponding by the trustees under the indenture of 1877. The Lord Ordinary in the interlocutor under review has found that these claimants are entitled to be ranked and preferred as riding claimants on the claim of the claimants Frederick Augustus Gore and others in terms of their claims. Now, that is a very curious interlocutor to be pronounced in the circumstances, because he has already recalled the ranking and preference in favour of Gore and others, and how the riding claims can be admitted upon a claim that is not yet ranked I do not very well see. But apart from that difficulty in point of form, I am decidedly of opinion that the Lord Ordinary is wrong in ranking these riding claims at all, for the reasons that I have already assigned, that the creditors have not in any way attached the fund upon which they seek to set up these riding claims.

**LORD MURE.**—I agree with your Lordship in thinking that the Lord Ordinary's interlocutor must be recalled, because I do not think the case is in shape for giving effect to a riding claim of the description of Mr Patrick's, or of Hill, Thomson, & Company's. They, as I understand, allege themselves to be creditors of the late Walter Gill, and they claim upon a part of the fund *in medio*, which is said to have belonged to Mr Gill, and which is now payable to his representatives whoever they may be. And they claim here as riders upon the claim of Mr Gore, who claims the fund *in medio* upon the grounds set forth under an indenture by which he takes a particular portion of that fund. Mr Gore, as I understand the matter, is not a debtor of the claimants. Their debtor is Mr Gill's executrix, who has been called in the action, but does not appear. Now, if she had appeared, and had put in a claim to be preferred to that fund as against Gore, and had been preferred, I could then have quite well seen that Mr Patrick and Hill, Thomson, & Company might have claimed as a rider on Mr Gill's executrix upon the share of the fund *in medio* that is said by them to belong to Mr Gill. But she has not claimed, and therefore Gore and others, as trustees under the indenture, have the right to get hold of the money belonging to Mr Gill. I agree with your Lordship that the riding claim in these circumstances upon what is coming into Gore's hands is not a competent proceeding in point of form, and cannot be entertained. The only hesitation I have had in this case about the matter was in consequence of certain statements on the record in answer to the claiming party. A proposal was made on the part of Mr Gore, which it strikes me was in the circumstances a very fair

No. 76. proposal, and by which the matter might possibly have been extricated in this process had that proposal been adopted, for Mr Gore frankly admits that of the £9400 that was claimed a considerable proportion is the sum which he probably will have to hand over to Mrs Gill, the executrix of Walter Gill. But then they say that it represented income which in point of fact belonged to Mr Gill. But they go on to say,—“The claimants submit that they should be authorised to uplift £9000 from the said deposits, that is, from the £9400, and that the balance should be retained to meet the riding claims, and that before they are disposed of intimation should be made to Mrs Alice Gill as executrix foresaid, and to the Norwich Union Insurance Company.” Now, that stands as a proposal made by Gore, and I think in the circumstances it was a very fair proposal. I called attention to it during the discussion, and I never heard any explanation as to why that proposal had not been adopted, because if Mrs Gill had got notice, and had come forward and claimed, this riding claim would have been in shape, but at present it appears to me to be altogether out of shape. It is very likely that there was some good reason for the course adopted, but as matters now stand I agree that this is an incompetent mode of working out the matter, and that these riding claims should be refused.

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LORD SHAND.—I have come to the same conclusion as your Lordships. It appears that the trust which was created by Mr Gill was by virtue of a deed executed, I think, in April 1877, and the deed was intimated to the trustees, the holders of the fund, on the 3d of May 1877. At that time neither Mr Patrick's debt nor Hill, Thomson, & Company's debt was in existence. They became creditors for the first time in November 1877, after the fund in question in the hands of Maxwell's trustees had been assigned to Mr Gill's trustees for the purposes of the deed of 1877. In that state of matters the question that arises is, in the first place, is there a good riding claim here on the claim of Gill's trustees to the fund *in medio*? Undoubtedly Gill's trustees *prima facie* are the persons entitled to draw the money from Maxwell's trustees. They have an assignation intimated, and they are prepared to give a discharge for any money they get. As I understand, the first view of this case presented for the claimants Hill, Thomson, & Company and Mr Patrick is this, that they are entitled to come in as riders on the claim of Gill's trustees. I agree with your Lordship in thinking that that cannot be allowed in the state in which matters are. Mr Patrick and Hill, Thomson, & Company claim to be creditors of Mr Gill; but he is dead, and there is no decree of constitution here, there has been no proceeding adopted by way of action against Gill's executrix to constitute the claim and to obtain a warrant of arrestment, and no arrestment has been used either in the hands of Gill's trustees or in the hands of the raisers, Maxwell's trustees. I doubt very much whether an arrestment would have attached anything in Maxwell's trustees' hands, but assuming it to be so, there is no *nexus* of that kind here, and therefore I think Gill's trustees are in a position to say, these claimants who propose to have a riding claim on our claim have no title whatever to take up that position. There is neither constitution nor arrestment nor *nexus* of any kind attaching this fund. It is a personal claim, bearing to be a claim against Mr Gill, who had a claim against his own trustees, who again had a claim against the raisers. In these circumstances it appears to me that in the absence of any *nexus* there is no room for the riding claim on Gill's trustee so as to attach money in the hands of the raisers. On the other question,

whether there is any direct claim, I concur in what your Lordship has said. No. 76.  
 What the Lord Ordinary has done is to sustain the riding claim. If there had  
 been an arrestment there might have been a direct claim, but, looking to the Feb. 6, 1889.  
 circumstances in which parties here are, there having been no proceeding against Gill's Trustees  
 the executrix and no arrestment of any kind, I do not see that there is a case v. Patrick and Others.  
 for a direct claim against Maxwell's trustees interpellating them from paying to  
 the holders of the assignation so much of the funds as would meet the claims of  
 Patrick and Hill, Thomson, & Company. So that in either view of the case I  
 agree with your Lordship in thinking that these claims must be disallowed.

**LORD ADAM.**—The parties we have here are Maxwell's trustees, who are raisers  
 of the multiplepounding, and are or were the holders of the fund *in medio*. Then  
 we have Captain Gill's trustees under a certain indenture, who are claimants,  
 and we have also here alleged creditors of Mr Gill, Mr Patrick and Hill, Thom-  
 son, & Company. Now, Mr Patrick and Hill, Thomson, & Company claim  
 alternatively. They claim either as a riding claim upon Gill's trustees' claim,  
 or, if that be not successful, they claim directly against the fund *in medio* as  
 against Maxwell's trustees. That is the position of matters. Now, it is to be  
 observed that these two creditors—Mr Patrick and Hill, Thomson, & Company  
 —do not allege that they are creditors of Maxwell's trustees. If that be so, it  
 appears to me perfectly clear that they could not have sued Maxwell's trustees  
 directly for the sums alleged to be due to them by Mr Gill, because that would  
 be, as your Lordship has pointed out, simply a creditor suing his debtor's debtor,  
 and that we have decided very recently, upon well-known principles, is quite  
 incompetent. So far as the claim is made directly against Maxwell's trustees,  
 I hold that any claim directed by these two creditors against Maxwell's trustees  
 is quite out of the question. But in my opinion, the position is exactly the  
 same as regards Gill's trustees. They do not allege that they are creditors of  
 Gill's trustees, and they do not allege that they have any claim under Gill's trust.  
 What they claim, as I said before, is that they have a claim against the late Mr  
 Gill. That again is simply a claim by a creditor against his debtor's debtor or  
 alleged debtor. It is neither more nor less than that, and I hold that such a  
 claim as that is quite out of the question. It humbly appears to me that that  
 being so, this claim of these creditors must on either branch of it be repelled, and  
 I think that the whole case lies there, and that it is a clear and a simple case.  
 It is quite clear to my mind that the claim of these parties is upon Gill's repre-  
 sentative, and against nobody else directly, and if they desire to get payment of  
 their money, that is their course to follow.

**THE COURT** pronounced this interlocutor:—"Recall the interlocutor  
 reclaimed against: Repel the claims of the claimants Hill, Thom-  
 son, & Company and David Patrick, and rank and prefer the claim-  
 ants the said Frederick Augustus Gore and others as trustees fore-  
 said in terms of their claim, and decern: Grant warrant to, authorise,  
 and ordain the pursuers and real raisers to endorse . . . Find  
 the claimants the said Hill, Thomson, & Company and David  
 Patrick liable to the said Frederick Augustus Gore and others, as  
 trustees foresaid, in expenses."



No. 77.

MRS HELEN DOLLAR OR COUPER AND OTHERS (Archibald Couper's Trustees), Pursuers (Appellants).—*Balfour—Murray.*Feb. 6, 1889.  
Couper'sTrustees v.  
National Bank  
of Scotland,  
Limited.THE NATIONAL BANK OF SCOTLAND, LIMITED, Defenders (Respondents).—*Low.*

*Bank—Current account—Initialing of entries by bank-agent—Fraud—Bank-agent also agent for customer of bank—Liability for loss.—Entries in a customer's bank pass-book of sums paid into the bank, duly initialed by a bank official, are prima facie evidence against the bank that the money has been paid in.*

The law-agent and factor of a trust was also agent of a branch bank with which the trustees had a current account, and was authorised by them to operate on the account. After some years he absconded. It was then found that four entries in the trustees' pass-book of sums paid in had no corresponding entries in the bank ledger. All the entries in the pass-book were initialed by the agent himself, and not by the bank teller, as was the usual course with such entries, and two of the four entries had also the forged initials of the bank cheque clerk. The other two, like the rest of the entries, had only the initials of the agent, who kept the pass-book in his own custody. The agent had also annually signed docquets in the bank ledger as "factor," certifying the correctness of the balance as appearing in the bank ledger. In an action by the trustees against the bank for payment of the sums as entered in their pass-book, held that the money had never been paid into the bank, and consequently that the bank were not liable.

2D DIVISION.  
Sheriff of  
Lanarkshire.  
I.

ON 31st July 1876 the trustees under the trust-disposition of Archibald Couper, manufacturer in Kirkintilloch, appointed Richard Reid, writer there, to be factor and law-agent to the trust, and he continued so to be until he absconded in October 1887. During the same period he was also agent for the branch of the National Bank of Scotland, Limited, at Kirkintilloch, with which the trustees had a current account, Reid being authorised by them to operate as their factor on the account.

After Reid's disappearance the trustees claimed credit for a sum of £82, 2s. 2d., as the balance in their favour on the account with the bank. The bank disputed this, maintaining that there was a debit balance against the trustees of £98, 9s. 5d. The dispute turned mainly\* upon four sums which were entered as paid in to the credit of the trustees in their pass-book, but which did not appear in the bank ledger. The two earlier of these entries, viz., £86, 8s. 3d. on 1st December 1879, and £9, 15s. 0d. on 16th June 1882, were initialed "R. R.," being the genuine initials of Reid; the two later entries, being £35, 15s. 4d. on 1st November 1885, and £38, 13s. 4d. on 28th July 1886, besides Reid's genuine initials, bore the forged initials of the cheque clerk.

Reid also, after each annual balance, signed a docquet at the foot of the account in the bank ledger in the following terms, the balance credited or debited being that brought out by the ledger, not by the pass-book:—"The above account examined and found correct, the vouchers delivered up, and the balance, carried to credit (or 'debit') in a new account, amounts to  
.—Richard Reid, factor."

In July 1888 the trustees brought an action in the Sheriff Court of Lanarkshire against the bank for payment of the above-mentioned alleged balance of £82, 2s. 2d.

The pursuers averred;—(Cond. 6) "Up to the 1st of June 1887 the sums paid into the bank are regularly and formally entered in the pass-

\* There were certain other minor matters in dispute not necessary to be referred to.

books, and are initialed by the bank-agent. Such entries are the recognised acknowledgments by bankers for moneys paid into bank." No. 77.

The defenders answered;—(Ans. 6) "The pass-books are referred to for their terms. *Quoad ultra* denied. Explained that the pass-books do not set forth the true state of the account; that it is not the custom for such entries to be initialed by the bank-agent. It is unusual for him to initial such entries, which are usually initialed by the teller or the ledger clerk, and sometimes by both." Feb. 6, 1889.  
Couper's  
Trustees v.  
National Bank  
of Scotland,  
Limited.

The defenders in their statement of facts further averred;—(Stat. 4) As the pursuers' factor, Reid "had possession of the pursuers' pass-book, and operated on the said cash account from time to time. Further, as factor for the pursuers, he also from time to time docquetted the said account in the defenders' Kirkintilloch ledgers. Counter statement denied."

The pursuers answered;—(Ans. 4) " . . . Explained that it was from the defenders the pursuers obtained possession of the pass-books, and that any docquets made in the bank's ledger were not made by Richard Reid as factor for the pursuers; that they were false and fraudulent, and at variance with the pass-books and the facts, and were made by him solely to conceal the manipulations on the account and his defalcations as bank-agent."

The pursuers pleaded;—(2) The pursuers having paid into the defenders' branch at Kirkintilloch the sums entered in their pass-books, and said payments having been duly acknowledged by the initials of their agent, the defenders are liable for the balance due upon the entries in said pass-books, and the pursuers are entitled to decree as craved, with expenses. (4) The docquets founded on by the defenders not having been made by the said Richard Reid in his capacity as factor, but as part of a series of false and fraudulent manipulations by him as bank-agent, to deceive the defenders, the pursuers are not bound thereby. (5) The entries in the pass-books being the usual acknowledgments given by the banks for moneys paid to their officials, the defenders are bound thereby.

The defenders pleaded;—(2) Any loss the pursuers may have sustained having been caused by the malversations of the said Richard Reid, in his character of factor to the pursuers, the defenders should be assoilzied. (4) In any view, the said Richard Reid having docquetted the pursuers' bank account on 1st November 1886, they are bound by the terms of that docquet.

A proof was allowed. The evidence was mainly directed to the practice of banks in initialing the paid-in entries in their customers' pass-books. It appeared that it was unusual, though not irregular, for the agent to initial the entries, that being properly the duty of the teller and, in branches of any size, of the cheque clerk also. In the pass-book in question Reid had invariably initialed the entries himself, and in the few instances where other initials appeared along with his these were forgeries. He had hardly ever initialed the pass-books of other customers. It did not appear that down to his disappearance the pass-book had ever been out of his own personal custody—it had neither been in the possession of the trustees personally nor of any of the bank officials.

On 30th October 1888 the Sheriff-substitute (Lees) pronounced this interlocutor:—"Finds that the pursuers, as trustees libelled on, appointed Richard Reid, agent of the branch of the defenders' bank at Kirkintilloch, to be their factor, and granted to him a mandate to draw the dividends effieing on the trust funds, and authorised him to operate on the account in their name, of the trust funds with the said branch of the defenders' bank: Finds that the said Richard Reid, in his capacity as factor, received from

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time to time monies on behalf of the pursuers to the amount of about the sums and at about the times specified in the bank pass-books, Nos. 8/1 and 8/2 of process: Finds that the said Richard Reid adhibited his initials to the entries of sums bearing to be paid into the defenders' bank, as per said pass-books: Finds that said entries were in the main false and fraudulent, and did not correctly represent the monies paid by the said Richard Reid to the bank, or received by him on its account: Finds that the bank did not receive the sums claimed by the pursuers, which go to make the balance claimed by them: Finds in law (1) that in the circumstances above set forth, the initialing of the bank pass-books by the said Richard Reid was not habile to constitute a claim in the pursuers' favour, in terms of the pass-books; and (2) that the sums claimed by the pursuers not having been paid to the defenders, or to anyone on their behalf, and the defenders not having received the same, they are not liable to make payment to the pursuers of the sums claimed: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable to them in expenses," &c.

The pursuers appealed, and argued;—The money here must be held to have been duly received by the bank. It was entered in the pass-book, and the entries were duly initialed by the agent, who acted as teller, and so acting could undoubtedly bind the bank. It was said that Reid had embezzled the money in his capacity as factor to the trustees and not as agent for the bank. But that argument had been rejected where the facts were very similar to the present.<sup>1</sup> The docquet was of no avail to the defenders, for it was outwith Reid's mandate as factor gratuitously to discharge the bank of debt which appeared *ex facie* of the pass-book.<sup>2</sup>

The defenders were not called on.

LORD YOUNG.—This case is of some interest, and it is a satisfaction to us that we have had the argument which was so fully and ably stated by Mr Balfour. I indicated in the course of the debate the question upon which, I think, our decision must turn. That question is, whether as a matter of fact the bank received the money which the pursuers seek to have paid to them. The entries in the pass-book are no doubt *prima facie* evidence that the bank did so receive the money, but they are not conclusive evidence, and we must determine upon consideration of the whole facts of the case whether the bank did really receive it. I have no doubt that the entries in the pass-book are *prima facie* evidence against the bank, even as regards those entries to which only the initials of the agent are attached. I think it would be distressing, and that the public would be alarmed if it were held to be the law that when a customer paid money to the agent of a bank personally, and received an acknowledgment from him by his initialing the entry in the pass-book, that that was not *prima facie* evidence against the bank. I think the usual custom is that there should be two signatures to the entry—first, the initials of the teller who received the money, and then the initials of the cheque clerk. That is done because the bank desires to have this check upon its own officials—it is a matter within the bank itself. If the teller alone, or the agent alone, acknowledges the receipt of the money, he does so by affixing his initials to the entry. Such acknowledgments constitute *prima facie* evidence against the bank, and if a customer of the bank should pay money into the hands of the bank-agent as bank-agent, and he instead of

<sup>1</sup> *Craw v. Commercial Bank*, Dec. 9, 1840, 3 D. 193, 13 Scot. Jur. 76; *Rhind v. Commercial Bank*, Feb. 24, 1857, 19 D. 519, Feb. 10, 1860, 22 D. (H. L.) 2.

<sup>2</sup> *Fell v. Rattray*, Jan. 28, 1869, 41 Scot. Jur. 236.

paying it into the bank puts it into his own pocket, I think it not doubtful that he is a thief from the bank, and that the bank is responsible for the money so paid in. No. 77.

In this case Mr Reid was agent and factor for these trustees, and he received the trust funds and absconded, carrying off a portion of these funds. With respect to the items there seemed to be a certain confusion, but the parties have now reduced the sum to about £80. The question is whether Reid embezzled this money as factor to the trustees, or as agent for the bank? He filled both capacities, but he could not embezzle in both capacities; the money could not be embezzled twice; he must have embezzled it in one capacity or the other. If he embezzled it as a factor for the trustees, then the money was never paid into the bank, but the suggestion of the pursuers is that he passed it from himself as factor to himself as agent for the bank, and then embezzled it, so that the money was in the bank's hands, and they are now liable to repay it. Now, looking at it as a matter of fact, I think that that is not a suggestion which has any likelihood to recommend it. I think the money had not been paid into the bank before it was embezzled, and therefore it never came into Reid's hands, or anybody else's hands, as representing the bank. I think that is the sound conclusion with reference to the first and second entries here in question. And I think the facts as they were told us as regards the two later entries, which have two sets of initials to them, point in the same direction, for while initialing the items himself he forged the initials of another official of the bank. If the sums of money had come into his hands as bank-agent there would have been no necessity for his forging the name of the other official. When he made up his pass-book no one can tell, for he kept it in his own possession, and probably no eyes but his own ever saw it, but I think the conclusion to which the forgery points is that he never paid the money into the bank. The docquets in the bank ledger also are evidence that the money was never paid into the bank. I therefore agree with the finding of the Sheriff-substitute, and hold it proved as matter of fact that the bank never received the sums claimed by the pursuers. That being so, the *prima facie* evidence of the pass-book has been displaced by satisfactory evidence that the money was not paid in, and I would suggest to your Lordships that we should dismiss the appeal with expenses.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"Find in fact that on 1st November 1886 the balance due by the defenders on the cash account with Richard Reid, as agent and factor for the pursuers, was £1, 17s., and that on 1st November 1887 there was a balance due to the defenders on said account, and that no sum is now due by the defenders to the pursuers: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff-substitute appealed against: Find the defender entitled to expenses," &c.

DONALD MACKENZIE, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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No. 78. JOHN F. M'LAREN (Nicol's Trustee), Appellant.—*C. J. Guthrie—Craigie.*  
F. C. HILL, Respondent.—*Strachan—Patten.*

Feb. 8, 1889.  
Nicol's Trustee v. Hill.

*Bankruptcy—Catholic and secondary creditors—First and second bondholders—Poinding of the ground.*—The holder of a first bond over heritable subjects, who had by poinding the ground obtained a preference over his debtor's moveables to the extent of £122 (of interest), after obtaining payment of his bond by realising the heritage, assigned his preference over the moveables to the holder of a second bond.

In a question between the trustee on the debtor's sequestrated estate and the holder of the second bond, *held* that the holder of the first bond was bound as far as possible to take payment from the moveables or to assign his preference over them to the second bondholder, and that having taken payment entirely from the heritage the second bondholder had right to his preference over the moveables.

1st Division.  
Sheriff of  
Argyllshire.  
M.

By bond and disposition in security, dated 8th, and recorded 15th May 1883, James Nicol borrowed £2500 from Mr Thomas Sime, on the security of certain heritable subjects in Oban, called Craigievar.

By another bond and disposition in security, dated 20th, and recorded 26th November 1884, Nicol borrowed £500 from Mr F. C. Hill, on the security of the same subjects.

On 10th June 1887 Sime, the first bondholder, obtained decree under a poinding of the ground, which he had executed, and thereby obtained a preference for one and a-half year's interest on his bond, or £122, 16s. 1d.

On 21st June following the estates of Nicol, the debtor in the bonds were sequestrated, and Mr John F. M'Laren was appointed trustee.

On 18th October following Hill, the second bondholder, served a summons of poinding of the ground upon the trustee. On an admission from the trustee that Hill had a preference under his poinding for the current half year's interest, and arrears for the previous year, it was arranged, on 29th November following, that the action should not be further proceeded with. A sum of £24, 5s. 5d., the amount admittedly due, was thereafter paid to Hill.

On 19th October 1887 Sime, the first bondholder, sold the security subjects under the powers in his bond at the price of £2900, which was paid on 23d November following. After satisfying Sime's claim for principal and interest, and deducting expenses, &c., there remained out of the £2900 a balance of £199, 8s. 6d. to meet Hill's debt of £500.

Hill, the second bondholder, objected that Sime ought to have paid his claim of £122, 16s. 1d. for interest out of the moveables secured by his poinding, which had realised about £500, and that he was not entitled to satisfy that portion of his debt out of the proceeds of the heritage. Hill only consented to Sime's doing so on obtaining from him an assignation to his preference over the moveables. The assignation was granted on 26th January, and was intimated to the trustee on 13th February 1888.

Hill then lodged a claim in Nicol's sequestration for the £122, 16s. 1d.

The trustee rejected the claim, holding that Sime's legal claims "were fully met on 23d November 1887, and his diligence was of no effect after that date, and any assignation granted by him after his diligence was extinguished carried nothing."

Hill appealed to the Sheriff, and pleaded;—The appellant being now in right of the preference acquired by the said Thomas Sime, the first bondholder, is entitled to decree as concluded for.

The trustee pleaded;—(3) After a sale of the heritable subjects the first bondholder could not put the said decree in force, and his assignee is in no better position than his cedent.

On 31st October 1888 the Sheriff-substitute (MacLachlan) recalled

the trustee's deliverance, and ordained him to rank Hill in terms of his No. 78. claim.\*

The trustee appealed, and argued ;—(1) The security subjects had been completely disencumbered of all diligences and securities over them by the sale, which was completed by the payment of the purchase-price on 23d November 1887.<sup>1</sup> The assignation by the first bondholder of his decree of poinding, and of the rights thereby secured, which was not executed till some months after that date, carried nothing. (2) This was not a case of catholic and secondary securities, for both creditors had availed themselves of their right to poind the ground in security of the interest due to them, so far as they could legally do so. That right was restricted, and only extended to interest for the current half year and arrears of the previous year.<sup>2</sup> Accordingly the security created by the first bondholder's poinding could never have been available to the second bondholder ; the more so, as at the date of the settlement with the first bondholder on 23d November, the second bondholder's poinding was still in force, and had not been withdrawn. None of the cases quoted upon the other side were authorities for extending the rights of a second bondholder so far as it was proposed to extend them here. The result of so extending them would be most prejudicial to the interests of the ordinary creditors, of which the law was always particularly jealous.<sup>3</sup>

Argued for the respondent ;—(1) The operation of the 123d section of the Titles to Land Consolidation Act of 1868 did not affect this question. No doubt the lands were disencumbered of all diligences when a sale was carried through under the Act, but that was only in a question with the purchaser. It did not affect the interests of creditors. (2) This would have been the ordinary case of a catholic and secondary security if it had been the first bondholder only who had executed a poinding. In that case he could not have capriciously injured the secondary creditor by taking payment out of the heritage only, leaving the moveables untouched. He would have been bound either to satisfy his debt out of the moveables so far as they went, or to give the second bondholder an assignation to his

\* "NOTE.— . . . When the sale to which this action refers took place the selling creditor's debt consisted of the principal sum of £2500 and £122, 15s. 1d., being one year's interest, less tax, and his security consisted of the bond along with the preference created by his poinding of the ground. In the circumstances it was unnecessary for him to realise the security created by his poinding of the ground, seeing that his principal debt and interest were paid out of the proceeds of the sale of the heritable subjects. But there still remained the obligation in section 122 of the Titles to Land Consolidation (Scotland) Act, 1868, of holding count and reckoning with the postponed creditor, and this obligation he fulfils by paying over the balance of the price, and assigning his diligence of poinding of the ground, being the unrealised portion of his security.

"The appellant, by withdrawing the poinding of the ground executed by him, gave up the security thereby created over the moveables, and his security was thus confined to the heritable subjects, and I hold that the first bondholder, seeing that his security extended over the moveables as well as over the heritable subjects, was not entitled to defeat the second bondholder's claims by selling only that portion of the property which formed the latter's sole security, and paying himself in full out of the proceeds, leaving the other portion untouched."

<sup>1</sup> Titles to Land Consolidation (Scotland) Act, 1868 (32 and 33 Vict. cap. 119), sec. 123.

<sup>2</sup> Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 118 ; Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 55 ; Conveyancing Act Amendment Act, 1879 (42 and 43 Vict. cap. 40), sec. 3 ; *Boswell v. Ayrshire Banking Co.*, Jan. 15, 1841, 3 D. 352.

<sup>3</sup> *Urquhart v. Macleod's Trustees*, June 16, 1883, 10 R. 991.

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rights over them.<sup>1</sup> Indeed, a formal assignation was not necessary.<sup>2</sup> [LORD PRESIDENT.—I am inclined to agree with the opinion expressed by Lord Ivory (18 D. 218) that it was not.] The fact that the second bondholder had also brought a pointing of the ground could make no difference; besides, the trustee had conceded his rights so soon as it was brought, and practically before the sale was carried through on 23d November. Nor could the fact that the rights of creditors executing pointings of the ground were restricted by the 3d section of the Conveyancing Act Amendment Act of 1879 affect the question. It diminished the extent of the right, but it did not alter its nature.

At advising,—

LORD PRESIDENT.—The question here arises in the sequestration of a person of the name of Nicol, a writer in Oban, which was awarded on 21st June 1887. There were two heritable securities over certain subjects belonging to the bankrupt, one created in May 1883 for a sum of £2500 in favour of Mr Sime, and the second in favour of Mr Hill, the respondent in this appeal, for £500, and created in November 1884. Mr Hill was thus in the position of being second bondholder, Mr Sime being the first. Mr Sime executed a pointing of the ground on 10th June 1887, and Mr Hill also served a summons of pointing of the ground on the trustee in October of the same year. The pointings were of course restricted in their effect by the operation of the Bankruptcy Act, which deny all effect to pointings of the ground executed either after sequestration or within sixty days of bankruptcy, except to a limited extent—that is to say, to the extent of the current half year's interest and arrears for one year. The pointings were here in consequence restricted to that extent; in the case of the first the amount for which it was effectual was £122, 16s. 1d., and in the case of the second the amount was £24, 5s. 5d.

The first bondholder availed himself of the power to sell the heritable property. He sold it in October 1887, and the price was £2900, which was more than sufficient to pay the sum in his bond with the interest due upon it, and in consequence left a surplus, for which, of course, the first bondholder was liable to account to the second bondholder and to the trustee. The first bondholder proposed to hand over the surplus which he said he had in hand, but the second bondholder was not satisfied, because he objected that the first bondholder had taken full payment out of the price of the heritable subject, and not at all out of the moveables which he had effectually pointed, and the second bondholder contended that in fairness to himself payment ought to have been taken out of these moveables in so far as the claim for the £122, 16s. 1d. was concerned. The contention of the second bondholder just comes to this, that the first bondholder had a catholic security—a security over the heritage and a security over the moveables—and that, as a catholic security holder, he was bound so to divide what was available to him under these securities as to leave as large a surplus as possible to the second bondholder. In answer to this contention, the first bondholder granted an assignation in favour of the second bondholder of the sum of £122, 16s. 1d. secured by the first bondholder's pointing of the ground; and the contention of the second bondholder now is, that he is entitled to be ranked preferably on the bankrupt estate for that amount, on the ground

<sup>1</sup> Bell's Comms. ii. (5th edn.) 524, (7th edn. 418); Goudy on Bankruptcy, 500; Littlejohn v. Black, Dec. 13, 1855, 18 D. 208, 28 Scot. Jur. 87; Goldie v. Bank of Scotland, Feb. 27, 1834, 12 S. 498, 6 Scot. Jur. 293.

<sup>2</sup> Littlejohn v. Black, 18 D. 208 (Lord Ivory's opinion, p. 218).

that the assignation of the poiding of the ground is effectual to him in virtue of the equity arising in the case of catholic securities. The question is, whether that equity applies to the present case?

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The equity itself is well established in the law, and it is almost unnecessary to cite authority in regard to it, but it may be well to quote what Mr Bell says, carrying out the doctrine as he finds it in Lord Kames' remarkable work on the Principles of Equity (Bell's Comma. (7th edn.) ii. 417),—"Where two estates," says Mr Bell, "of the same debtor are covered by a security for the debt, and there is no third party interested in either of the estates, the operation of the principle is obscured by the identity of interest in the proprietor; the creditor may of course take his payment from either estate, and there can be no room for assignation, the debt being to all purposes extinguished. But if a separation of interest in the two estates take place (*ex gr.*, if the debtor die and is succeeded by two heirs in different lines of succession) the same rule must of course be applied as if the estates had belonged originally to two several debtors. They must pay the debt rateably in proportion to the value of the estates; and if the proprietor of one pay the whole, he is entitled to an assignation that he may recover the share belonging to the other." And then comes a passage which is more immediately applicable to the present case. "Where there are secondary creditors on the two estates, the right of the catholic creditor to demand his debt must suffer the same qualification as if the estates belonged to several proprietors. Thus, if A have an heritable bond over two estates belonging to B, and C have an heritable security over the one estate and D an heritable security over the other, A cannot capriciously prefer the one to the other, by claiming his debt from one of the estates, leaving the other free, but must in equity assign his security. But if there be a secondary security over one estate only, and no interest in opposition upon the other estate but that of the debtor, the rule uniformly laid down is that the catholic creditor is not capriciously to injure the secondary creditor by claiming his debt from the estate over which his security extends, leaving the other unburdened to the debtor, but that he must claim from the unburdened estate, or must assign his security."

Now, the question is whether that doctrine is applicable to the circumstances of the present case. The peculiarity here is that we are dealing with the heritable estate and the moveable estate as two separate subjects of security—that both the creditors have a security over both the estates. Each of them has a security over the heritage, and also over the moveables, but to a limited extent, that is to say, to the extent of the value of their poidings, and the value of the moveables is undoubtedly sufficient to satisfy both of these limited rights over the moveables. That peculiarity distinguishes the present case from any former case, so far as I am aware, but does it distinguish it in principle from those cases to which the equity arising from the position of catholic security holders has been held to be applicable? There is no doubt that if the first bondholder had taken payment out of the moveables to the extent to which his right over them extended he would have taken just so much the less out of the heritable estate, and in consequence would have left just so much the more for the second bondholder. He has in fact taken payment of his whole debt out of the heritable estate, and has thus made worse to that extent the position of the second bondholder. It appears to me that this is just the situation to which the equity does apply. It is precisely where the first bondholder has it in his power injuriously to affect the second bondholder that he is bound so to act as to cause



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the least prejudice to the second bondholder consistently with payment of his own debt in full, or if he chooses to act otherwise, that he must assign the second bondholder the security which he has not used. It was argued, and forcibly and plausibly argued, that to give effect to that contention would be to benefit the second bondholder at the expense of the general body of creditors, and that is quite true. But then that is just the effect of giving the doctrine in any case. Whatever has the effect of giving the second bondholder a larger preference necessarily implies a loss to the general body of creditors, but nevertheless that effect has been disregarded and the doctrine maintained. I can see nothing in the circumstances of the present case to exclude the application of the doctrine, and, therefore, I think that the judgment of the Sheriff-substitute is right, and ought to be affirmed.

LORD MURE.—I also think that the Sheriff-substitute has come to the right conclusion. The passage which your Lordship has read from Mr Bell's Commentaries fully warrants that conclusion, which is also, I think, borne out by the case of *Littlejohn* referred to by Mr Patten. The second bondholder was prejudiced by the way in which the first bondholder proceeded to work out his preference, but no fault is to be found with the first bondholder for so doing, because he granted an assignation to his poiding in favour of the second bondholder, and thus did all he could to put him into the position which he ought to occupy.

LORD SHAND.—I am of the same opinion. Each of the bondholders had a security over the heritable estate, and at the same time the power of stretching their hands and securing the moveables by the diligence of poiding to the extent of one half year's interest and arrears for the past year. The first bondholder exercised his diligence over the moveables by executing a decree of poiding, and thus secured a preferable right over them to that extent. He nevertheless then turned back upon his security over the heritage and proceeded to sell it under the decree and pay himself in full out of the price. Now, I take it that in such a case of matters the right of the second bondholder was to say,—"You must not take such of your securities as are available to me in payment of your debt, but you must have other securities which will in part reduce your claim, but of which you must directly take the benefit." Because, I think, the principle explained in *Bell*, in the passage which your Lordship has read, forbids that. In the case of *Littlejohn* this doctrine was carried so far as to require the first bondholder to realise a separate security which he had over ships, the property of the second bondholder in which the second bondholder had no direct interest, in order to prevent the diminution of the second bondholder's interest in his heritable security. In the present case it appears to me to be *a fortiori* of the present, for if the first bondholder had been bound to realise a security in which the second bondholder had no interest or right whatever, much more, as it appears to me, ought he to have been bound to do so when both parties have interests in the same security, namely, the heritable property, and the moveables on it which are liable to be poided for a year's interest on the debt, and which had been in fact poided. I am, therefore, of opinion that the judgment of the Sheriff-substitute was right.

LORD ADAM.—It is quite clear that if Hill, the second bondholder, had a security only over the heritage, this would just have been an example of an ordinary case of a catholic security, for Sime, the first bondholder, would

held a security both over the heritage and the moveables, and Hill over the heritage only. Does it make any difference that each creditor holds a security over both subjects? There is no direct authority on the point, and I am not surprised. In the ordinary case, each security right extends over the whole subject, and consequently it cannot matter out of which the prior creditor takes his payment; he just leaves so much the more of the other subject out of which the posterior creditor may pay himself. Here the peculiarity is that neither creditor can exhaust the moveables. But I am clear that this peculiarity makes no difference. I think it is just an instance of the ordinary case to which the equitable doctrine of catholic securities applies. That doctrine is that when a prior creditor has one way of working out his preference which is less injurious to the postponed creditor than another, the prior creditor is bound either to adopt that course, or by assignation to put the postponed creditor into his right. Sime accordingly was bound to pay himself out of the moveables to the extent of the £122, 16s. 1d., or to assign that right to Hill, for in either way there was a larger fund to meet Hill's debt. I therefore agree with your Lordship that we should adhere.

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THE COURT adhered to the Sheriff-substitute's interlocutor, and refused the appeal.

WELSH & FORBES, S.S.C.—M'NEILL & SIME, W.S.—Agents.

JOHN STEWART KENNEDY, Pursuer (Respondent).—*Lord-Adv. Robertson*—No. 79.  
*D.-F. Mackintosh—C. S. Dickson.*

SIR ARCHIBALD DOUGLAS STEWART, Defender (Reclaimer).—*Balfour—Asher—Dundas.* Feb. 8, 1889.  
Kennedy v. Stewart.

*Entail—Sale of entailed estate "subject to ratification of Court"—Contract—Specific performance—Entail Amendment Acts, 1848 (11 and 12 Vict. c. 36), sec. 4; 1853 (16 and 17 Vict. c. 94), sec. 5; 1875 (38 and 39 Vict. c. 61), secs. 5 and 6—Entail Act, 1882 (45 and 46 Vict. c. 53), secs. 13, 19, 20, 21, 22.—S, an heir of entail in possession, sent to K a holograph offer to sell the entailed estate at a specified price, containing these words,—"In the event of your acceptance the sale is made subject to the ratification of the Court." The offer was accepted. Thereafter S presented a petition to the Court, setting forth the above missives, and sections 19-22 of the Entail Act, 1882,\* and praying the Court to ratify the contract constituted by the missives, and to grant an order of sale in terms thereof. The heir next entitled to succeed (who was the only other existing heir) lodged answers, in which he founded on section 22 of the Act of 1882, which gave him a right to refuse his consent to a sale by private bargain. In an action brought by K against S, concluding for declarator that by the missives a valid contract was entered into for the sale of the estate, and that in respect thereof the defender was under a legal obligation to apply to the Court for authority and power, under the Entail Amendment Acts, to sell and dispoise the estate, and for implement, the Court held that the procedure under sections 19-22 of the Act of 1882 was not applicable to the circumstances, and that the heir in possession was bound to present and prosecute to a conclusion a petition, in terms of section 4 of the Entail Amendment Act, 1848, and section 5 of the Entail Amendment Act, 1853, as amended by section 13 of the Entail Act, 1882, for a sale of the estate on the footing of compensating the next heir, and, further, ordained the pursuer to lodge in process a draft of a disposition by the defender of the entailed estate.*

SIR ARCHIBALD DOUGLAS STEWART was heir of entail in possession of 1st Division. the estates of Murtly, Grandtully, and others in Perthshire. Lord Trayner.  
B.

In 1885 he had presented a petition (after mentioned) to the Court of

\* These and the sections subsequently referred to are quoted *infra*, p. 427.

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Session for an order of sale of the estates in terms of the Entail Act, 1882, but after some preliminary steps the proceedings therein were not carried further, and the petition was ultimately dismissed on the motion of the petitioner, on 26th October 1888.

In the year 1888 Sir Douglas received certain communications from Mr Peter Glendinning, Leuchold, Dalmeny Park, on the subject of a proposed sale of the estates to a third party, whose name was not at first disclosed, but who was, as ultimately appeared, Mr John Stewart Kennedy, banker, New York.

On 18th September 1888 Mr Kennedy and Mr Glendinning visited Murtly Castle, and saw the house and grounds.

On 19th September Sir Douglas wrote the following letter to Mr Kennedy:—"Murtly Castle, 19th September 1888.—Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation, of the nett rental thereof, as may be ascertained by an agreed appraisement, you appointing one, and me the other, and if the two cannot agree, a third party to be chosen by the two.

"Payment to be made in cash unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889.

"This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me.

"In the event of your acceptance the sale is made subject to the ratification of the Court."

Mr Kennedy answered:—"Edinburgh, 20th September 1888.—Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto."

On 5th October Sir Douglas wrote to Mr Kennedy as follows:—"My dear Sir,—Since I wrote to you on the 19th ulto., I have thought a good deal, as you may suppose, about the important transaction which in that letter I proposed to enter into with you. I am quite satisfied on reflection that my offer was a very foolish one, and I should never have made it if I had not been hurried and pressed, or if I had taken proper legal advice, as I certainly should have done. I am told now that there are legal difficulties in the way of which I was not then aware, and it appears that it is by no means matter of certainty that the Court will agree to ratify the proposed arrangement. That may involve unpleasant publicity and the interference of the next heir of entail. I should be well pleased if you see your way to release me altogether from it. I repent it both on my wife's account and my own, as well as on account of the heir of entail entitled to succeed me, who is even now more interested than I am.

"If, however, you insist upon it, I am ready to endeavour to obtain the ratification of the Court, which I am advised can only be done for an order or authority to sell in terms of our contract."

Mr Kennedy declined to cancel the transaction.

Thereafter Sir Douglas and Mr Kennedy's agents agreed that the price of the estates, on the basis of the missives above quoted and according to a rental adjusted between them, should be £372,982, 10s. 10d. No. 79.

On 6th November 1888 Sir Douglas presented a petition to the Court of Session for "ratification of agreement to sell." The petitioner after setting forth the missives of sale, and praying for an order for service on Walter T. J. Scrymgeour Fotheringham of Pourie, the only existing heir of entail (other than the petitioner) under the deeds of entail therein narrated, craved the Court "to ratify and confirm the contract constituted by the missives of sale set forth in the petition; and to grant an order of sale of the said estates of Grandtully, Murtly, Strathbraan, and others, in favour of the said John Stewart Kennedy at the said price of £372,982, 10s. 10d., in terms of the said missives; and authorise the petitioner to execute, at the sight of your Lordships, a disposition or other deed of conveyance of the said estate in favour of the said John Stewart Kennedy, containing all clauses usual and necessary for the purposes of the conveyance, according to the nature of the transaction, and the clause of warrandice specified in the said Entail (Scotland) Act, 1882; and further to authorise the price, after payment of the expenses after mentioned, and after payment of the debts and redemption-price of rent charges affecting the said estates, to be invested in terms of the said Entail (Scotland) Act, 1882." Feb. 8, 1889.  
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Mr Fotheringham lodged answers to the petition, in which he stated, *inter alia*;—"The present petition, which prays for the ratification by the Court of an alleged private bargain of sale of the whole of the said entailed estates, dated 19th and 20th September 1888, between the petitioner and Mr John Stewart Kennedy, a New York banker, is not in conformity with or warranted by any of the Entail Statutes. . . . In the procedure authorised by the Entail (Scotland) Act, 1882, the respondent, as next heir, has right, by intimating within one month after an order for sale that he desires the sale to be by public auction, to prevent any sale by private bargain. . . . A sale in the manner and at the price proposed would very injuriously affect the patrimonial interest of the respondent."

On 6th November, the same day as that on which the petition was presented, Mr Kennedy raised an action in the Court of Session against Sir Douglas, concluding, *inter alia*, for declarator that by the missives above quoted "a valid contract was entered into between the said pursuer and the defender for the sale by the defender to the said pursuer of the estate of Murtly, including the lands and estates of Grandtully, Murtly, Strathbraan, and others, situated in the county of Perth, belonging to the defender as heir of entail in possession thereof, and that, in respect of the said contract, the defender is under legal obligation to apply to our said Lords for authority and power under the Entail Amendment Acts to sell and dispose the said estate; and the defender ought and should be decerned and ordained, by decree foresaid, to implement the said contract, and forthwith to present a summary application to our said Lords, under and in terms of the Entail Acts, and specially the following sections thereof, viz, the 4th section of the Act of the 11th and 12th of our reign, cap. 36, the 5th and 6th sections of the Act of 38th and 39th of our reign, cap. 61, and the 13th section of the Act of 45th and 46th of our reign, cap. 53, or otherwise in terms of other sections of the said Acts, all as the said petition or application may be adjusted at the sight of a person to be appointed by our said Lords in the process to follow hereon, for authority to sell and dispose the said lands and estates to the said pursuer, and to adopt and carry out with all due speed the procedure prescribed by the said Acts, including, if necessary, the com-

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pensating of the next heirs for obtaining such authority; and thereupon, after having obtained such authority, to make, execute, and deliver, at the sight of our said Lords, a formal disposition of the said lands and estates to the pursuer, the said John Stewart Kennedy, containing all usual and necessary clauses, and to make and execute such other deeds of conveyance, and other deeds as may be necessary for giving effect to the said contract of sale, the defender duly making payment of the price as the same is or may be fixed in terms of the letters above mentioned; or otherwise, the defender ought and should be decerned and ordained to make such application, in terms of said Entail Acts, as shall entitle him to carry out and implement his said contract or agreement with the said pursuer; and failing implement of the foresaid contract, the said defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £50,000 sterling, in name of damages.\*

The pursuer founded on the correspondence above quoted, and averred;—"The defender presented the petition referred to after the present action was raised, and he did so not for the purpose of enabling him to carry out the contract, but in order to secure that the contract should not be carried out. For this purpose he has been and is in communication with the next heir of entail so as to prevent any sale by private bargain, or any approval of the sale to the pursuer. Further, the next heir has lodged answers to the petition by the defender, in which, *inter alia*, he founds upon section 22 of the Entail (Scotland) Act, 1882, which provides that a sale under the procedure adopted by the defender shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction, and the next heir asks the Court to dismiss the petition as incompetent."

The defender in answer stated;—"That the application is in dependence before the said Lord Ordinary, and the defender is willing to proceed with it with all reasonable dispatch. He has thus implemented so far as has been possible the terms of his agreement with the pursuer. A print of said petition is produced herewith. It is denied that it was presented in order that the said contract should not be carried out, or that the defender has been, or is in communication with the next heir of entail, so as to prevent any sale by private bargain or any approval of the sale to the pursuer. The answers to said petition are referred to. The pursuer's agents were made aware that the said petition was being prepared, and that it had been lodged, before they sent the summons in the present action to the defender's agents to accept service. In these circumstances the action is unnecessary, or at all events premature."

The defender also made the following averments, which were denied by the pursuer;—"The letter here quoted (*i.e.*, the letter of 19th September) was copied by the defender from a draft which Mr Glen-dinning brought with him, and which he suddenly and earnestly

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\* When the case came before the Inner-House, the pursuer added the following conclusion after the words "in terms of the letters above mentioned," "or otherwise the defender ought and should be decerned and ordained, by decree foresaid, forthwith to implement the said contract, and to execute a formal disposition of the said lands and estates by the defender to the pursuer, the said John Stewart Kennedy, containing all usual and necessary clauses, as the same shall be adjusted at the sight of our said Lords, and to make and to prosecute to a conclusion an application to the Court for the sanction and approval of the said sale and disposition, all in terms of the Acts 11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, 38 and 39 Vict. c. 61, 45 and 46 Vict. c. 53, or any of them, and upon the Court sanctioning and approving as aforesaid, to deliver the said disposition to the said pursuer."

pressed the defender to copy out and sign, there and then. The defender, who is eighty-one years of age, and in very infirm health, yielded to the pressure thus brought to bear upon him when he was in a highly nervous, flurried, and excited condition, and thus weak and facile, and wrote and signed the letter. In doing so, he did not intend to make, or understand that he was making, an offer which could, by a simple acceptance, be made finally binding on him, to the effect of excluding all further opportunity for consideration and advice, and all proper supervision of its terms by the Court, in the interests of parties. In particular, he did not intend, and would have absolutely refused, to enter into any bargain on the footing of his being obliged to disentail or sell the estates and compensate the next heir of entail. The next heir of entail is Mr Fotheringham of Pourie and Tealing, who is about twenty-six years of age. In the event of its being held that the said letter and the acceptance set forth in article 8 of the condescendence import any such obligation on the defender as the pursuer alleges, he avers that the said letter was impetrated from him under essential error, fraudulently induced by the pursuer or his representatives, and he reserves all right competent to him to reduce and set aside the transaction."

The pursuer pleaded;—(1) In respect of the letters condescended on, the pursuer is entitled to decree of declarator and implement as concluded for. (2) Failing implement of the said contract the pursuer is entitled to damages as concluded for. (3) The defender's statements being irrelevant, *et separatim*, so far as material, unfounded in fact, the defences should be repelled. (4) In respect the defender has not presented, and is not prosecuting, any petition *in bona fide*, in order to carry out the sale, but, on the contrary, the only petition presented by him being for the purpose of securing if possible that the sale should not be carried out, the defences and pleas founded on the said petition should be repelled. (5) The pursuer being entitled to have the authority of the Court, so far as necessary for having the said sale carried out, obtained in any competent form, the decree to that effect should be granted.

The defender pleaded, *inter alia*;—(1) The action should be dismissed in respect that it is unnecessary, *et separatim*, that it is premature. (2) The pursuer's averments are irrelevant. (3) The defender, not being bound to implement the said missives in the manner specified in the summons, should be assoilzied.

On 21st December 1888, the Lord Ordinary (Trayner) pronounced this interlocutor:—"Repels the 1st, 2d, and 3d pleas in law for the defender: Finds, decerns, and declares, in terms of the declaratory conclusions of the summons; ordains the defender to implement the contract referred to in said conclusions, and forthwith to present a summary application to the Court, as concluded for in the first petitory conclusion of the summons, or otherwise to make such application to the Court, in terms of the Entail Acts, as shall entitle him to carry out and implement the said contract: *Quoad ultra* continues the cause, and grants leave to reclaim."\*

\* "OPINION.—Had it not been for the concluding paragraph of the defender's letter of 19th September 1888, I suppose it is not open to doubt that that letter, and the pursuer's letter in reply, dated 20th September (if not reduced), would have constituted a valid and binding contract of sale between the parties of the Murtly estates. It is the meaning and effect of that paragraph therefore which has to be considered. The paragraph is as follows:—'In the event of your acceptance, the sale is made subject to the ratification of the Court.'

"It is said by the defender that what he had in view when he conditioned for the 'ratification of the Court' was a proceeding under the Act of 1882, and not a disentail under the Rutherford Act and amending Acts. I hesitate to

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The defender reclaimed, and argued;—The action was premature. A competent petition had been presented to the Junior Lord Ordinary with a view to carrying out this bargain, and was still in dependence. This action was virtually an interdict against the Lord Ordinary proceeding in that application.

On a fair construction of the missives, the sale contemplated was to be "made subject to the ratification of the Court," i.e., it was one which might or might not be fulfilled. If it turned out that the Court either could not or would not ratify the proposed terms of sale, the bargain would be at an end, and the defender free.

A petition for authority to sell, in terms of the Rutherford Act, sec. 4,

accept that statement on the evidence referred to in support of it, consisting chiefly of statements made in letters by the defender to the pursuer, when asking that he might be relieved of the bargain he had made. But, however that may be, it is not so material to inquire what the defender meant or intended; the question rather is, what he said, and what meaning the pursuer, in considering the defender's offer, might fairly put upon the language used. The circumstances surrounding the transaction, as known to both parties, afford some aid in the solution of these questions. The parties were dealing with an entailed estate, and knew that some proceeding before the Court was necessary to enable the heir of entail in possession to sell the property to a stranger. But what the precise form of the proceeding should be, and on what statute the application to the Court should be based, were matters on which neither of the parties could be supposed to have correct information, or be able to form an opinion. These were matters of detail requiring professional assistance which the parties would leave to their professional advisers. But it needed no professional knowledge or skill for the defender to make, and the pursuer to accept, such an offer as this—I will sell you the entailed estates of Murtly at a specified price, provided the Court will pronounce such an order as will enable me to carry out the sale and give you a valid title. And that, I think, is the offer which the defender made and the pursuer accepted.

"The defender, however, says that his offer was one dependent on the 'ratification' of the Court, and that the Rutherford Act and Acts amending the same make no provision in terms for such a ratification. But neither does the Act of 1882, for while that Act prescribes (sec. 19 *et seq.*) certain procedure under which an order for the sale of an entailed estate may be obtained, it does not provide at all for the case of the Court being asked to ratify or approve of a sale already made—or made provisionally on the Court's approval being obtained. The Court cannot, under the Act of 1882, at any time or under any form of procedure, ratify the sale by the defender to the pursuer. It could only authorise the estates to be sold publicly (for the next heir does not consent to a private sale), and at that sale the pursuer might not be the successful offerer. In short, the Act of 1882 refers to and provides for a sale yet to be effected—not to a sale already made.

"The defender pleads that this action is premature, because he has presented an application under the Act of 1882 asking the Court to ratify the sale to the pursuer. I repel that plea, because if I am right in the view I have taken of that statute the application is inappropriate; and equally so, as it appears from the answers lodged to that application by the next heir of entail, that he does not consent to a private sale; and the Court could not authorise anything but a public sale if the next heir insists upon it.

"The defender having sold the estate in question to the pursuer subject to the ratification or approval of the Court, he is bound to adopt all proper means to obtain such an approval or ratification. By disentailing, or by obtaining the consent of the next heir to a private sale to the pursuer at the price and under the conditions already fixed, he will be able to carry through the transaction with the 'ratification' of the Court, in the sense in which (according to my view) that word is used in his offer to the pursuer."



as amended by secs. 5 and 6 of the Act of 1875, and sec. 13 of the Act of 1882,\* would not satisfy the spirit or the words of the contract. There was

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\* The following sections of the various Entail Acts were cited :—Section 4 of the Act of 1848 provides that “it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as would by this Act enable him to disentail such estate, to sell, alienate, dispoise, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute at the sight of the Court all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted.”

Section 5 of the Act of 1853 provides,—“It shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispoise, charge with debts or incumbrances, lease, feu, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance, or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion; and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit, or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Acts being obtained, containing express consent to and approval of such deed of conveyance, or contract of excambion, or other deed executed as aforesaid, the Court shall pronounce an interlocutor approving of such sale, disposition, charge, lease, feu, or excambion, as the case may be, and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act.”

The Act of 1882 provides (sec. 13),—“In any application under the Entail Acts, to which the consent of the heir-apparent or other nearest heir is required, and such heir, or the curator *ad litem* appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sections 5 and 6 of the Entail Amendment (Scotland) Act, 1875, shall apply to the nearest heir, as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August 1848, as well as to entails dated prior to that date.”

Section 19.—“It shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate or part of it.”

Section 21.—“The Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper. Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it will be for the benefit of the applicant.”

Section 22.—“The Court shall fix the time, and place, and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots,



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no "ratification" of a "sale" by the Court in such a proceeding. The sale authorised by sec. 4 of the 1848 Act was simply a lesser power than and flowing from that of disentail, created by sec. 3, and the "ratification," if any, in such a proceeding, was the shaking off the fetters of the entail upon evidence that the interests of next heirs of entail and of creditors on the estate had been properly provided for, and had nothing to do with the disposition, which the proprietor could grant without any "ratification" when freed from the fetters. The Court did not in such a proceeding apply any *arbitrium* at all to the terms of the sale, or to the adequacy of the price. The pursuer, therefore, could not insist on the defender disentailing the estate, or selling it on the footing of compensating the next heir, in terms of the Rutherford Act, amended as above.

Nor would the Act of 1853, sec. 5, help the pursuer's contention. The defender was not in the position required by that section as a condition of its exercise. The next heir did not consent to the execution by him of any disposition in favour of the pursuer, and his consent thereto could not be forced, in virtue of the sections of the Acts of 1875 and 1882 above referred to. Sections 5 and 6 of the Act of 1875 bore expressly to amend sections 3 and 4 of the Rutherford Act, but were not intended to alter, and did not alter, the Act of 1853, section 5. And the Act of 1882, while carrying the relaxation introduced by that of 1875 a step further, and making the consent of even the nearest heir unnecessary in applications under the Rutherford Act, as thereby amended, did not remove the necessity, in the case of a proprietor who sought to avail himself of the Act of 1853, sec. 5, of producing the required "consents" of the next heirs to the disposition which the Court was asked to sanction. The pursuer, therefore, could not, in the present circumstances, derive aid from the Act of 1853.

The Act of 1882 remained. It was said by the Lord Ordinary not to be applicable to the present case. If that were so, there was no means of obtaining "the ratification of the Court" to the proposed sale, and the bargain must come to an end, and the defender must be assoilzied. The defender, however, was, and had all along been, willing to obtain the ratification of the Court to the missives under the procedure prescribed by this Act, if that could competently be done. The defender submitted that it could. This Act did require the "ratification" or *arbitrium* of the Court, for the Court must see (sec. 21) that no patrimonial interest was injuriously affected by the sale. In the ordinary case the petition was presented, and after the estate had been exposed to sale the Court was invited to approve, or disapprove, of the proposed terms of sale. In the present case the parties submitted to the Court certain agreed-on terms of sale for approval or ratification, and invited the Court, if it saw fit, to make these terms its own. The defender, at all events, had throughout had the Act of 1882 in view. He was aware of its scope and terms, having had a petition thereunder for an order of sale depending in Court from 1885 till October 1888, as above narrated. He would not have consented, and could not be presumed to have intended to do so, to

and either by public auction at such upset price, or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price. Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction. When the estate is sold by public auction any creditor or person interested, other than the applicant, may be the purchaser."

a sale, on the footing of compensating the next heir, looking (1) to the very heavy amount of such compensation in the circumstances; and (2) to the fact that, if he outlived the one other existing heir of entail, he would possess the whole entailed estates, or entailed money, in fee-simple. If the Act of 1882 were not applicable, the bargain must fall; if it were so, the defender was willing to proceed under it, and the accident that the next heir did not and might not consent was no fault of the defender.

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Even if the defender's construction of the missives was wrong, the Court would not in the circumstances, order specific performance of the contract by an application under the Entail Act, but would leave the pursuer to his remedy by way of damages. The granting or refusing of this equitable remedy was always in the discretion of the Court.<sup>1</sup> There was a "want of fairness" in the contract disclosed on the record, and besides, the Court would not pronounce a decree of specific performance where a continuous series of acts was necessarily involved,<sup>2</sup> nor where there might be difficulty, or even impossibility, in working out the decree of the Court, as might be the case here, if the defender refused to present or to carry through to a conclusion an application under the Entail Acts.<sup>3</sup>

Argued for the pursuer;—The word "ratification" simply meant "sanction" or "approval." It was precisely applicable to the procedure initiated by the Act of 1848, as perfected by the subsequent Acts, including section 13 of the Act of 1882. The Act of 1882 dealt with two distinct branches of procedure; by one section (sec. 13) the consent of even the nearest heir might be dispensed with in applications under the Rutherford and other Acts to which the consents of the next heirs, or the valuation of their interests when consent was refused, was necessary. By other sections (sec. 19, *et seq.*), an entirely new procedure was introduced for the conversion of entailed land into entailed money. With regard to this latter process, there was no authority in the statute for the Court ratifying a sale previously entered into; the sale and the terms on which it was to be made must be initiated by the Court. It was therefore impossible for the defender to fulfil his contract by proceeding under sections 19-22 of that Act, and this was rendered the more apparent as the consent of the next heir was admittedly essential to a sale by private bargain, and was in the present case refused. But there was no impossible condition in the contract if another procedure could be found which would satisfy it, and any reading of the contract which would give effect to it must be preferred to that which would invalidate it.<sup>4</sup> Now here the defender was in a position to carry out his bargain, subject to doing certain things which were quite within his power. Under section 4 of the Rutherford Act he had to carry the Court along with him, and its authority had to be interposed before he could give a purchaser a good title. But further, that Act was amended by the Act of 1853, and there in the section applicable to this case (sec. 5) it was provided that the executed deed of sale should be produced along with the application for the "sanction" of the Court thereto, and thereafter, after certain pro-

<sup>1</sup> Moore v. Paterson, Dec. 16, 1881, 9 R. 337—see Lord President, p. 348, Lord Shand, p. 351; Winans v. Mackenzie, June 8, 1883, 10 R. 941.

<sup>2</sup> Fry on Specific Performance, 2d ed. pp. 168, and following; Wycombe Railway Co. v. Donnington Hospital, 1866, L. R., 1 Chan. 268; Thomas v. Dering, 1837, 1 Keen, 729; Blackett v. Bates, L. R., 1 Chan. 117; Hendry v. Marshall, Feb. 27, 1878, 5 R. 687.

<sup>3</sup> Fry on Specific Performance, 2d ed. pp. 36, 37.

<sup>4</sup> Bell's Prin. sec. 524, subsec. 3; Ersk. Inst. iii. 3, 87; Coutts & Co. v. Allan & Co., 1758, M. 11,549.

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cedure, the Court was to "approve" of the sale. The later Acts which amended those statutes only introduced the novelty of the consents being obtainable after valuation, if they were refused. There was therefore no possible hitch in the matter, always supposing that enough money was forthcoming to pay creditors, and to satisfy the interests of succeeding heirs. If the price at which the defender had contracted to sell his estate was not sufficient to pay off the creditors and the claims of the heirs the loss would fall on him personally. The English law laid down in the *Wycombe Railway Company's* case was not applicable in Scotland, as in that country the Courts proceeded on arbitrary rules of equity to which we had no analogous rules here. [LORD PRESIDENT.—The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland.] With regard to specific implement, there would be no difficulty in carrying out a decree in terms of the conclusions. Such an order had been granted by the First Division in the case of *Merry & Cunningham v. Lord Glasgow and his Trustees* (13th March 1888), though the question of awarding damages as alternative to specific implement had not there been argued.\* The Court frequently ordained a person to execute a disposition. All the defender would have to do here was to grant an irrevocable mandate to some person to sign an application to the Court on his behalf, and thereafter the matter would proceed automatically.<sup>1</sup> There were only two classes of cases in which the Court would refuse to order specific implement, (1) where to do so would run counter to public policy (*e.g.*, a promise of marriage); (2) where the contract could be equally well carried out by some other person at some other place (*e.g.*, where a firm had contracted to build a ship). The present case did not fall under either of these classes.

At advising,—

LORD PRESIDENT.—The conclusion of this summons is for declarator that by certain missives a valid contract was entered into between the pursuer and defender for the sale by the defender to the pursuer of the estate of Murtly, "including the lands and estates of Grandtully, Murtly, Strathbraan, and others, situated in the county of Perth, belonging to the defender as heir of entail in possession thereof, and that in respect of the said contract the defender is under a legal obligation to apply to our said Lords for authority and power under the Entail Amendment Acts to sell and dispose the said estate." The Lord Ordinary has decerned in terms of that declarator. He has gone further and pronounced a decerniture, of which I shall have something to say hereafter. But the question really at issue between the parties is completely raised by that declaratory conclusion. The missives which are said to constitute this contract of sale are dated on 19th and 20th September of last year. The defender writes in these terms,—*"Murtly Castle, 19th September 1888.—Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation of the nett rental thereof as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree,*

\* This case was taken out of Court on a joint minute of the parties.

<sup>1</sup> *M'Arthur v. Lawson*, July 19, 1877, 4 R. 1134.

a third party to be chosen by the two. Payment to be made in cash, unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance, the sale is made subject to the ratification of the Court."

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The answer of the pursuer is this,—“Edinburgh, 20th September 1888.—Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.”

The defender shortly thereafter was desirous of repudiating this bargain, but the pursuer declined to accede to the proposal, and brought this action for the purpose of enforcing it. I see that on the same date on which the principal summons was signeted the defender presented a petition to the Lord Ordinary apparently for the purpose of carrying out his obligation in terms of the conclusion of the summons. The date is in both cases 6th November 1888. Now, that was a petition presented under the authority of certain sections of the Entail Act of 1882, beginning with the 19th section, which confers a new power entirely upon heirs of entail to convert the entailed land into entailed money, and the conditions prescribed as applicable to the exercise of that power are somewhat peculiar, and require very strict attention.

The 19th section provides that “it shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person, who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person to apply to the Court for an order of sale of the estate, or part of it.”

The 21st section provides that “the Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper: Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it shall be for the benefit of the applicant.”

Then by the 22d section it is provided that “the Court shall fix the time and place and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price, or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price. Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction.”

Now, upon the recital of this statute and of the missives which passed between

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the parties, what the defender prayed the Court to do was to ratify and confirm the contract constituted by the missives of sale set forth in the petition, and to grant an order of sale of the estate at the price of £372,982, 10s. 10d., which is the rental of the estate at twenty-five years' purchase in terms of the missives. Now, this petition was presented apparently for the purpose of carrying out that clause in the missives which is the concluding clause of the defender's letter of 19th September,—“In the event of your acceptance the sale is made subject to the ratification of the Court.” It appears to me that the proceeding taken by the defender under the Act of 1882 is not a proceeding for the purpose of obtaining the ratification of a sale already made, except in so far as that professes to be done by the terms of the prayer, because with reference to the sections of the statutes which are quoted in the petition it is very plain that the Court could not ratify in any sense of the word a sale already completed. And accordingly the next heir of entail appeared in answer to this petition, and he stated in the first place that the petition was incompetent in that it was not in conformity with or warranted by any of the Entail Statutes. He said further, that a sale in the manner and at the price proposed would very injuriously affect his patrimonial interests, which, I think, in other words means plainly,—“I will object to a private sale.”

Now, in these circumstances it must be perfectly obvious, I think, that that petition is an extremely incompetent proceeding. It is clearly not competent, because the prayer of the petition is not only unwarranted by the clauses of the statute, but is in direct contradiction to the provisions of the statute; and in the second place, because the petitioner has not obtained, and apparently never will obtain, the consent of the next heir to a private sale at the price fixed by the missives. Therefore it has to be considered what the defender is bound to do in execution of his contract of sale—what he is bound to do for the purpose of obtaining the Court's ratification of that sale.

I think there are means under the Entail Acts of obtaining a ratification of this concluded sale, but not under the clauses referred to in the petition and founded on by the defender, but upon other clauses altogether, and particularly under the authority granted by the Act of 1853. The first section of any statute authorising a sale of entailed estates is the 4th section of the Act of 1848, the original Entail Amendment Act. It contains power to any heir of entail who is in the same position as an heir of entail who could disentail the estate, to sell the estate with the same consents, and subject to the same conditions as he required to have under the clauses which enabled him to disentail. But the Act of 1853 introduces an amendment upon that 4th section. It is the 16th and 17th Vict. c. 94, and it is entitled “An Act to extend the benefits of the Act of 11th and 12th years of Her present Majesty for the amendment of the law of entail in Scotland.” It provides by section 5 that “it shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispose, charge with debts or incumbrances, lease, feu, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion; and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit, or when such production shall be ordered by the Court; and on such application being presented, and

such consents, if any, as are required by the said recited Acts being obtained, No. 79.  
 containing express consent to and approval of such deed of conveyance or contract of excambion, or other deed executed as aforesaid, the Court shall pro- Feb. 8, 1889.  
 nounce an interlocutor approving of such sale, disposition, charge, lease, feu, or Kennedy v.  
 excambion, as the case may be, and of the deed executed as aforesaid for carrying Stewart.  
 the same into effect, and thereupon such deed shall have the same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act."

Now, the peculiarities introduced by this Statute of 1853 are these; that an heir of entail is entitled to come to the Court after having made a contract of sale at a specified price, and to lay before the Court the disposition which he proposes to execute giving effect to such sale, and if the Court are satisfied that due provision has been made for the interests of heirs of entail and creditors, then it is imperative upon the Court to approve of the sale. The words are "the Court shall pronounce an interlocutor approving of such sale." But no doubt under this clause the Court must be satisfied that the proper consents have been given by the heirs of entail interested, and also that all the burdens upon the estate have been duly provided for. Now, if there had been no subsequent statutes, of course the defender here could not have proceeded with the petition under that statute without the consent of the next heir of entail, the only existing heir of entail as it happens in this case, and he must have obtained his consent to the application and to the proposed deed of conveyance. But then there are other sections which require to be attended to before we arrive at the full effect, as the law now stands, of a petition presented under this Act of 1853.

In the first place by the Act of 1875 (38 and 39 Vict. c. 61), there is a very important provision in the 5th section—"In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may be competently given after such application has been presented to the Court, and in the course of the same. In the event of any of the foressaid heirs, except the nearest for the time, whether an heir-apparent or not, entitled to succeed, declining, or refusing to give, or being legally incapable of giving his consent, the Court may dispense with such consent, in terms of the provisions following."

Then there follows a provision for ascertaining the money value of the expectancy of such heirs, and upon such money value being ascertained the Court shall direct the amount to be lodged in bank for the benefit of the heirs whose consents would have been required under the previous Act; and then they shall dispense with the consent of such heirs. Now, under the statute there still remains the necessity for the consent of the nearest heir, and this section is also confined to the case of disentail only, and further, it is confined to the case of tailzies executed before 1848. But the immediately following section of the same Act introduced another provision in these terms:—"The provisions of the preceding section with reference to application for authority to disentail shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to 1st August 1848, applies for power to sell, alienate, dispoise, charge with debts or incumbrances, lease or feu, or excamb such estate in whole or in part: Provided always that nothing contained in this Act shall render it necessary in any application with reference to an

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entailed estate to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of this Act."

Now, that makes the provision of the Act of 1875—the 5th section of the Act of 1875—cover cases of application to sell as well as to disentail. And lastly, we come to the 13th section of the Act of 1882, which introduced still further innovations. The 13th section of the Act of 1882 is an amendment of the previous Act in those particulars, and is not in any way connected with the clauses of that Act of 1882 which I have already read, for the purpose of enabling an heir of entail to convert an entailed estate from land into money. There is no connection between those two parts of the statute at all. This 13th section has reference entirely to applications authorised by the previous statute, whereas the 19th and following sections introduced a new form of application for a new purpose. The 13th section is this,—“ In any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir or the curator *ad litem* appointed to him in terms of this Act shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sections 5 and 6 of the Entail Amendment (Scotland) Act, 1875, shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August 1848, as well as to entails dated prior to that date.”

Now, this is a very comprehensive section. It dispenses with all consents whatever, and in place of consent introduces a rule of buying off those whose consents were previously required, including the next heir as well as more remote heirs; and it makes the provisions of the Act of 1875 applicable to all applications to which consents are required, and to all entails whatever, no matter what their date may be. Now, what is the result? It comes to this, that under the Act of 1853, as amended by these subsequent Acts, an heir of entail in possession is entitled to come to the Court and state to the Court that he has sold the entailed estate, and to produce a disposition for the purpose of giving effect to that sale. He requires no consents to enable him to do so, but the Court of course still require to see that the expectancy of the succeeding heir or heirs of entail is valued and money secured, and the burdens on the estate duly provided for, before they will sanction and approve of the sale already made. But if they are satisfied upon these two points, that the expectancies are duly valued and provided for, and that the burdens upon the estate are all provided for, then it is imperative upon the Court to sanction the sale, and the sale shall have the same effect as the Act of 1853 provides, viz., “ it shall have the same force and effect as if the same had been executed at the sight of the Court in terms of the said recited Act.”

Now, it appears to me that when an heir of entail has carried through an application under the Act of 1853 in the manner which I have now detailed, he has obtained the ratification of the Court to a sale already made, and thus has fulfilled the very words of that clause in the missives which provided that the sale shall be ratified by the Court. I am therefore of opinion that it is the duty and obligation of the defender in this case

to apply to the Court under the statutes which I have thus enumerated; that he is bound to produce to the Court a disposition of the estate in terms of the missives, and to pray the Court to approve of it, and to give it their sanction—and that that is the only way in which he can fulfil the obligation imposed upon him by the contract with the pursuer into which he entered in the month of September last. Therefore, while agreeing with the Lord Ordinary that we should decern in terms of the declaratory conclusions of the summons, it rather appears to me that the next step to be taken is to have a disposition of the estate executed by the defender in favour of the pursuer, and I think we should take the course which we did in the *Earl of Glasgow's* case, and appoint that disposition to be prepared at the sight of the Court by some conveyancer to whom we may remit for the purpose. And when that disposition comes before us we can then decern further in terms of the petitory conclusions of the summons relating to the presenting by the defender of the requisite application to the Court for carrying that sale into effect.

LORD MURE.—The main question we have now to decide, dealing with the reclaiming note from the Lord Ordinary's interlocutor, is, what is the meaning of that passage in Sir Douglas Stewart's letter in which he says—"In the event of your acceptance the sale is made subject to the ratification of the Court." It is contended by the defender that this is to be done by means of a petition which I understand he presented under the Act of 1882. But I think we must take it that the ordinary meaning of the words "ratification of the Court," and what must have been in the minds of the parties, was that they should apply to the Court under some of the Acts of Parliament applicable to entails, by which the Court had power given to them to sanction such a step as that which was proposed when the offer was made and accepted. Now, I quite agree with your Lordship that the only Act of Parliament which appears to point at proceedings of the nature which would come up to the expression "ratification of the Court" is the Act of 1853, dealing with the case where an heir of entail is authorised to sell an estate and make a disposition of it, and then come to the Court for ratification. I understand your Lordship's opinion to be that that is the course which the heir of entail ought to take, and I concur in your Lordship's view.

LORD SHAND.—I concur with Lord Mure in thinking that the only question to be determined in this case is in regard to the meaning of the words, "In the event of your acceptance the sale is made subject to the ratification of the Court," and I think in determining the meaning of these words we must have regard to what the purchaser was entitled to take to be their meaning. It is not a question entirely of what was in the mind of the seller when these words were used, but the question is, how was the purchaser entitled to read these words when he gave a written acceptance of the offer? Now, I think the word "ratification," as used here, simply means confirmation or approval. Both parties knew the estate was entailed, and of course before the Court can either confirm or approve of the sale of an entailed estate, it must be shewn to the satisfaction of the Court that the interests of the heirs of entail entitled to compensation have been protected, and that creditors who may have claims against the estate have also had their debts provided for. It is essential that in every proceeding by which there is to be a dealing with an entailed estate it shall be under the statutes subject to the approval of the Court. Now, looking at the

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contract in that aspect of it, and without going over the various provisions of the statutes to which your Lordship has referred, it is quite plain that on the one hand there is a mode of proceeding by which the seller of this estate is in a position of exercising a right to get the approval or confirmation of the Court. He may, under the section of the Act of 1853 to which your Lordship referred, execute a deed of conveyance; he may present it to the Court, and ask for the confirmation or approval of it, and the Court, if satisfied that the interest of the heirs of entail and creditors have been provided for, will grant approval accordingly. There would have been a block in the way of a proceeding of that kind if this contract had been entered into in 1853 or immediately afterwards, because the next heirs of entail who had a material interest might then have refused their consent. But in 1875 there was a statute passed which enabled the heir in possession to compel the consents of the second and third heirs next entitled to succeed, and under the Act of 1882 the heir in possession can equally compel the next heir to himself to give his consent. It is important to observe that such next heir is not entitled to enforce such a payment for his interest as shall amount to a prohibitory price for it, for the statute contains provisions declaring that a reluctant heir may be compelled to give his consent upon reasonable terms. If the consent be refused, the Court are in a position to make such inquiry as will enable them to ascertain the true value of the heir's consent, which being ascertained, the value of it is fixed, the money is consigned, and the Court has thereupon power to dispense with the consent altogether. And so it is quite clear that in that view of the case there is no difficulty whatever in this contract being carried out to the very letter of it according to the view which I think any buyer of this estate upon that letter was entitled to entertain.

The proposal that is made in defence to this action is—not to adopt a proceeding under the Entail Acts which will secure the end which the seller of the estate became bound to secure if he could—the proposal is to present an application to the Court in such a form that the approval of the Court cannot be obtained. The proposal is, as I understand, to apply to the Court for authority to have the estate sold at the price agreed on to the present pursuer for the purpose of substituting entailed money in room of the estate. But one condition of carrying out a proposal of that kind is that you must carry the next heir with you in some respects, and if he refuses to give his consent to the arrangement he can block the proceedings entirely. Your Lordship has read the section which provides that in an application of that kind to convert an entailed estate into entailed money, the next heir has nothing to do but appear and say, “I object to a private sale, and insist on a sale by auction.” In this way he can absolutely prevent a private sale. And if he takes up that position, what is the effect upon a bargain of this kind? Why, it destroys the bargain, because it is a sale by private bargain, and if a public sale were ordered, Mr Kennedy would have to appear in the market as a competitor with any others who might come forward for the estate. In point of fact, as I read the answers which Mr Fotheringham, the next heir, has lodged in the application by Sir Douglas Stewart, in which he says he declined to consent to a sale “in the manner proposed,” I understand he means that if a sale were to take place under that petition, he would insist that it should be a sale by public auction.

Now, I think in that aspect of the case the question is quite simple. On the one hand the seller, who has stipulated for a ratification or approval of the sale,

proposes to adopt a proceeding under the Entail Acts under which he cannot obtain the approval of the Court, because the next heir, having the power under the statute to do so, has interposed a block which will absolutely prevent that. On the other hand, the seller has it in his power to carry out the sale by taking a proceeding, not for selling this estate with a view to substituting entailed money, but for selling the estate so that he shall himself get the reversion of the price. He can have the interest of the next heir valued, and so he can carry out his contract of sale in that way. I am clearly of opinion that upon the question of construction of this contract and obligation the defender is bound to adopt a proceeding which will enable him to fulfil the contract, which it is clear he can fulfil, the matter being absolutely within his power, and that it is no implement of that contract to offer to take proceedings of another nature which a third party has power to frustrate, and with reference to which in this particular case the next heir of entail intimates that he will exercise his power, and so frustrate and prevent the sale being carried out. I am therefore of opinion with your Lordships that, following out the proceedings which are authorised by the Statute of 1853 and subsequent Acts, the defender should be ordained to execute a deed as your Lordship proposes, and that the terms of this deed in the meantime should be adjusted by a man of business.

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It is right to notice that when the point as to the mode of working out the different stages of the case with the materials for so doing was argued before the Lord Ordinary when the case was before him, the conclusions of the summons did not describe the proper course to be adopted, but there has been an amendment made on the conclusions to the effect that the defender should be decerned and ordained to execute a disposition of the estate, and thereafter to take and follow out proceedings to have the sale and disposition approved of, and I think that alternative conclusion enables the Court to deal practically with the case as your Lordship proposes.

**LORD ADAM.**—In my opinion if this had not been an entailed estate, and missives in the terms of the offer and acceptance had been exchanged, in that case there would have been a completed contract of sale, and that would be all that was required. But this was an entailed estate, and therefore such a contract of sale could not be carried out without—to use the statutory words—the “approval” or, as it is sometimes called, the “sanction” of the Court,—because an application must be presented to the Court to obtain approval in respect of the interests of the heirs of entail and creditors upon the estate. Therefore we find that the concluding words of the offer here are,—“In the event of your acceptance the sale is made subject to the ratification of the Court.” As I read that it means this—subject to the sanction or approval of the Court. I think that is the only sensible meaning that can be given to the word ratification there. Well then, if that be so, so far as I am aware, there is only one way in which the approval or sanction or ratification of the Court can be obtained, and that is by a proceeding under the 5th section of the Act of 1853, because that gives authority to the heir of entail to execute and produce, either during or before he presents an application, a disposition of the estate. Now, it is quite true, as Lord Shand pointed out, that if the entail legislation had stopped with the Act of 1853, this sale could not have been carried out, and the sanction or approval or ratification of the Court could not have been obtained, because at that date the consent of the heir or heirs of entail was

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requisite, and there would have been a bar, just as there is a bar to any other proceedings under the Act of 1882 here, because the consent in this case clearly would not have been given. But then have come the subsequent Entail Statutes, which I think it would be a waste of time, after your Lordship's exposition of them, to go over again; but the result of them is just this, that under the Act of 1882 there is a means by which the consent of the heir of entail, which was necessary under the Act of 1853, may be dispensed with, by ascertaining the money value of his expectancy or interest in the entailed estate. That is entirely a matter which can be done, and done as a matter of certainty. The Court, if it be done, cannot say anything against the sale; it must just give its sanction and approval of the sale if all the statutory formalities are carried out. There is no difficulty here, it appears to me, therefore in Sir Douglas Stewart doing what he is bound to do, I think, by the offer and acceptance, viz., in the first place, to execute a disposition of this entailed estate, and after having done that to proceed under the 5th section of the Act of 1853 and the subsequent Entail Statutes, and get the sanction and approval of the Court, which will follow as a matter of course if the statutory requisites are all attended to. Therefore I agree with your Lordship that the first thing is to ordain Sir Douglas Stewart to execute a disposition of this estate.

THE COURT pronounced this interlocutor:—"Adhere to said interlocutor in so far as it repels the first, second, and third pleas in law for the defender, and find, decern, and declare in terms of the declaratory conclusions of the summons: *Quoad ultra* recall the interlocutor *in hoc statu*, and appoint the pursuer to lodge in process within fourteen days the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer, in fulfilment of the contract of sale constituted by the missives of sale, dated 19th and 20th September 1888, founded on by the pursuer."

TODD, MURRAY, & JAMIESON, W.S.—DUNDAS & WILSON, C.S.—Agents.

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DONALD MACGREGOR, Appellant.—*C. S. Dickson.*

COMMISSIONERS OF INLAND REVENUE, Respondents.—*Sol.-Gen. Darling—  
A. J. Young.*

*Revenue—Property and Income-Tax—Casualty—Superior and vassal—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 60, schedule A—Taxes Management Act, 1880 (43 and 44 Vict. c. 19), sec. 60.*—A singular successor paid to the superior for his entry a casualty of a year's rent of the lands, without deduction of income-tax. The Crown, after receiving payment from the superior of income-tax on the casualty, assessed the vassal for income-tax on the rent. The vassal objected to the assessment, on the grounds (1) that the superior had received the whole rent for the year, and (2) that a casualty was of the same nature as feu-duty, for which deduction was allowed. The Court *sustained* the assessment.

DONALD MACGREGOR of Ardgartan, in the county of Argyll, appealed to the Income-Tax Commissioners against an assessment of £16, 9s. 6d., under schedule A of the Property and Income-Tax Acts, for the year 1888 to 1889. The assessment was based upon £659 as the annual value of Ardgartan. Macgregor's objection to payment was that he had, as a singular successor, been called upon to pay, and had paid, to his superior, the Duke of Argyll, "a casualty of superiority amounting to a full year's rent of the lands."

The Commissioners refused the appeal, on the ground that "the statute

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contains no provision authorising any allowance from an assessment under schedule A in respect of the payment of a casualty of superiority." No. 80.

Macgregor took a case for appeal.

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The facts were that Macgregor had paid the casualty to the superior without deduction of income-tax, the superior refusing to allow the deduction on the ground that he had been charged income-tax upon the casualty, and had paid it.

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Argued for the appellant;—The assessment was a double assessment on the same fund, for the year's rent had already paid income-tax. The charge in question therefore fell to be vacated as an overcharge in the manner provided by the Taxes Management Act, 1880.\* Further, the rents for the year, which formed the casualty, were not income or profit in the hands of the appellant, for he had been obliged to pay them to the superior. The appellant ought to be relieved on the principle of the case of *Sharp*,<sup>1</sup> in which a tax-collector was held not entitled to assess a proprietor of subjects, which were twice entered in a Valuation-roll, upon both entries. The case was provided for under rules 9 and 10 of the general rules under schedule A of the Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 60.† A casualty was a payment of the same nature as feu-duty. But even if it were not, the superior was proprietor in right of the rents for the year in which he obtained the casualty of a year's rent, and his feudal remedy—prior to 1874—was to enter into possession of the subject.<sup>2</sup> So, in the case of *Allan*,<sup>3</sup> the Lord Justice-Clerk (Moncreiff) said,—“The lands being in non-entry the superior is presumed to be in possession, and what the singular successor must render for his entry is the value of the beneficial enjoyment or income of the lands, for which it is the equivalent.” Such being the nature of the superior's right, the appellant, his vassal, could not be called on to pay income-tax out of the rents of the year, for they were not really his.

Argued for the Crown;—The casualty exacted by the Duke of Argyll from the appellant was merely the price payable for his entry. The appellant must pay income-tax on the rent of the year (unless he could shew a claim for exemption) just as he must pay income-tax on any other sum which became his, though he might have to pay it away to a creditor. There was no double charge on the sum any more than on any other sum which might become in the same year the income of one person, and, by his paying it away, might become the income of another. The appellant had not, in the words of the Taxes Management Act, 1880, sec. 60 (*supra*),

\* The Taxes Management Act, 1880 (43 and 44 Vict. c. 19), provides by sec. 60,—“Double Assessments.—Whenever it appears to the satisfaction of the board that a person has been assessed more than once to the duties for the same cause and for the same year, they shall direct the whole or such part of such one or more of the assessments as appears to be an overcharge to be vacated, and thereupon the same shall be by such order vacated accordingly.”

<sup>1</sup> *Sharp v. Latheron Parochial Board*, July 12, 1883, 10 R. 1163.

† The Act 5 and 6 Vict. c. 35, by sec. 60, rule 9, provides that the occupier of lands or heritages, being tenant, shall deduct the duty out of the rent, “and the occupier of lands charged on the amount of any composition, rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition, rent, or payment on paying the same.”

Rule 10 provides,—“Where any such lands . . . are subject or liable to the payment of any rent-charge, . . . or any . . . quit-rent, feu-duty, teind-duty . . . ” the owner shall deduct the duty out of the rent-charge, feu-duty, &c.

<sup>2</sup> *Hill v. Caledonian Railway Co.*, Dec. 21, 1877, 5 R. 386, Lord Deas at p. 390.

<sup>3</sup> *Allan's Trustee v. Duke of Hamilton*, Jan. 12, 1878, 5 R. 510.

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"been assessed more than once to the duties for the same cause and for the same year." Express exemption must be made out, for the statute (sec. 159) provided that it should not be lawful to make any other deductions "than such as are expressly enumerated in this Act." That was the answer to the appellant's supposed right of relief by comparing the case to that of a feu-duty. The particular deductions allowable were specified in No. 5 of schedule A, and the case did not fall under any of the deductions there specified. The payment made by the appellant was a capital payment, and the Act of 1842 contained no provision for allowing such a payment to be deducted from the yearly value in assessing for income-tax.

At advising, the opinion of the Court (LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD LEE—LORD YOUNG absent) was delivered by

LORD LEE.—The objection of the appellant is that the effect of the assessment imposed upon him is to charge doubly the rent for the year 1888 to 1889—that is, to charge it with duty, firstly, in his hands, and again in the hands of his superior, the Duke of Argyll.

This objection of the appellant is founded on the idea that a composition paid to a superior by a singular successor for his entry makes the superior the proprietor in right of the rents for the year in which the entry is obtained.

My opinion is that this is a fallacious view. I think that the composition is exigible not as rent, but as the price payable for entry, and that it is a mere accident that in some cases the amount of the price is measured by a year's rent. The vassal's right to the rents remains unimpaired so long as the superior is not in possession, and the superior could not uplift the rents without legal proceedings equivalent to a declarator of non-entry.

I therefore think that the decision of the Commissioners was right, and should be affirmed, with costs.

THE COURT refused the appeal.

WEBSTER, WILL, & RITCHIE, S.S.C.—D. CHOLE, Solicitor for Inland Revenue—Agents.

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Feb. 8, 1889.\*  
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Scotland v.  
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THE STEEL COMPANY OF SCOTLAND, Pursuers (Respondents).—

*D.-F. Mackintosh—Sir Charles Pearson—Salvesen.*

TANCRED, ARROL, & COMPANY, Defenders (Reclaimers).—*Balfour—Jameson.*

*Contract—Specification—Construction—"30,000 tons more or less"—Words of estimate or expectancy.*—A steel company made the following offer to T., A., & Co., the contractors for the construction of the Forth Bridge. "We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices. . . . The estimated quantity of the steel we understand to be 30,000 tons, more or less." T., A., & Co. wrote in reply,—"We hereby accept your offer to supply the whole of the steel required by us for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained." The terms and conditions in the offer were repeated, and among these the sentence, "The estimated quantity of steel we understand to be 30,000 tons, more or less."

One of the conditions was that T., A., & Co. should have power to cancel the contract should their "contract for the erection of the bridge be from any cause determined," as provided in their principal contract with the Forth Bridge

Railway Company, T., A., & Co. paying for the steel completed up to that date, and for any loss the steel company might sustain by the cancelment of the contract. No. 81.

Another condition was that delivery should be made in such quantities as might from time to time be required, extending over four years, it being understood that T., A., & Co. should furnish specifications, "so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named." Feb. 8, 1889.  
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In an action brought by the steel company against T., A., & Co. for declarator that the defenders were bound to take from the pursuers the whole steel required in the construction of the bridge, and for damages in respect of the defenders having supplied themselves elsewhere with steel required for the bridge, the defenders pleaded that the contract was limited to the supply of 30,000 tons, more or less.

Held that the defenders were bound to take from the pursuers the whole steel required for the bridge, the mention of the 30,000 tons being merely by way of estimate of the quantity to be required.

(VIDE previous report, Dec. 22, 1887, 15 R. 215.)

On 27th February 1883 the Steel Company of Scotland sent the following letter to Messrs Tancred, Arrol, & Company, contractors for the construction of the Forth Bridge,—“Gentlemen,—We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz. :—

Steel plates, per ton,	. . . . .	£10	0	0
Angles,	. . . . .	8	10	0
Tees, up to 12 united inches,	. . . . .	8	10	0
Tees, 12" x 6½" x 1",	. . . . .	12	0	0
Channels, 10" x 3",	. . . . .	10	10	0
Do., 12" x 4", or, 14" x 3",	. . . . .	14	0	0
Flats,	. . . . .	8	10	0
Rivet bars,	. . . . .	9	10	0"

Then followed a set of general conditions to the same effect as those after mentioned.

On 7th March 1883 Messrs Tancred, Arrol, & Company returned the following reply,—“Gentlemen,—We hereby accept your offer, dated 27th February, to supply the whole of the steel required by us for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz.,” [the prices as above and the general conditions were then repeated]. Under head “General Conditions,” there were these stipulations,—“The work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract for the construction of the Forth Bridge, and to the entire satisfaction, in all respects, of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect, in person or by deputy, the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory, or not in accordance with the said specification, and his decision is to be final and conclusive. . . .

“Upon the first day of each month you shall render us an account of the material delivered during the preceding month, and the amount found due by us thereon is to be paid by us to you in cash on or before the first Tuesday of the following month.

“We are to have the power to cancel this contract should our contract for the erection of the bridge be from any cause determined, as provided in our principal contract with the company, upon the condition that we

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give you three calendar months' previous notice in writing, and supply you with specifications for those three months to keep you fairly employed for that time, and upon the further condition that we will pay to you the contract price for all steel you may complete according to specification at or before the expiry of such notice, whether the steel be delivered or not within that time.

"Further, we undertake to pay you the amount of loss (if any) you may sustain by the cancelment of your contract or materials (pig iron, ores, &c.), which you may have purchased before notice as against this contract.

"The steel to be manufactured at the works of the Steel Company of Scotland, Limited, and deliveries are to be made at such times and in such quantities as we may from time to time require, and to extend over four years, unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named.

"The estimated quantity of steel we understand to be 30,000 tons, more or less."\*

\* The specification of the contract between Tancred, Arrol, & Company and the Forth Bridge Railway Company referred to was as follows:—

#### "CONTRACT No. 1.

#### (VIADUCT ACROSS THE FORTH.)

#### SPECIFICATION.

##### GENERAL CONDITIONS.

"3. The railway and works intended to be constructed, and included in this specification, consist of,—

"First, A continuous main double line, from a point marked about 440 yards south-east of the end of Newhalls Pier, in the parish of Dalmeny, to a point about 580 yards north of the end of West Battery Pier, in the parish of Dunfermline. Length one mile and a-half or thereabouts.

"Second, A viaduct of the same length, constructed of steel, iron, masonry, and concrete, with spans as follows, or thereabouts:—

"2 spans of 1700 feet.

2	"	675	"
15	"	168	"
5	"	25	"

#### "IRONWORK IN CAISSONS.

"51. The whole of the iron for the permanent and moveable caissons, &c. . . . The cutting edge of the caissons will be formed of steel-plates, or of a cast-steel curb, as may be determined by the engineer. . . .

#### "SUPERSTRUCTURE.

"53. The engineer will give instructions as the work proceeds as to the particular form, sectional area, and detail of the several struts, ties, girders, floors, parapets, bed-plates, holding down bolts, and other parts constituting the superstructure of the main spans and of the viaduct approach. . . .

"54. The contract sum must be based upon the assumption that the superstructure will include 42,000 tons of steel work in main spans, and 20 tons of cast steel in bed-plates and sundries, 3000 tons of wrought-iron in approach viaduct, 200 tons of cast-ironwork in bed-plates of approach viaduct and sundries, 2000 tons of old iron to weight ends of cantilevers,  $1\frac{1}{2}$  miles of permanent way for double line, with expansion joints complete, and asphalted side-walks with hand-rails, as shewn on the drawings, and any alterations or omissions in,

Following on the offer and acceptance, the Steel Company supplied No. 81. steel up to 31st May 1887 to the extent of 26,230 tons.

On 28th June 1887 the Steel Company raised an action in the Court of Session against Messrs Tancred, Arrol, & Company, concluding for declarator "that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders, dated 7th March 1883, and the defenders should be decerned and ordained to make payment to the pursuers of the sum of £100,000 sterling, or such other sum as shall be ascertained in the process to follow hereon, as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

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They averred;—(Cond. 5) "It has recently come to the knowledge of the pursuers that the defenders have been supplying themselves with steel for the purpose of being used in the construction of the said bridge from other sources over and above the said excepted amount of 12,000 tons, as to which no question is raised. This they have been doing at prices considerably under the contract prices above mentioned."

In their statement of facts the defenders averred (Stat. 4) that by the custom and practice of the iron and steel trade the contract libelled was regarded as for 30,000 tons of steel as an estimated quantity. That the words "more or less" were understood to mean, and were intended by parties to mean, that the quantity delivered should not exceed or fall short of the estimated quantity by more than 5 per cent. That the parties had since the contract was made acted on the footing that if the defenders took 30,000 tons of steel from the pursuers they might get any extras elsewhere as not being within the contract of the parties. In statements 5-9 inclusive they averred that they had, with the acquiescence of the pursuers, purchased steel from other companies, such as rivet bars (Stat. 5), steel for temporary purposes (Stat. 6), steel shoes for the caissons (Stat. 7), steel for the approach viaduct (Stat. 8). In statement 9 they averred that the pursuers had failed to deliver timeously the required steel, and that but for that delay the defenders would have taken from them by 7th March 1887 not less than 32,000 tons of steel.

On 26th November 1887 the Lord Ordinary (Trayner) allowed the defenders a proof of their averments contained in their statement of facts 4 to 9 inclusive, and to the pursuers a conjunct probation.

The defenders having reclaimed to the First Division of the Court, their Lordships, on 22d December 1887,<sup>1</sup> altered the Lord Ordinary's interlocutor in so far as it allowed a proof of the averments of custom and practice of trade contained in the 4th article of the defenders' statement of facts; *quoad ultra* adhered to the interlocutor, and remitted to the Lord Ordinary to proceed.

or additions to, the above quantities will be estimated at schedule rates and be added to or deducted from the contract sum as the case may be. . . .

#### "MAIN SPANS.

"56. The main spans include two openings of 1700 feet centre to centre, and two of 675 feet spanned by continuous girders. . . .

#### "STEELWORK.

"70. The whole of the metal in the main spans will be steel, of a make specially approved of by the engineer, and no wrought or cast-iron will be used unless hereafter ordered by the engineer. . . ."

<sup>1</sup> 15 R. 215.



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On 21st February 1888 a proof was led, the import of which sufficiently appears in the opinion of the Lord Ordinary, *infra*, and in the opinions of the Judges in the Inner-House.

On 2d March 1888 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Finds and declares that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry in so far as such steel is or may be required in the construction of the four main spans of said bridge, and decerns." \*

\* "OPINION.—The first question to be decided in this case is, What is the meaning of the contract between the parties which was constituted by the letters of offer and acceptance set forth upon record? The pursuers maintain that that contract is to be read literally according to its expression, and that it binds the pursuers to provide and the defenders to take the whole steel required by the defenders for the construction of the Forth Bridge at the prices specified. On the other hand, the defenders maintain that the contract is one for 30,000 tons of steel, more or less, but not a contract for the whole steel required for the bridge.

"The defenders aver that, according to the custom and practice of the steel trade, 'a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described in general terms, and not definitely fixed, but which has a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed.' According to the said custom and practice, the contract libelled is a contract for 30,000 tons of steel, more or less. When this case was debated before me in the Procedure Roll, I allowed the defenders a proof of this averment of custom, reading the defenders' statement as amounting to this, that the contract was framed in such a manner as technically to express (in the particular trade referred to) a contract for 30,000 tons, with a certain margin, more or less. The Court, however, on a reclaiming note, took a different view, holding that there was nothing technical about the contract or its expression requiring or admitting of interpretation by proof of custom; and accordingly the proof (so far) which I had allowed was refused. Dealing, therefore, now with the contract as one in no way technical, and one which is to be enforced according to the natural and ordinary meaning of its terms, I have no hesitation in holding that it binds the defenders to take from the pursuers the whole steel required for the construction of the Forth Bridge, 'less 12,000 tons of plates' ordered from another firm. This is a matter which does not admit of any argument; it is simply a question of what the contract says, and its words do not appear to me to have more than one meaning.

"The defenders, however, further aver that 'the parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers they might get any extras elsewhere, as not being within the contract of the parties,' and in support of this averment the defenders condescend on several specific transactions. Of this averment, as well as of the alleged specific transactions, a proof was allowed, and has now been led, with the result that, in my opinion, the defenders have failed to establish their averment. The directors of the pursuers' company (so far as available at the proof), and their manager and secretary, distinctly deny that they ever acted in regard to the contract in question on the footing averred by the defenders; and the several specific transactions are explained satisfactorily, and in such a way as to shew that they were neither known to, nor regarded by, the pursuers as in any way infringing or modifying the contract.

"A word or two in regard to each of the specific transactions will be sufficient to indicate my view of the evidence bearing upon each.

"(1) In 1883 the pursuers supplied 3000 tons of steel to Messrs P. & W. McLellan, to be used by them in the construction of the viaduct approaches to the Forth Bridge. These viaduct approaches it had been originally intended to form of wrought-iron, but it was afterwards determined by the engineer that

On the 12th May the parties lodged a joint minute, in which they concurred in making, *inter alia*, the following statements:—“(1) That

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they should be constructed of steel. P. & W. M'Lellan had made a contract with the defenders for the iron work, and their contract was continued after the change to steel had been resolved upon. The steel obtained by them from the pursuers was for the purposes of this contract. The defenders rely on this transaction as shewing that the pursuers did not read their contract as one for the 'whole steel required for the Forth Bridge,' as they supplied steel to P. & W. M'Lellan in the knowledge that it was to be used in the construction of the bridge. The pursuers explain in reply that they did not regard the viaduct approaches as part of the 'bridge,' as that word was read by them in their contract. They regarded the bridge as the four main spans—nothing else. It may be that the contract in question, strictly read, covers the approach viaducts, and that the pursuers were wrong in law in giving it the limited construction which they did. They do not now wish to depart from that limited construction, rightly or wrongly; it is the view they have always held, and they are willing to abide by it. If they are right, then the transaction with P. & W. M'Lellan has no bearing upon the case; but if they are wrong, it does not avail the defenders. For if Mr Riley's explanation is an honest one (as I do not doubt it is), their supplying steel for what was believed not to fall within the pursuers' contract could not be regarded as a departure by them from their contract rights as understood by them. And it is worthy of notice that in 1883 no question had arisen between the parties as to the meaning of their contract. But the pursuers' position as regards their contract came out very distinctly when the second transaction took place, to which I shall now refer.

“(2) In 1884 the defenders ordered from the Clyde Rivet Company a large quantity of steel rivets. The Rivet Company applied to the pursuers to know at what price they would supply the necessary steel bars, informing the pursuers that the rivet bars were 'for Forth Bridge contract.' The pursuers at once communicated on this subject with the defenders, and afterwards there was a meeting between the defender Mr Arrol and the manager and secretary of the pursuers' company. What took place at that meeting appears from the proof. Mr Arrol says that he maintained that it was no matter to the pursuers where he got his rivet bars (although they formed a specific item in the pursuers' contract), provided he took from the pursuers the 'contract quantity' of 30,000 tons of steel in all, which he said he would do. Mr Riley and Mr M'Lellan say, on the other hand, that 30,000 tons, as 'contract quantity,' was not mentioned; that Mr Arrol said he had ordered rivets, not rivet bars, and was not therefore violating the contract; that his partners wished rivets ordered and not rivet bars; and that the pursuers should let the matter pass, as there would more steel be required than was originally expected, which would fall to be supplied by the pursuers under their contract. This meeting, and what took place at it, having been reported to the directors of the pursuers' company, it was agreed that they should waive their rights in reference to the rivet bars, in order to get on smoothly with Mr Arrol.

“I do not hesitate to accept, in this conflict of evidence, the statements of Mr Riley and Mr M'Lellan rather than the statement of Mr Arrol. It is, besides, the statement of two witnesses against the statement of one—the two having no pecuniary interest in the matter, the one having great interest. At the very lowest, it is impossible to hold on such evidence that the defenders have proved (and the *onus* lies on them) that in the transaction about the rivets the pursuers acted upon a reading or construction of their contract such as the defenders aver they acted upon.

“(3) The steel for the shoes of the caissons stands in the same position as regards the steel sold to P. & W. M'Lellan for the viaduct approaches, and I need not say more on this transaction.

“(4) The fourth transaction was steel sold for 'temporary purposes,' and it is admitted by the defenders that the evidence on this matter is not very strong in support of their view. I think the evidence is distinctly against them. The steel sold for temporary purposes was sold by the pursuers to the defenders on

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the defenders had ordered outside the contract, and have used or will use for the permanent work of the four main spans of the Forth Bridge not less than 5000 tons of steel, viz., 2400 tons plates, 2000 tons angles, 300 tons tees up to 12 united inches, and 300 tons flats. (2) That, assuming the previous interlocutors in the cause to be well founded, the pursuers are entitled to damages in respect of said 5000 tons. (3) That the measure of damages in respect of said 5000 tons shall be held to be the difference between £6, 5s. per ton overhead and the contract prices for the different classes of steel specified in article 1 hereof. That the amount of damages represented by this admission is £14,850. (4) That the pursuers' claim in respect of all further quantities of steel already used, or which may be used by the defenders for the said four spans, and their whole rights as to the assessment of damages in respect thereof, are reserved for subsequent determination, the defenders also reserving their whole pleas and rights thereanent, but it is agreed that the 5000 tons in article 1 shall be held to be the steel of the different classes mentioned, first taken by the defenders outside the contract."

the statement of the latter that it was not to be used in the permanent structure, and the correspondence about this steel distinctly bears that it was 'not to be placed against contract, being intended to be used merely for temporary purposes,' and was at the defenders' request advised, priced, and invoiced 'so as to keep them distinct from the bridge construction.'

"The defenders relied very much on the terms of the minute\* of the pursuers' directors, dated 23d September 1885. I agree with Mr M'Lellan in thinking that that minute is 'unfortunate' in its expression; but I also agree with him as regards the explanation to be given of it, and which is given by him. I will only say further with regard to this minute and the explanation, that it appears to me that the pursuers would never have ventured to approach Mr Arrol with the proposal that he should pay for steel 'at our contract prices for the Forth Bridge,' if they had been asking him for orders which their contract did not cover. The prices of steel had by September 1885 fallen so much below what they were in 1883, when 'the contract prices for the Forth Bridge' were fixed, that any such proposal would only have made the pursuers ridiculous, as Mr Arrol would not have been slow to shew them. As regards what took place at the meeting on 2d October 1885, I again prefer the evidence of Mr Riley to the evidence with which he is in conflict. I regard the minute\* of 7th October 1885 as an honest statement of what took place at the meeting on the 2d. Further, I accept as correct the evidence of Mr Riley and Mr M'Lellan as to the meeting held on 29th April 1887.

"On the whole matter, I am of opinion that the defenders have failed to establish the averments on which their fourth and fifth pleas are based, and that these pleas ought therefore to be repelled."

\* [The minutes to which his Lordship referred were these:—"23d September 1885.—Messrs Tancred, Arrol, & Company asked that the company accept bills occasionally in payment of their account and bear one-half the charge of discounting. It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity and at our contract prices for the Forth Bridge." "7th October 1885.—Mr Riley reported that he had seen Messrs Arrol and Philips, of Messrs Tancred, Arrol, & Company, and had arranged with them that this company would, when desired by their firm, draw upon them in payment of their account, and only one-half of the costs of discounting to be charged.

"In consideration of this concession these gentlemen agreed that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge, except that covered by the contract with the Landores Siemens Steel Company, which is for 12,000 tons plates.

"Messrs Arrol and Philips pledged themselves to carry out this arrangement, but stated that they did not think it judicious to embody it in a formal letter."]

On 13th June 1888 the Lord Ordinary interponed authority to the joint minute, and in respect thereof, decerned against the defenders for £14,850, and found the defenders liable in expenses.

The defenders reclaimed, and argued;—The reference to the 30,000 tons of steel occurred in identical language in both the offer and acceptance, and that was against the idea that it was there merely for information. The quantity of the steel was amongst the very conditions of the contract, and the language used with reference to it, viz., “the understanding is,” &c. was language appropriate to define obligations, and to signify a term of a contract. The words “more or less” were words used to leave a latitude, but a latitude only needed where the parties were bargaining.<sup>1</sup> It was not a question of repugnancy at all. Instead of defining the quantity hard and fast the term of the contract was constituted by a condition inserted into both documents. Both parties (and most of all the pursuers) would have to know beforehand pactionally what was the quantity of steel to be supplied. The pursuers would never have undertaken an absolutely blind contract. Then, again, the clause as to deliveries made this necessary. The word “understanding” was used every day in mercantile documents as “agreement.” The clause should have read “to supply the whole steel which we concur in contracting shall be required for the bridge, 30,000 tons.” That was a reasonable *consensus in idem* for something more or less indefinite. There was no general rule of law to be deduced from the cases, which were each decided on their own special circumstances, but the cases cited below favoured the defenders’ view.<sup>2</sup> The case of *Gwillim v. Daniel*<sup>3</sup> was different from this. There the subject of the sale and contract was notoriously a by-product, and the Court construed the words, “say from 1000 to 1200 gallons” as words of expectancy, on the ground that it would be unreasonable to expect the seller to make so much of the product as would be necessary to produce the exact quantity of the by-product. In *M’Connel v. Murphy*<sup>4</sup> the words “say about 600 red spars” were held to be words of expectancy, and not of warranty, but only because it was held impossible to construe strictly a contract by a timber merchant for his winter’s cutting. The contract, then, on every principle of legal construction, being one to supply 30,000 tons of steel, with a percentage latitude covered by the words “more or less,” the second question was, what parts of the bridge did it include? This was of importance, looking to the view taken of the specification by the pursuers at the proof. They had now broken the universality and integrity of the contract which they maintained on record. Under stress of the proof adduced by the defenders that they had, with the acquiescence of the pursuers, purchased steel from other parties for certain portions of the bridge, they maintained that what was contained in the specification and imported into this contract was merely the superstructure of the four main spans. This was not so, however, for it included the approach viaducts, the rivets, and the cutting edge of the caissons. The Lord Ordinary had erred in his view of the proof. The defenders had proved that they had, with the acquiescence of the pursuers, bought steel for these parts of the bridge as well as steel for temporary purposes from parties other than the pursuers. Argued for the pursuers;—(1) As to the construction of the docu-

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<sup>1</sup> Benjamin on Sale, p. 499, 4th ed.

<sup>2</sup> *Morris v. Levison*, Feb. 10, 1876, L. R., 1 C. P. Div. 155; *Leeming and Another v. Smith*, Jan. 17, 1851, L. R., 16 Ad. and Ellis, 275.

<sup>3</sup> *Gwillim v. Daniel*, 1835, 5 Tyr. Exch. Rep. 644.

<sup>4</sup> April 22, 1873, L. R., 5 P. C. 203.

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ments which embodied the contract.—Had the offer and acceptance stood alone, it was not suggested that there could be two constructions. It was just a covering contract to embrace the whole steel required for the bridge, and made more emphatic by the deductions in respect of the previous contract of 12,000 plates with another party. The specification shewed clearly that what was covered by it was the steel required for the superstructure of the four main spans, and for nothing else. To this the pursuers had consistently confined their claim at the proof. It was said, however, that the natural definition of the subject of the contract was overridden and altered by the expression, “the estimated quantity of steel we understand to be 30,000 tons, more or less.” Surely such a cardinal alteration would have been found among the terms and conditions of the contract, and not near the end of the deed immediately before the clause of arbitration. It was just as if it was sought to qualify the dispositive clause in a disposition by something at the end of the deed before the clause of registration. The alteration was an impossible one for the parties to adopt. It was highly improbable that the defenders would tie themselves down to a contract for 30,000 tons of steel when the pursuers were to give them “more or less” as they required, and when, according to the statement on record, the work contracted for by the defenders was one of great magnitude, and the engineer had full power to increase or diminish, &c. The word “estimated” merely meant “presently estimated.” It was true the word belonged to the category of contract, *e.g.*, in a building contract “estimated price” meant a calculated fixed price, but there was no analogy between that case and the present. In a sale of land boundaries and measurements were given, and then an estimated acreage or rent was adjected, but the latter could not override the boundaries or the measurements by which the parties had contracted. The words, then, were words of “expectation,” and necessary to the working out of the clause for monthly deliveries and the clause of cancellation, the object of which was to protect the Steel Company if there was a stoppage of the works. The cases bore out that there was no general rule as to the effect to be given to a specification of quantity adjected to a general contract, but in the cases cited *infra*<sup>1</sup> it had been held that the quantity was only inserted as an estimate of what would be required. The case of *Leemings* was very special. The only force which could be given to the words, “not less than say 100,” was that at least 100 should be given. In the case of *Morris* the Court, in construing the words, “say about 1600 tons,” proceeded upon the view that the owner of the vessel must be dealt with as a person who knew the carrying capacity of his own vessel, and that it would have been unreasonable to require the person who was to provide the cargo in ignorance of this, to deliver more than the quantity estimated as necessary by the owner of the vessel himself. The contract, then, upon a sound construction, and read in the light of the specification, was a contract to supply all the steel required for the superstructure of the four main spans of the bridge. But (2) assuming that the contract was ambiguous, and required construction from the actings of parties, it was not enough for the defenders to prove that the pursuers had adopted an erroneous construction. They must shew that they had adopted the particular construction for which the defenders contended. The Lord Ordinary was right in his views upon the evidence on the subject.

<sup>1</sup> *Gwillim v. Daniel*, *supra*, 5 Tyr. Exch. 644; *M'Connel v. Murphy*, *supra*, L. R., 5 P. C. 203; *Brawley v. United States*, Oct. 1877, 6 Otto's Amer. Rep. 168; *North British Oil and Candle Co. v. Swann*, May 27, 1868, 6 Macph. 835, 40 Scot. Jur. 444.

At advising,—

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LORD PRESIDENT.—We have now before us the evidence which has been led under the authority of Lord Trayner's interlocutor of the 26th of November 1887, as modified by our interlocutor of the 22d of December 1887, and with the additional light thus afforded we now resume consideration of the terms of the contract between the parties.

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The offer which was made by the pursuers and the acceptance by the defenders are precisely in the same terms, that is to say, the one is just an echo of the other, both being expressed in the very same words, making allowance for the difference of expression arising from the parties being different. And therefore it is quite plain that the terms of this contract, although it is expressed in letters, must have been the subject of very careful and anxious consideration between the parties, and that is not surprising, because it was a contract of a very heavy kind involving great interest and great risks both on the one side and on the other. The contract is for the supply of steel work, the pursuers of the action being steel manufacturers, and the question comes to be what is the steel work that falls under the contract, or, in other words, what is meant when the one party offers to supply "the whole of the steel work required by you for the Forth Bridge, less 12,000 tons of plates," and the other in the same words accepts of that offer.

There seems very little room for construction or doubt in regard to the words that I have quoted, "the whole steel required for the Forth Bridge." But there are considerations arising from other terms in this contract that require to be taken into view, in order to understand what is meant by the term "required for the Forth Bridge."

Now, the first observation that occurs to one is that in specifying the prices which are to be charged for each kind of steel we get a view of what sort of steel—what form of steel work—is intended to be supplied under the contract. There are enumerated steel plates at £10 per ton, angles at £8, 10s. per ton, and in like manner so much a ton for tees of a certain size, for tees of another size, for channels and for channels of another size, for flats, and for rivet bars. Therefore it is natural to suppose that the kind of steel—by which I mean the form of the steel—that is to be supplied for the purpose of this contract consists of these different things—steel plates, angles, tees, channels, flats, and rivet bars.

Now, the next observation that occurs to one is that there are immediately after this enumeration of the forms of steel work that is to be supplied certain general conditions, and the first of these appears to me to be very material, "the work and material therein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract" (that is, Tancred, Arrol, & Company's contract) "for the construction of the Forth Bridge, and to the entire satisfaction in all respects of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect in person or by deputy the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory or not in accordance with the said specification, and his decision is to be final." Now, this reference to the specification applicable to the contract between the defenders and the Forth Bridge Railway Company is extremely important, because it shews very clearly upon the face of it what is the steel work required according to the terms of that

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specification for the construction of the Forth Bridge. It shews, quite in accordance with the enumeration of the forms of steel which I have already referred to, that the steel required is just the steel that has been priced in the contract between the two parties before us. It shews that that steel work is to be used exclusively for the construction of the superstructure of the four main arches of the bridge, and has nothing to do with any other part of the bridge whatever. There is just one exception to that statement which it is necessary to notice in passing, and that is that in the specification, in speaking of the caissons upon which the main pillars of the bridge are to stand, it provides that "the cutting edge of the caissons will be formed of steel plates or of a cast-steel curb, as may be determined by the engineer." Now, that occurs under the head "iron work in caissons," and therefore the steel there mentioned is a mere incident of the very heavy iron work required for the caissons. It is the cutting edge of the caissons, by which I understand from the evidence we have had the lowest part of the caissons,—which cuts into the ground below water,—and to say that that is a part of the steel work required for the Forth Bridge is I think a misconception altogether of that part of the specification. That is not dealt with in the specification as steel work. It is dealt with as iron work, the edging of steel being a mere incident. Therefore I return to what I said before, that the steel, which, according to the specification in the contract between the defenders and the Forth Bridge Railway Company, is required, is steel that is to be applied exclusively in the construction of the superstructure of the four main arches of the bridge.

Now, by these means we are enabled to fix, I think, with precision and accuracy what is meant by the words of the contract between the parties before us when they say that the pursuers are to supply the whole of the steel required for the Forth Bridge, less 12,000 tons. It means, and can mean, at the date that these letters were written, nothing but the steel work specified in the specification of the principal contract. Now, the words, "the whole of the steel required" are certainly very emphatic. It is difficult to understand that the parties could have meant something less than the whole of the steel which is according to the specification of the principal contract necessary for the construction of the bridge. Surely the words "whole of the steel" would never have been used unless that was in the contemplation of the parties. But if these words are emphatic, I think they are rendered even still more emphatic by the exception which is introduced, "with the exception of 12,000 tons of plates," which, as we learn, had been already secured by the defenders and paid for to another steel company altogether. It is to be the whole steel that is required by the contract with the Forth Bridge Company less 12,000 tons, but less nothing else.

Now that being so, I think the contract could not have admitted of the slightest doubt as to its meaning if it had not been for some words which are used at the very end of the conditions to which I have already referred, and upon which indeed the whole argument of the parties turns. The words are these—"The estimated quantity of steel we understand to be 30,000 tons, more or less." Now, it is contended that that limits the words of obligation to supply and of obligation to take to 30,000 tons or thereabout. It appears to me that these are not words of contract at all, but the expression of an understanding: and it was certainly most natural and convenient that there should be some such understanding between the parties. A contract of this kind is of course a very serious one, and it is very difficult to foresee what might be the extent of the

furnishings likely to be required under its leading words. It is a very extensive and a very large contract, and of a most unusual and novel kind; and therefore in the course of the communications between the parties which must have preceded this very carefully expressed letter and answer, it would of course naturally come to be considered what about the quantities expected? The pursuers would naturally say—"We should like to have some idea of what you are likely to require"; and the answer to that is—"Well, 30,000 tons, more or less." Does that limit the obligation in the principal part of the contract? I think not. I think these are mere words of expectation or understanding or estimate, but certainly do not limit the very emphatic words with which the contract begins. There is another reason why this expression was introduced in the place where it is, because it is immediately preceded by this condition—"The steel to be manufactured at the works of the Steel Company, and deliveries are to be made at such times and in such quantities as we" [that is, Tancred, Arrol, & Company] "may from time to time require, and to extend over four years, unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named." If these equal monthly quantities were to be supplied according to the demands of the defenders over a period of four years, it certainly was all the more necessary that the pursuers should have some notion of what kind of quantities were to be required each month, or what was likely to be the total quantity required to be delivered in equal portions over four years. If the parties had gone blindly into this contract, not knowing whether the quantities ultimately to be required might be 30,000 or 300,000 tons, it would have been a very awkward position for both parties. And therefore it is that they come to an understanding as to what is probably to be required during that period. If the pursuers had not had this hint given them as to what they were to provide for, they would have been placed in the greatest possible difficulty in managing their works. Their works might require to be kept in more or less constant operation for the purpose of this contract than they would otherwise be if the quantity were larger or smaller; and very possibly, in order to fulfil their obligations under this contract they might require additional machinery in their works or even an extension of the works themselves if the quantities had been of such an amount as to require that that should be done. And therefore they naturally said, "What quantity is it that you expect us to deliver within these four years?" And the answer is, "The estimate, the understanding"—that is all, an estimate or an understanding—"is 30,000 tons." I come without any hesitation to the conclusion that these words do not in any way limit the legal obligation in this contract, and that the pursuers are entitled to supply and the defenders are bound to take the whole quantity of steel required by the specification of the principal contract to be supplied for the purpose of constructing the Forth Bridge; but that is limited in the specification to the superstructure of the four main spans.

Now, when the parties came into Court, it seems to me that they were both in the wrong. The claim made by the pursuers was a great deal too large, and quite unjustified by the contract as I have now construed it, because they came into Court demanding that they should have the right to supply under their contract not merely the steel which within the meaning of the contract was required by the specification of the principal contract for the construction of the

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four main spans, but also all the steel which by subsequent alteration of the principal contract had come to be used for portions of the bridge other than the four main spans. And that, I think, was an entirely unfounded claim. The defenders, on the other hand, have maintained throughout that they are not bound to take from the pursuers the steel requisite for the four main spans of the bridge as specified in the specification of the principal contract, and therein they were wrong.

There is only one part of the case remaining to be noticed, and that is, that the defenders contend that the pursuers have by their actings interpreted this contract in a sense different from that for which they now contend, and that their actings must be taken to override the terms of the contract, and to shew that the true meaning of the parties, whatever the words used may be, was different from that which I have now explained.

Now, I think this attempt upon the part of the defenders has proved quite a failure. In the first place, in regard to the supplying of steel for other parts of the bridge, that would have been a very good answer if the true construction of the contract in itself had been that the pursuers were entitled to supply all the steel that might be required for any part of the bridge according to the altered contract afterwards made between the defenders and the Forth Bridge Company. But that not being the meaning of the contract as I construe it, and the meaning of the contract plainly being that the steel to be supplied is limited to that which is necessary for the superstructure of the four main spans, this fact of the defenders taking steel for the other parts of the bridge from other manufacturers, with the knowledge and without the objection of the pursuers, only shews that at that time the pursuers were construing their contract a great deal more correctly than they did when they afterwards came into Court. Then there was another matter regarding the steel for temporary purposes. I cannot conceive that the fact that that was supplied and taken by the defenders from other dealers than the pursuers could possibly have been objected to by the pursuers as being a departure from the contract which they had made as we now construe it, because they are not under any obligation to supply, and the defenders are not under any obligation to take under the contract before us, any steel for temporary purposes. Then there is another matter in which it is said the contract has been departed from as now construed by the pursuers, and that is in regard to the matter of rivet bars. Rivet bars was one of the things specially within the contract, and were to be supplied at £9, 10s. a ton. Now, it certainly is the case that the defenders were desirous, in place of receiving delivery of rivet bars, to purchase rivets in a manufactured state—not merely the materials for making rivets, but manufactured rivets ready to be used. There was a good deal of communing between the parties on this subject, and there is a good deal of conflicting evidence about it. I am disposed to take the view that the Lord Ordinary has done in preferring the evidence for the pursuers on this subject to that of the defenders. But really I do not think it of very much consequence to determine exactly which of them is giving the more precise and accurate account of the communings on this subject, because it is, to my mind, perfectly obvious that the pursuers were not disposed to press this matter, seeing that the defenders were very anxious to have their rivets direct from the rivet-maker instead of taking the rivet bars from the Steel Company. They say, and say most naturally—"It would not do for us to quarrel with the defenders on this matter; our interests are bound up with theirs in this great contract in such a way that

nothing could be more inexpedient than that we should give them any cause of No. 81.  
 quarrel, and therefore by all means let us yield this point rather than have any  
 question about it." It is impossible to say that that is an acting of the parties Feb. 8, 1889.  
 which is sufficient to take off the plain meaning of the contract itself, and to Steel Co. of  
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Lastly—for I think this is the last point—reference is made to certain minutes of the pursuers which seem to imply that they were not of the mind that they were entitled to supply the whole of the steel work of the bridge, and that they would like very much to have their contract so construed and extended as to include the whole. The minutes, so far as I see, were not communicated to the defenders, and therefore could not have misled them in any way, and the verbal communication which the pursuers say was made to the defenders on this subject, and which formed the subject of an agreement or arrangement, is entirely denied by the defenders. They deny that there was any such communication or any such arrangement. Now, is this an acting by which the contract can be construed? I think not. It is not an acting of the parties at all. I can quite understand what was in the minds of the pursuers, or some of the directors—that in consequence of that little controversy about the rivets and the rivet bars they would like to have had some very plain assurance that no other question of that kind should be raised. The cause—the beginning of the whole affair—was that the defenders had proposed an alteration on the terms of payment under the contract, that they were to give short bills instead of cash as stipulated in the contract, and the pursuers very naturally thought, "Well, this is a very good opportunity for requiring a little concession from the other side, and we should like to have a positive assurance that there is to be no more question about our right to deliver the whole of the steel required." That seems to have been the origin of the thing, but I really do not attach any importance to this point, for the reason I have already stated, that I think it is not an acting of the parties that can construe the contract. The proof therefore, it appears to me, which was allowed does not contribute to throw any material light on the question before us, and I think we are just driven back to the construction of the contract itself, coupled, however, with the specification of the principal contract, which is directly imported by reference into the contract between the pursuers and the defenders for the purpose of shewing what are the obligations laid upon Tancred, Arrol, & Company as to the use of steel in the construction of the bridge, and upon that question I have already expressed an opinion and do not require to say anything further on the matter. I am for adhering to the Lord Ordinary's interlocutor, that is to say, to the interlocutor of 2d March 1888, which, of course, was brought up along with the last interlocutor which is expressly reclaimed against, and if we adhere to the interlocutor of 2d March 1888 it is quite unnecessary for us to consider anything further than that, because it is matter of arrangement between the parties by the minute which is before us, that if that interlocutor of the 2d March is well founded and is to stand, then the measure of the damage and the amount of damage is settled by agreement.

**LORD MURK.**—I also concur in thinking that the Lord Ordinary has come to a sound conclusion upon the main question brought before him, and which he decided on 2d March. I have very little to add to what your Lordship has so

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clearly stated as to the meaning of this contract. It appears to me that the words of the offer and acceptance are in themselves very clear and distinct. The steel to be furnished was the whole steel required for the Forth Bridge, and if these words had stood alone they could scarcely have given rise to any dispute. But it is said there are certain words in the latter part of the offer which qualify and control these expressions, and these are the words—"The estimated quantity of steel we understand to be 30,000 tons, more or less." It is said that by these words the leading provision of "the whole steel" is controlled. I cannot adopt that construction. The nature of this contract, the very expensive character of the works that were to be put up, and the time that was required to carry the work to a conclusion, would naturally lead the parties who furnished so large a proportion of iron or steel to ask to have a general idea as to the quantity that might be required in order to enable them to go on with the work, and I think therefore that these words were merely put in as a statement of the general understanding of the parties as to the probable amount of steel that would be required for the bridge. "Thirty thousand tons, more or less," evidently means that in this particular contract there might be less than 30,000 required, or there might be more than 30,000 required. That is pretty clear reading these two passages alone, but when we come to look at the terms of the specification it is made quite distinct that the whole steel required for the Forth Bridge meant the whole steel to be used in the formation of the four main spans of the bridge, because it is upon that part of the work alone that at that time steel was to be required. I think, therefore, the view which the Lord Ordinary has taken, and which the pursuers themselves have taken since the case was last before us, is that the fair meaning of the contract was the whole steel required for the erection of the superstructure of these four main spans. On these general grounds I concur in what your Lordship has stated with reference to the effect of the proof upon the reading of the contract. The parties were allowed a proof that certain actings of the pursuers in this matter shewed that they construed the contract differently. I have gone over the evidence carefully on the four points that the Lord Ordinary has dealt with, viz., the approaches to the four main spans, the rivets, the caissons, and the temporary purposes, and I think the Lord Ordinary has come to a right conclusion on all these four points, and I have nothing to add.

LORD SHAND.—The words of this contract which have raised any question of difficulty are contained in the conditions appended to the offer and acceptance respectively relating to the quantity of steel to be furnished by the Steel Company, the pursuers, to the defenders, and they are these,—“The estimated quantity of steel we understand to be 30,000 tons, more or less.” And upon the construction of the contract the question to be determined is, whether these are words of expectation and estimate only, or are words of contract which fix a quantity with a certain percentage up or down, “more or less,” which of course could not be taken to be of unlimited amount. I had not the advantage of being present at the first discussion which took place on this case, when your Lordships had to consider the contract, and allowed a proof which has now been taken, and which has formed the subject of much of the debate, and I confess that throughout a considerable part of the argument, which has taken place under the present reclaiming note, I was in considerable doubt as to the true effect to be given to the words I have quoted. I thought it a question of very consider-

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able difficulty whether these words were not to be interpreted as words of contract, and the consideration which weighed with me in feeling that difficulty was this, that the contract was one involving very large liability upon the part of the contractors the Steel Company, who had agreed to supply the whole steel for this bridge. It seemed to me that it was not a likely thing that dealing with a great undertaking of this kind they would enter into a contract without any limit, which might be a protection to them against claims involving very serious liability. Of course in making a contract like this they had to buy the quantity of steel that was likely to be required, so as to be ready to supply it, unless indeed they wanted to run the risk of a very speculative market—the iron market, which, as one knows, has fluctuations of very considerable amount. They had also to arrange for labour in connection with the large amount of work to be done. It might even be, as your Lordship has suggested, that they might have had to extend their works. If they had proceeded to purchase a very large quantity of material on a mere rough estimate of what might be required, and if afterwards a great deal of that material had been dispensed with, they might have suffered very serious loss. On the other hand, if they purchased a very limited quantity, and if a much larger quantity was afterwards demanded, they might have had to make large purchases of material at great loss after the market for iron had risen. This led me to think that it was a serious question to be determined, whether these words had been intended to express a matter of mere expectation or estimate, or were not rather really inserted as words of contract for the purpose of protection to the pursuers. But the result of the argument, and particularly the closing argument submitted on behalf of the respondents in the reclaiming note, has satisfied me that the construction of the contract is as your Lordship has explained it.

In the first place, the offer itself is perfectly distinct apart from the conditions. It is an offer to supply the whole steel required for the bridge less a certain specified quantity, while what is said to have the effect of limiting that obligation occurs not in the body of the contract itself, where one would naturally expect it, but in one of the series of conditions appended to the contract. The first of these conditions imports to a certain effect the specification attached to the contract for the construction of the bridge. In regard to that matter, I am bound to say that looking at the reference to the specification in the conditions as a reference I think only in regard to the nature and quality of the "work and material" to be executed and supplied, I am not prepared to say that on the sound construction of the contract the Steel Company were not entitled to supply the steel for that part of the bridge which has been called the viaduct, and that part of the steel which was also required for the feet of the caissons for the support of the four spans, to which your Lordship has referred. I think that was a question attended with considerable difficulty, and I am not satisfied that the reference to the general specification would have controlled the words "the Forth Bridge" in the earlier part of this contract so as to limit their meaning to the superstructure of the four spans. But I think it unnecessary to form any final opinion on that matter, because as parties proceeded it was made clear that they were both agreed in acting on the footing that the steel furnished, as falling under the contract, was the steel for the superstructure of the four spans alone. It has been made clear upon the proof that that was the view upon which the Steel Company, at least, were willing to act, and of course the defenders, with a falling market for iron, would be quite ready to close with that view, because it

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saved them a large sum of money. I have only said this in passing, because I was considering the effect of the words of estimate or words of contract as to the quantity of the steel. Now, in regard to these words, it appears to me that we find in the other conditions of the contract a key to their presence where they are. It might very well be said that there is no need for putting in such words as these, "the estimated quantity of steel we understand to be 30,000 tons, more or less," in these documents in framing a contract, if they are to be used as mere words of expectation or estimate of what would likely be required, for this might have been done as well in conversation between the parties, or in a separate letter after or about the time the contract was concluded. The strength of the defenders' argument lies in this, I think, that this estimate is not given in conversation or in a separate letter, but that it is in the contract. We have to find, if we can, a reason for these words being in the contract, and yet for not giving them the full force of words of contract fixing a contract quantity. Now, I think that looking at these conditions we have a sufficient explanation of the presence of these words there. One of the reasons your Lordship has fully dealt with, viz., that arising from the immediately preceding clause in regard to the deliveries under the contract. I think these words receive an appropriate meaning, and have an appropriate place in these conditions, because something had to be arranged in reference to the measure of the deliveries, and the company were fairly entitled to get an estimate which would guide them in their preparations as to what amount of deliveries would be required each year and each month. Having got this estimate they would be entitled, I think, to found upon it in the event of unreasonable demand for delivery having been made, by saying there must be some check on that, and we have that check in this clause. But, as was pointed out by the Dean of Faculty, there is a more important consideration to account for the words of quantity, and that is the earlier provision in the deed containing the clause that Tancred, Arrol, & Company should be entitled to cancel the contract in the event of their principal contract being cancelled. In that case there would have been a very grievous hardship on the Steel Company if they had made all their arrangements. The Steel Company provided that in that case the defenders should undertake to pay them the loss which might be sustained on materials which the company might have purchased before notice as against the contract. The purpose of putting in the estimated quantity was, as I take it, for the protection of the Steel Company, and I cannot doubt that if the company had purchased 30,000 tons of material under this contract, and if a month or two afterwards the contract had been brought to an end, they might have appealed to the clause of expectation or estimate, and said that before the notice they had purchased 30,000 tons of material and they were entitled to do so because of that estimate. I think when we examine the contract as a whole, this case is in a position which distinguishes it from the previous cases that have occurred in England or in America, because we have in the agreement itself a special reason which accounts for the words being inserted, and a special ground, therefore, for the presence of such words of estimate in the contract. They would have a clear bearing on any questions of damage which might arise, and on the claims in reference to the time of delivery under the contract. And so I have come to have a clear opinion that the sound construction of the contract is as I have stated.

I may add that this view is strongly corroborated and supported by the decisions to which reference was made in the law of England and of America.

There were two classes of cases referred to. The first were cases entirely, I think, of contract of purchase and sale; and in all of these the view contended for by the pursuers received effect in these Courts. The first of these was *Guillim v. Daniel*. There the contract was for all the naphtha manufactured by A B, say from 1000 to 1200 gallons per month during two years. It was held that although the quantity supplied was much smaller than had been contemplated—there were 7000 gallons of a deficiency in nine months—yet as the manufacturer had supplied all the naphtha which he had made, that was sufficient, and that the words referring to quantity were mere words of expectation. So again in *M'Connal v. Murphy*, where the contract was all the spars manufactured by M'Connal, say about 600 of a certain size, it turned out that there were only 496; but there again the Court held that as all that had been manufactured were supplied, that was sufficient, and that the other words were words of expectation merely. The third case of the same class was the case of *Brawley*, in the American Court, and there the same principle received effect. The quantity of cords of wood expected to be supplied in that case was stated at 880 cords more or less, but it was qualified “as shall be determined to be necessary” by a third party named or pointed out. The quantity ultimately ordered was only 40 cords or some small quantity. But there again the principle received effect that the quantity mentioned was to be regarded as a mere estimate, and the ruling words, “as shall be determined to be necessary,” were held to be operative. So here we cannot hold that the words referring to quantity are to control the more important words “the whole of the steel required for the bridge,” more particularly as we find in the contract a special explanation of the use of these words in the clause referred to. The cases quoted on the other side do not, I think, affect the authority of the three cases just noticed. They were special. One was the case of *Leeming*. The words there were that the party should take such a quantity not less than say 100, and the only possible force that could be given to the words was that at least 100 should be given. The only other case referred to was *Morris v. Levison*, and there there was this specialty, that an owner of a vessel stipulated for a full cargo at a foreign port, but he added the words, “say about 1100 tons,” and the Court, proceeding upon the view that the owner of the vessel must be presumed to know the carrying capacity of his own vessel, must be taken to have been contented with 1100 tons if he got that when dealing with one who did not know the carrying capacity of the vessel, and who had to provide the cargo in ignorance. It was held that it would be unreasonable to require the party who was to present the cargo to have ready in a foreign port more than the quantity which the owner of the ship himself estimated as necessary. On these grounds I am of opinion that both on the special terms of the contract, and on the authorities, it must be construed in the way your Lordship proposes—that the Steel Company were entitled to provide the whole steel for this bridge in the limited sense of the word bridge as applying to the superstructure of the four main spans.

As to the proof which has been taken, I agree with your Lordship in thinking that it can have no substantial effect on the question to be now decided. If the meaning of the contract be clear, any proof as to the actings of the parties could not have the effect of changing that meaning. If, however, it could be made out that though the meaning of the contract was clear, the actings of the parties shewed unequivocally that they agreed to make a new contract in some

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particular, or to modify its original terms, then the actings might have that effect. The proof should no doubt receive effect to this extent, that if it appears that the Steel Company had agreed to abandon their right to supply steel for certain parts of the bridge which they had the right to supply, and Tancred, Arrol, & Company acquiesced in this, so far the contract would be modified; and if there be difficulty, as I think there is, in the question whether this contract would not, if strictly construed, include the steel for the whole bridge, the proof then is very material, because it shews that whatever might be the decision of the Court on that question, both parties have by their actings agreed that the supply shall be limited to the superstructure of the four spans. I am not sure that the Steel Company in their actings have ever contended for anything more, or that one can infer from their actings that they ever maintained that they had anything to do with the supply of steel for any part of the bridge except the superstructure of the four spans. I think the proof shews that they never said or maintained in their communings with the defenders in reference to the supplies,—“ We insist that we have right to supply the 3500 tons for the viaduct,” or “ We are entitled to supply the steel plates or curb for the shoes of the caissons.” I cannot say so much for their pleading in Court. I think they erred in their pleading, though their actings in regard to this matter seem to have been consistent throughout. In statement 7 the defenders say,—“ The caissons for the Forth Bridge were originally intended to be made entirely of iron, but afterwards the engineer of the works requested, under the powers given him in the contract, that steel shoes should be used for these caissons. For this purpose 500 tons of steel were needed. The defenders gave this work to Arrol Brothers of Glasgow, who bought the steel from Neilson Brothers in Glasgow, who again bought it from the pursuers, who were well aware that it was required for the Forth Bridge.” And what is the answer to that? “ Admitted that the pursuers tested 500 tons of steel which was bought from them by Neilson Brothers of Glasgow. Explained that at the time they were not aware that the said steel was for work which fell under the contract, and that consequently they did not at that time raise action against the defenders.” That means this, they never raised any question in point of fact about it. But now when they come to plead their case, in order, I fancy, to support their view of the contract, and apparently in some dread lest if they made a concession that the contract was limited to the superstructure of the four spans it might hurt their cause otherwise, they say what I have just quoted. The same observation may be made as to the approach viaduct to the bridge. In statement 8 the same statement is made, and the answer is,—“ Explained that at the time they were not aware that the said steel was for work which fell under the contract, and that consequently no action was taken by them.” These answers and the proof satisfy me that in point of fact the Steel Company never claimed to supply either the 3500 tons of steel work for the viaduct nor the steel for the caissons, although they have pleaded that they were entitled to make such claims under the contract, and the conclusions of the summons indicate no limitation of the bridge to its four leading spans and to the superstructure of these spans only.

The next point in the proof was in regard to the rivet bars. I have a strong opinion that if the Steel Company had thought right to object to the proceeding about the rivets they were entitled to do so. They had undertaken to supply all the steel for the bridge, and as part of that steel rivet bars were specified.

The view undoubtedly was that they should get the rivet bars ready, and Tancred, Arrol, & Company were to convert these steel bars into rivets. I do not think it was in Tancred, Arrol, & Company's power to say, "We will supply steel ourselves for part of the bridge, and not take any rivet bars from you, but make our own rivets even for the work on the four spans." But I agree with your Lordships in thinking that on this part of the case the proof shews that while the Steel Company thought this was an invasion of their contract they resolved that they would not make a question about it. They thought it was not a large enough matter to get into conflict with Tancred, Arrol, & Company about, and I attribute no importance to that point.

The only other point that remains is the matter of the minutes, and I agree with your Lordship in thinking that there was no acting of parties proved in reference to this subject. As to the second minute, I think nothing can be made of it. It is quite properly expressed with reference to the position in which the parties stood. It is dated 7th October 1885—"In consideration of this concession" (about taking bills instead of cash) "these gentlemen agree that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge"—that is to say, the question having been raised as to whether the contract did include the whole steel, the Steel Company maintaining that it did, and Tancred, Arrol, & Company maintaining that it did not, they agreed that the contract should be construed as the Steel Company construed it. There is nothing in that to shew that the Steel Company construed the contract otherwise than in the manner to which effect will now be given. The earlier minute is more loosely expressed:—"23d September 1885.—It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract prices." Undoubtedly these words are quite fitted to bear the meaning that the Steel Company thought there was a "contract quantity" only stipulated, and that they were asking a new and extended arrangement in this respect, but my opinion on the evidence as a whole is that the minute is not truly expressed so as to bear out what was in substance the controversy. I think the real question between the parties was not as to having a fixed contract quantity, but rather that the Steel Company were maintaining the view that they were entitled to supply the whole. But in any case it would be a novelty, if the contract be clear in itself, to say that if the defenders can find in the books or documents of the pursuers, recovered under a diligence, something that tends to shew that the pursuers had a view of the contract differing from its legal meaning and effect, and that was more favourable to the defenders, this should control or alter the contract. If these were very clear minutes—and a series of minutes—making it clear beyond all question that the pursuers took the same view as the defenders maintain, that the true contract was for a limited quantity, this might raise a question of difficulty as to whether the Court should not construe the contract as both parties by their actings declared they interpreted it. But there is no such state of the facts. I am of opinion that the solitary passage in a single minute can have no effect whatever in controlling the written contract of parties, constituted by letters which passed between them. And accordingly I think that in this matter of the minutes the proof gives no assistance in the determination of the case. It is a case which must be determined entirely on the contract. The parties are now agreed that the limit of the claim of the Steel Company shall

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be the steel for the superstructure of the four spans, and I am of opinion that on the contract the Steel Company clearly had right to supply, and were bound to supply, the whole steel required for that superstructure.

LORD ADAM.—I entirely concur with your Lordship, and wish to make only one observation, and that is, that the reference in the contract between the Steel Company and Tancred, Arrol, & Company to the main specification is not limited to the material to be supplied. The reference is to the work to be executed by Tancred, Arrol, & Company “in strict accordance with the specification,” and I think that that being incorporated in the Steel Company’s contract gave a right to the Steel Company to see what the work to be executed by Tancred, Arrol, & Company with reference to this steel was in that specification. It is in that view that I concur with your Lordship that we are entitled to look at the specification as to that matter, and to incorporate it in the Steel Company’s contract with Tancred, Arrol, & Company. And if that is done, we see quite plainly that the work required to be executed by Tancred, Arrol, & Company is the superstructure of the four main spans.

LORD PRESIDENT.—I would suggest to your Lordships a slight variation of the interlocutor of 2d March 1888, where the Lord Ordinary finds that they are entitled to supply, and so forth, “in so far as such steel is or may be required in the construction of the four main spans,” so as to make it read “in the construction of the superstructure of the four main spans.” That is in accordance with all the opinions that have been delivered, and it is necessary in order to exclude the steel for the cutting edge of the caissons.

THE COURT pronounced the following interlocutor :—“Having heard counsel on the reclaiming note for the defenders as a reclaiming note against the Lord Ordinary’s interlocutor of 2d March 1888, and all the subsequent interlocutors in the cause, vary the said interlocutor of 2d March 1888 by inserting after the words ‘construction of,’ and before the words ‘the four main spans,’ the words ‘the superstructure of’: Recall the interlocutor of 13th June 1888, in so far as it finds the defenders liable in expenses, and in place thereof find them liable in expenses with the exception of the expenses of the proof: *Quoad ultra* adhere to the whole interlocutors reclaimed against.”

TODD, MURRAY, & JAMIESON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 82.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Appellants.—  
*Balfour—Jameson.*

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, Appellants.—  
*Asher—Maconochie.*

NORTHERN ASSURANCE COMPANY, Appellants.—*D.-F. Mackintosh—  
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SCOTTISH PROVINCIAL INSURANCE COMPANY, Appellants.—*D.-F. Mackintosh  
—J. C. Thomson.*

SURVEYOR OF TAXES, Respondent.—*Lord-Adv. Robertson—  
Sol.-Gen. Darling—A. J. Young.*

*Revenue—Income-tax—Fire and Life Insurance Company—Profits or gains—Property and Income-Tax Act, 1842 (Act 5 and 6 Vict. cap. 35), schedule D, First Case.*—In a question as to the assessment of income-tax, under the Income-Tax Act, 1842, schedule D,\* on the profits or gains of a company carrying on the businesses both of fire and life insurance, *held* (1) that the nett profits and gains from the two branches of the business must be massed together as one undivided income assessable according to the rules applicable to the First Case under schedule D; (2) that in estimating profits and gains there fell to be taken into account interest on investments which had not suffered deduction of income-tax at its source; (3) that as fire insurance policies are contracts for one year only, the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period, and ordinary expenses, may be fairly taken as the profits and gains of the company without making any allowance for the balance of annual risks unexpired at the end of the financial year; (4) that the profits or gains upon the life business could be ascertained by actuarial calculation only, and that this actuarial calculation might be obtained by taking the result of the quinquennial investigation prescribed by statute, or of the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by schedule D of the Income-Tax Acts; and (5) that where a gain is made by the company (within the year of assessment or the three years prescribed by the Income-Tax Act, Schedule D) by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, incorporated under a special Act of Parliament (41 Vict. cap. 53), appealed to the Commissioners of Income-tax for the county of Midlothian against an assessment under schedule D of the Income-Tax Acts for the year 1885-86 upon the following amount:—

Fire profits on an average of seven years,	.	.	£24,373
Fees and untaxed interest, &c., estimated,	.	.	5,000

In all,	.	.	<u>£29,373</u>
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Upon which the duty was £979, 2s.

\* The Property and Income-Tax Act, 1842, schedule D, First Case, Rule First, enacts,—“The duty to be charged in respect thereof” (i.e. “in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act”), “shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, &c., upon a fair and just average of three years, ending on such day of the year immediately preceding the day of assessment in which the accounts of the said trade, &c., shall have been usually made up,” &c.

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On 1st February 1887 the Commissioners issued the following deliverance:—"The Commissioners are of opinion that the insurance companies should be assessed on their nett revenue, including therein premiums, untaxed interests, and profit from investments, and giving credit for all payments under policies, expenses, and losses, such revenue to be determined on the average of three years, if that be the only legal course, but the Commissioners would suggest that the parties and the Crown should arrange that the average should be determined by the number of years adopted by each respective office as the period of its investigation, and they remit to the surveyors and insurance companies to adjust the figures on this basis. The result to be reported to the Commissioners. In the event of its being found that the profits of life assurance companies must be determined by actuarial valuation, the Commissioners are of opinion that the Crown ought not to be bound by the rate of interest or other elements arbitrarily adopted by the companies themselves to the effect of reserving profits for future distribution."

Thereafter a statement upon the basis prescribed by the Commissioners was drawn up, the summary of which was as follows:—

Fire profits for 1882-83-84,	.	.	.	.	£112,113
Life profits for 1882-83-84,	.	.	.	.	324,727
					<u>3436,840</u>
Average for one year,	.	.	.	.	£145,613
Less taxed interest—Fire,	.	.	.	.	£13,816
—Life,	.	.	.	.	<u>91,866</u>
					105,682
					<u>£39,931</u>
Balance of annuities paid by the company in the year ended 31st December 1884, from which income-tax was retained by the company, and for which they are accountable to the revenue,	.	.	.	.	7,290
					<u>£47,221</u>
Total estimated liability,	.	.	.	.	

The Commissioners accordingly, on 20th May 1887, found that the sum assessable to income-tax for 1885-86 was £47,221, and they assessed accordingly, having power on appeal to increase an assessment under the Taxes Management Act, 1880 (43 and 44 Vict. cap. 19), sec. 57 (8).

The Insurance Company then took a case for the opinion of the Court of Exchequer, in which the following were the facts as stated by the Commissioners;—"1. The appellants carry on the business of fire and life insurance, including the sale of annuities and other ordinary branches of the said businesses within the limits defined by their special Act, which is referred to. They have a common seal and one body of shareholders, with a paid-up capital of £282,571. Their central office is in Edinburgh, and all the branches of their business are managed by the same directorate. The results of their business in all departments, so far as their shareholders are concerned, are thrown together into one account, called the profit and loss account, and dividends to the shareholders are declared out of the balance of profit shewn upon this account, and not out of profits made in any particular department.

"2. The profits of the appellants' fire insurance business are ascertained from year to year. In respect of the premiums in hand at the end of each year, risks are still running under existing policies, which risks may be taken as equivalent on an average to one-third of the premiums received

during the preceding year. It has been the custom for many years to reckon the profits of fire insurance business with reference to income-tax upon a seven years' average, but the appellants are satisfied to accept the ruling of the Commissioners, and reckon these profits upon a three years' average.

"3. The whole interest, dividends, rents, and other revenue from invested funds received by the appellants, are divided into two portions, one of which, being the proportion of the whole which is earned from the investment of the paid-up capital and reserves belonging to the shareholders, passes to the credit of their profit and loss account, and forms a portion of their yearly profits. The remainder of the interest, dividends, and other revenue from invested funds, is earned from the investment of the accumulated life and annuity premiums, and goes to provide for the company's obligations under its life assurance and annuity policies.

"4. In carrying on the business of life insurance the appellants issue policies upon lives in return for payment of a premium or premiums. Such payments are made in one sum, or in sums spread over a few years, or in sums spread over a whole lifetime, and by the said policies the appellants undertake to pay certain sums upon the death of the person assured, or on his attaining a certain age, or on the happening of other contingencies connected with human life.

"5. The liabilities of the appellants to the holders of their life and annuity policies are discharged partly out of the premiums received and partly out of the interest or other annual returns arising from the investment of the premiums. These liabilities embrace an obligation not only to pay the specific sums named in the policies but to account to the policy-holders for any surplus that may arise in the business, and to appropriate nine-tenths of that surplus by way of bonus to the policy-holders. This surplus, ascertained in the matter hereafter explained, is popularly known as 'profits,' but as regards the application of nine-tenths of it, it forms, so far as the appellants are concerned, a debt due by the company to its policy-holders, equally with the sums named in their policies. The appellants, however, admit, for the purposes of this case, that income-tax falls to be calculated on all such 'profits.'"

\* The Commissioners further stated in the case the following grounds of their opinion :—" In this case the appellants conduct fire and life insurance, and the returns embrace the results of both branches.

"In respect of the former branch, if it stood alone, there is no question as to the form and proper statement of the return. On the debtor side of the account will appear the premiums received for insurance against fire ; the interest on the capital and reserve funds, with income-tax resumed if it has been deducted ; the profit, if any, made on investments. On the creditor side will appear the payments for expenses ; payments for losses by fire ; losses, if any, on investments ; the balance will be profit assessable to tax, and to account of the tax so assessed will be imputed the tax already paid by retention from interest or dividends received.

"The difficulties which have been presented arise as to the profits on the life business.

"The main contention of the appellants, briefly stated, is that in their life business the income-tax paid by them by way of deduction from the interest which they receive, is more than is due by them on any profits they earn, so that even when tax is restored to revenue, the tax already paid equals, if it does not exceed, the whole tax duty exigible from them.

"If the facts are as stated, there can be no answer to the case. If a company shows a profit of £1000, and that profit is proved to arise exclusively from interest on capital, and income-tax has been deducted from all that interest as it accrued, it is plain no charge can justly be made in respect of profit which has

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The Insurance Company contended \* :—“(1) That they are only liable to pay income-tax under schedule D on the actual gains and profits arising

thus already borne its proportion of the impost. Assume the tax to be five per cent, or 1s. per £1, then the gross income of the Company has been really . . . £1050  
of which it has paid tax by way of retention made by its debtors, . . . 50

Leaving its profit . . . . . £1000

and it would be manifestly unjust to assess it again on that profit.

“But the actual case presented is by no means so simple. The profits of a life insurance company are not derived exclusively from interest; the interest is

\* The company put in a statement, exhibiting the total amount of their profits for one year, taking fire profits and interest upon an average of the three years ending 31st December 1884, and the life profits on an average for the period embraced in the last periodical investigation made at 31st December 1884 :—

“The average yearly profits for the three years 1882-83-84 were—

From interest on capital and reserve, . . . . .	£20,228
„ fire profits, calculated upon an average of three years, and carrying forward each year one-third of the premiums to provide for unexpired risks, . . . . .	16,028
„ life profits, ascertained upon the valuation made at the statutory quinquennial investigation of 1884, . . . . .	57,878
	<u>£94,134</u>

“The whole interest, dividends, rents, &c., received during the three years ending 31st December 1884 were as follows, including the interest in the foregoing statement :—

Year 1882, . . . . .	£115,107
„ 1883, . . . . .	117,883
„ 1884, . . . . .	123,027
Together, . . . . .	<u>£356,017</u>

Yearly average, . . . . . £118,672

Deduct for interest on which income-tax has not been paid by way of retention, taken at the amount charged by the Crown, . . . . . £5,000

Deduct also the amount of annuities paid from which income-tax was retained by the company, viz :—

Year 1882, . . . . .	£6,545
„ 1883, . . . . .	8,037
„ 1884, . . . . .	10,207

£24,789

Yearly average, £8,263 8,263†

13,263

£105,409

#### “ABSTRACT OF THE FOREGOING.

- 1st. Average of the total yearly profits, . . . . . £94,134 per annum.
- 2d. Average nett amount on which income-tax has already been paid at its source, . . . . . £105,409 per annum.”

† This deduction was ultimately not insisted in by the company.

to them from the whole departments of their business, including therein their life business, their fire business, and the interest on invested funds so far as belonging to shareholders.

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not the only element which contributes to its profit; the rate of mortality experienced may prove less than the rate of mortality assumed and provided for in its calculations; the charge made against the insured for expenses may yield a surplus after defraying the expenses actually incurred; the additional charge made against a class of insurers called 'participating,' in respect of advantages accorded to them, may exceed the amount of these advantages as paid; the forfeiture of policies for non-payment of premium may infer the gain to the office of a large proportion of the premiums actually already paid; all these and other contingencies incidental to the business may contribute to the profits, and of course the profits, if any, from these sources, are liable to assessment.

"The Commissioners are further of opinion that the difficulty of dealing with the profits of life insurance companies and corporations for income-tax is mainly due to an exaggerated importance attached to those elaborate actuarial calculations which they make for their own safety and guidance in the conduct of their business.

"But, viewed as an ordinary transaction, life insurance is just like fire and ship insurance, a wager in which the insured gives certain odds against his own life; if he lives for the period covered by the premium he gets nothing, just as a shipowner, whose ship arrives safely, gets nothing under his policy. The insured may renew the wager by paying another premium, and if then he dies, the office loses, just as underwriters lose when a ship is lost.

"The office may, no doubt, require to make elaborate calculations to determine on what terms it can safely do such business, but for the question of income-tax assessment the Commissioners do not see why, if against the premium paid to it the company puts the losses paid by it, the balance is not its income assessable to tax. By applying the doctrine of chances and of averages, the office may reduce the irregular and variable accidents of numerous transactions to an orderly procession of events; but that does not alter the fact that on each transaction the office stands to win or to lose, and makes profit or suffers loss as an underwriter, according as it wins or loses on the risk it undertakes.

"Such a position, if imposed on the insurance companies as regards their premiums, is by no means singular; there are many people who every year pay income-tax on income, the precise equivalent of the company's premiums. If A B goes to an insurance company and undertakes to pay £50 a-year, provided the company will pay him £1000 at his death, the company would appear, according to the contention of the appellants, to maintain its exemption from income-tax for that £50 a-year, which A B may continue to pay until the company has accumulated the full £1000 which it has undertaken to pay, and probably something more. But if the transaction be reversed, and A B takes his £1000 to the company, and in consideration of that sum gets an annuity of £50 from the company, A B must pay tax on that £50 as long as he draws it. If the tax is not leviable on the one £50, the Commissioners do not see why it should be paid on the other.

"But, if it be incompetent to assess the company on the annual balance of their premium income, there can, the Commissioners apprehend, be no doubt that they are liable to assessment in respect of the profits admittedly made, as ascertained or ascertainable by actuarial valuations.

"The Commissioners cannot, however, but feel that to assess on such a basis introduces many difficulties inconsistent with that simplicity and directness which characterises the incidence of the income-tax on other trades and businesses. The tax is levied in ordinary cases on the profits of each year, or on the results annually ascertained; an average of a few years may be accepted as the measure or test of one year to save detail or equalise results. But the actuarial calculations of an insurance company run into a very distant future, and embrace considerations all problematical and hypothetical, and some of

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"(2) That the amount of said profits falls to be calculated and ascertained—(a) As regards interest, by taking the average of the amount of interest belonging to the shareholders on capital and reserve as appearing in the appellants' profit and loss account for the three years immediately preceding the year in which the assessment for income-tax is to be imposed; (b) As regards fire business, by taking the average of the fire profits for the three years immediately preceding the year for which the assessment for income-tax is to be imposed; (c) As regards life business, by taking the proportion applicable to one year of the amount of life profits as ascertained at the last periodical investigation into the company's life business made in terms of the statutes. These statutory investigations are made on well recognised principles, under competent scientific advice, and with a view to ascertain what surplus or profit may be reckoned on as having already been realised, as distinguished from any profits which may or may not arise in the future working of the business. Before any realised profit can be reckoned on, provision has to be made for the whole liabilities of the company, on certain assumptions as to the rate of mortality, the rate of interest, and the amount of expenses likely to be experienced in the future. These assumptions are made by all insurance offices which have regard to their future solvency, not on the principle suggested by the Commissioners, that the business of insurance is a system of wagering—a suggestion which the appellants regard as unfounded and mischievous,—but with the express view to the certainty that they will be realised. The importance of these estimates cannot be exaggerated, as it depends on their soundness whether the company will be in a position in the future to meet its obligations, or whether the expectations of its policyholders will be disappointed, as it is impossible to predict with certainty what the future rates of mortality or of interest will be; and as the rate of interest in particular is likely to be much lower in the future than it has been in the past, it is necessary to make assumptions on these subjects within the limits of safety; but if, as may be hoped, the experience of a company proves more favourable than has been assumed, the surplus or profits thence arising will, at future investigations, come into account, and be assessable for income-tax.

"(3) That calculating the amount on which income-tax fell to be assessed for the year 1885-86 on the principles above contended for, the assessable income of the appellants, under schedule D, for that year amounted to £94,134, but that, as the appellants have already paid income-tax for that year (calculated upon an average of the three immediately preceding years) on a sum of £105,409, they ought not to be assessed for any further payment.

"(4) That the principle introduced for the first time into the mode of assessment of insurance companies by the Commissioners' deliverances of 1st February 1887 and 20th May 1887 is erroneous. That principle appears to be that the appellants are assessable for income-tax under schedule D, not on their gains and profits, but on their gross revenue for an average of three years, subject to deduction of their gross outgoing for the same three years. An account of profits cannot be made out on this principle without leading to erroneous and absurd results. Thus the returns made by the Board of Trade to Parliament for 1885 shew that the

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them purely arbitrary; the Commissioners think it hardly in accordance with the spirit of the assessment that its results should depend on guesses as to what may be the rate of interest, or the rate of mortality, or the rate of expense, fifty years hence. If equal latitude were allowed to the imagination of other traders, the result would not be favourable to the Exchequer. . . ."

premium income of the whole life assurance companies of the United Kingdom for that year was . . . £12,555,797

While the amount paid for claims, cash bonuses, surrenders, commission, and expenses of management was . . . 13,919,792

Shewing a deficiency for the year of . . . £1,363,995

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which was only provided for out of interest received, which amounted to £5,918,058. Thus if income-tax were charged against the whole life offices together, upon the principle laid down by the Commissioners, there would be no balance of profit which could be assessed, whereas there can be no doubt that a large amount of aggregate profit was earned by these companies during that year. This will be made more clear by reference to the accounts of a few of the best known and most prosperous English insurance offices. Taking the expenditure of these offices during 1885 for claims, cash bonuses, surrenders, commission, and expenses; and setting against this expenditure their incomes from life premiums, the following were the amounts by which the expenditure exceeded the premiums:—Guardian, £106,345; Provident, £31,140; Rock, £61,624; London Assurance, £20,970; Equitable, £141,334; Law Life, £155,718. The appellants therefore submit that by this method it is impossible to arrive at the profits truly made by the appellants in their business, more particularly in connection with their life business and the funds appropriated *thereof*. Their annual gross revenue, so far as their life business is concerned, consists partly of life assurance premiums and partly of interest arising on their life fund. Life assurance premiums are in no sense a gain or profit either to the company which receives them or to the policyholders. So far as the company is concerned each premium carries with it a corresponding obligation of a postponed and contingent character, but quite definite and capable of scientific measurement. So far as the policyholders are concerned, the premiums paid by them are in effect an investment out of their savings, to be repaid to them or their heirs on the emergence of whatever contingency is stipulated in the policy. The individual insurer, or his heirs, may receive more or less than he has paid according as he lives a shorter or longer time, but the policyholders, as a body, practically receive back what they have paid, with the interest of it. Under the Income-Tax Acts persons are under certain conditions not liable to be charged with income-tax upon the amount of such premiums, but, if the principle contended for by the Commissioners be sound, one of the purposes of these Acts would be defeated, for all insurers of lives would practically be compelled to pay income-tax on their premiums of life insurance."

The Surveyor of Taxes, "in support of the assessment by the General Commissioners, submitted that the principle of the assessment by the Commissioners in respect of the fire insurance and annuity profits was not understood to be disputed. That the General Commissioners have assessed the income-tax on life insurance profits on the same lines as the fire insurance profits. He also submitted—(1) That if the company invest their accumulated funds from premiums, &c., in heritable property, or in the acquisition of mortgages by taking transfers to them, or otherwise, income-tax will be assessed under schedule A on the heritable property. It will be deducted in the payment of the interest on the mortgages. These are tradings with the money, and the profits arising will bear the income-tax according to their nature and amount. If the company entered with the accumulation of premiums, &c., into other trades, if profits were made, such would be assessed to income-tax. (2) That interest on foreign securities is liable to assessment to income-tax,



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schedule D, No. 4. This is trading also, and the profit received in this country is liable to assessment without deduction. (3) That bank interest on the company's current account and other interest received, where income-tax is not deducted, is also assessable to income-tax, schedule D, No. 3. (4) That the profits of the fire and life assurance business are chargeable under schedule D, No. 1. The income-tax is assessed in respect of the profits of the year of assessment. The year of the assessment in the present case is the year 1885-86. The profits of the year of assessment are ascertained by estimate—Trade Schedule D, No. 1; Profession Schedule D, No. 2, on an average of three years. (Professions 16 and 17 Vict. c. 34, sec. 48.) Profits of uncertain amount, such as interest not being annual interest, schedule D, No. 3, on the preceding year. Foreign securities, on the amount which has been or will be received in the current year, schedule D, No. 4. The income-tax on annuities and yearly interest of money is paid by way of deduction from the payments by the person making the payments, if such person's income, out of which the payments are made, has been assessed. By section 102 provision is made for the case where the income is not assessed from which the payments are made. Section 52 provides that the income-tax return or statement, which all persons are required to make, shall be exclusive of the profits and gains from annual interest of money, &c. That it is the profits in the year of assessment which are in question is evident from section 133. By that section, if the actual profits fall short of the computation, provision for relief is made. There is no provision for correction if the profits turn out to be more than computed. The same company or person may have these various descriptions of profits, and have to pay tax upon each of them. The payment of the tax upon one cannot be set against the other. By the statutes there is a grant of duty on each of them, and the payment of the duty on one is no reason why it should not be paid on the others. In this case there was sufficient income in each of the three years upon which the assessment for the year 1885-86 was based to pay all the claims and expenses of management, and leave profit from the premiums and bank interest without the application of any part of the accumulated or invested funds to such purpose. The materials for assessment on the company (appendix) for 1885-86 are made up on the principle of leaving altogether out of the reckoning the accumulated or invested funds or the income from them. This is in accordance with the Statute 5 and 6 Vict. c. 35, sec. 52. The result brought out is the same as the finding of the General Commissioners. The Commissioners took in the income from investments on one side, but they deducted it on the other. The contention of the company is that they have right to place against the tax on, for instance, the profits from the fire insurance business the tax they have paid by way of deduction on the income from investments."

It was stated at the bar that, previously to the bringing of these cases, the plan which had been adopted by the Inland Revenue, in assessing for income-tax insurance companies carrying on both fire and life businesses, had been to treat the fire and life businesses as separate, and not to attempt to ascertain the life profits, the interest on investments being taken in lieu of the latter.

Argued for the appellants, the Scottish Union and National Insurance Company;—The principle of assessing a company doing fire and life business, and having invested funds, by putting the revenue for any one year on one side and the expenditure on the other, and holding the balance to be assessable income, was entirely new. (1) So far as the life business was concerned, the profit as ascertained by the statutory quin-

quennial investigation<sup>1</sup> was the proper basis of assessment, and the taxation each year should be on the proportion effeiring to the year of the profits shewn at the last statutory quinquennial investigation. (2) As regarded the fire business, the Commissioners proposed to take each year by itself. That seemed to assume that the business was stationary, which it was not. Future contingencies must be taken into account in fire just as in life policies. A right course would be to take say 33 per cent of the gross premium income for the year as the average of unexpired risks, and carry it forward for contingent losses. (3) There was a further point as to the assessment of interest upon invested funds which had escaped taxation at its source.

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It was admitted that *Last's* case<sup>2</sup> settled that income-tax fell to be calculated both on the profits divided as bonuses among the policyholders, which was nine-tenths of the whole, and on the remaining one-tenth which was paid to the shareholders. A good test to apply to the principle which had been adopted by the Commissioners was to take the case of a young office; their premiums would all fall to be taxed at first, because there would probably be no deaths, if they were careful to select good lives to begin with. And yet these premiums would represent payments towards liquidating obligations which would run on into future years. Take, too, the case of a single premium payment. That premium, according to the Commissioners, was to be held to be profit in the year in which it was paid, although it might never be profit at all.

Taking the words of the Income-Tax Acts, 1842, schedule D, and 1853 (16 and 17 Vict. cap. 34), sec. 2, schedule D, what were the annual profits or gains on the life insurance business of a company? The incomings and outgoings of an office in any particular year had no relation to the question whether the office was doing a profitable or a losing life business. An ordinary trader, making his income-tax return as at 5th April, would rightly take into account any bills he had to meet for goods supplied to him from the wholesale house and sold by him, before he could arrive at the amount of profit he had made upon these goods. But the Commissioners here would leave altogether out of account the future bills—the liability which the payment of the premiums involved. The profits and gains of a life insurance business could only be settled by an actuarial calculation as to whether the accumulated premiums paid by all the policyholders, plus the future premiums which might be received, were sufficient to meet the company's liabilities. The Act 33 and 34 Vict. cap. 61, secs. 4, 5, 6, and 7, shewed that the Legislature recognised a particular system of ascertaining the gains and profits of a company of this kind, and it was upon the statement made up in terms of that Act that its profits were divided. The analogy drawn by the Commissioners between marine and life insurance was quite false—even assuming that the Commissioners were right in their facts as regarded the payment of income-tax by the underwriter. Ship, like fire insurance, only extended over a short period, and as soon as the risk expired the underwriters could divide the proceeds among themselves. But what underwriters really did was to carry forward so much of their income at the end of each year for unexpired risks upon current policies.

*Last's* case settled that in calculating the profits of an insurance business the whole branches of it were to be treated as one.<sup>2</sup> The question of how premiums were to be dealt with was not appealed to the House

<sup>1</sup> Act 33 and 34 Vict. cap. 61, secs. 4 to 11.

<sup>2</sup> *Last v. London Assurance Corporation*, March 14, 1884, L. R., 12 Q. B. D. 389, Nov. 15, 1884, 14 Q. B. D. 239, July 14, 1885 (H. L.), 10 App. Ca. 438.

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of Lords. The Inland Revenue acquiesced in the judgment of the Queen's Bench upon that matter, and their judgment was exactly in point. It was true that as regarded the question of the carrying forward or not of unexpired risks upon the figures brought out by the company, the whole difference was one of £1670,—the difference between £66,600 and £68,270,—being the one-third of the premiums received in 1881 and 1884 respectively. But the sound principle was, that unexpired risks must be provided for.

The average of the total yearly profits, as brought out by the company, was £94,134, and the average nett amount on which income-tax had been paid was £105,409. Accordingly, on the authority of *Last's* case, the company was not bound to pay any income-tax, as it had already been paid on a larger sum than the whole amount of gains or profits.

Besides the questions of the carrying forward of the unexpired risks in the fire business, and of the right to treat the life premiums annually received as income, there were two other questions in the case. The first was, "Were the Crown entitled to receive income-tax on interest which had not suffered payment of income-tax at its source?"—i.e., on the £5000 sum stated in the accounts. Admittedly the decision in *The Clerical, Medical, and General Life Assurance Society*<sup>1</sup> was against the company's contention. But although the company might not be able to get back the sum overpaid by way of income-tax,—that was the difference between £94,134 and £105,409,—and under the Income-Tax Acts it was admitted they could not,—yet the interest which had escaped payment of tax at its source ought not now to be charged with tax, as tax had been already paid on a larger sum than the whole amount of the annual gains or profits. The second was, "Were the company bound to account directly for income-tax deducted by them when they paid their annuities?" or, as the company submitted, did these deductions fall to be included in the ordinary computation of gains or profits? That question arose under the Income-Tax Act of 1853 (16 and 17 Vict. cap. 34), sec. 40. It was like the payment of an annuity out of land where the annuity was deducted, but income-tax was not paid upon it. Here the fund out of which the annuity was paid was taxed at its source. The income-tax which the company retained from the annuity was put to the credit of profit and loss, and tax was paid upon the balance.

Argued for the Inland Revenue;—The main question between the parties was, how were the profits of the life business to be computed? The charge was made under the 1st rule, case I., of schedule D of the Income-Tax Act of 1842 (5 and 6 Vict. cap. 35), to which the Act of 1853 (16 and 17 Vict. cap. 34), sec. 2, schedule D, referred back. It was on profits or gains, but these might mean profits not distributed. The Commissioners proposed to treat both the fire and life business on the same footing. The proper course in both cases was to put the receipts against the outgoings, and by taking an average of years a reliable index of the profit actually earned was obtained. This was supported by the definition of profits given in the Court of first instance by Mr Justice Day in the case of *Last*,<sup>2</sup> and afterwards endorsed by the Master of the Rolls. The judgment no doubt was reversed, but that was not because the definition of profits was wrong, but because of the way in which it was applied. The case of the policyholder was different from that of the ordinary trader who had granted bills for goods received. The policy-

<sup>1</sup> *The Clerical, Medical, and General Life Assurance Co. v. Carter*, July 1888, L. R., 21 Q. B. D. 339.

<sup>2</sup> *Last v. London Assurance Corporation*, March 14, 1884, L. R., 12 Q. B. D. 389, L. R., 14 Q. B. D. 239.

holder had no absolute contract with the company beyond the period to which the premium applied, and there was no absolute obligation on the company to pay except for that period. Further, the Crown objected to take the quinquennial period in place of the three years as affording a fair criterion of the profits of the company. For instance, if there had been an actuarial inquiry, say in 1884, the Crown would have had to tax as upon the figures then settled for a period of five years afterwards, although the circumstances of the company might be in a much better position. To have had an independent actuarial inquiry would have been a very expensive matter for the Crown, hence the Commissioners had suggested the simple remedy proposed. If the Court did not approve the view taken by the Commissioners, then they should adopt the assessment as originally laid on by the assessor, with this alteration, that an average of three instead of seven years should be taken for the fire profits.

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The Court thereupon intimated that they did not desire to hear any further argument on the view taken by the Commissioners as regarded life profits, which they could not sustain. Senior counsel were then heard.

Argued for the appellants the Scottish Union and National Insurance Company;—Assuming the view taken by the Commissioners to be untenable, the question was, whether the original assessment adopted by the assessor could stand, first, in regard to the assessment of the fire profits on an average of seven years, and, second, in regard to the liability of the £5000 of untaxed interest to assessment? In regard to the first point, the sound course was to mass both branches of the business together. The question whether there was divisible profit or profits and gains depended on the nett result of the combined dealing. The business was treated as a unit, and the shareholders were the same. The legal *persona* was one. No doubt the fire business was the simpler case, but even it did not terminate every year. Fire policies were taken out at all periods of the year, and might be for shorter periods than a year. So that policies taken out during one bookkeeping or Inland Revenue year ran into another, and it was impossible to treat all the premiums as assets earned during the year, seeing that many risks fell to be carried forward to the next year. In the *Imperial Fire Insurance* case<sup>1</sup> the English Judges treated the matter in the rough, and held that with a going company each year could be taken by itself, and that when a loss from an unexpired risk took place, matters would be equalised by the profits being diminished for the year in which it occurred. Such reasoning was unsatisfactory, and the case was not in point. In dealing with the life business it was necessary to have regard to a tract of future time. The interest of investments on the life fund was not profit, but was for the most part like the premiums themselves, required to meet the liabilities of the company. That question was already settled by the case of *Last*,<sup>2</sup> in which the Crown did not take this point to the Appeal Court. That authority settled that the fire and life businesses could not be separated for assessment purposes. In the *Clerical Life Assurance* case<sup>3</sup> there was a statement of the schedules as adjusted in *Last's* case after the judgment of the House of Lords, which was very important as illustrating the present case.

<sup>1</sup> *Imperial Fire Insurance Co. v. Wilson*, Oct. 1876, 35 L. T. 271.

<sup>2</sup> *Last v. London Assurance Corporation*, March 14, 1884, L. R., 12 Q. B. D. 389, Nov. 15, 1884, L. R., 14 Q. B. D. 239, July 14, 1885, L. R., 10 H. L. 438.

<sup>3</sup> *Clerical, Medical, and General Assurance Co. v. Carter*, L. R., 21 Q. B. D. 339.

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Putting the nett profits of the business on one side, and the taxed interest on the other, what remained was what fell to be assessed. This principle had been recognised in some recent cases in the Scottish Courts.<sup>1</sup>

As regarded the question of assessment upon untaxed interest, amounting to £5000, that did not fall to be decided, because, assuming it to be just, that sum fell to be deducted from the £118,672; but even then the Crown had been overpaid by the difference between £118,672 and £94,134. If the Crown proposed to make a separate assessment on the £5000, and to found upon the *Clerical, Medical, and General Life* case,<sup>2</sup> the appellants contended that that case should not be followed.

Argued for the Inland Revenue;—Under the Taxes Management Act, sec. 59, the Court had ample power either to confirm, reverse, amend, or remit the assessment to the Commissioners with their opinion expressed. (1) The principle of the assessment made by the Commissioners was, in the first place, to take the interest on invested funds. The greater part of that was taxed at its source, and there was no reason why any such interest, probably derived from foreign investments, should escape taxation. It was impossible that the Income-tax Acts could have contemplated anything so irrational as that interest of funds invested at home should be taxed, but that of funds invested abroad should not be. The *Clerical, Medical, and General Assurance Association* case<sup>2</sup> was a direct authority in support of this view. The *Australasian Mortgage and Agency Company* case<sup>3</sup> was different, as it did not involve the massing of two different businesses. There the interest which it was proposed to tax was of a very fluctuating character, and was held to be like interest on banker's advances, and not interest on investments. The present case was quite different. (2) The investments here were all made from the income derived from the life funds, and were not available for fire purposes; the two branches of the business were entirely separate, and the fire profits fell to be separately assessed. The two businesses were very different, and the mere fact that they both yielded profits and were carried on by the same corporation in no way made them the same business. Their characters and incidents were different, and the funds of the two branches were separately treated by this company in terms of the Act of 33 and 34 Vict. cap. 61, secs. 4, 5, 6, and 7. It was no doubt true that there was only one profit and loss account, but that was merely because this was a company which required such an account to present to its shareholders, and, besides, for income-tax purposes it did not matter what became of the profits. The fact was, as stated in the case, that the interest from invested funds went to the life policies. The fire funds could not be diverted to meet losses on the life department, nor *vice versa*. Section 101 of the Income-tax Act of 1842 dealt with the case of a man carrying on two businesses, and allowed him, where there was loss on one of them, to set it off against the profits on the other, but that was only where the businesses were carried on with the same capital, and where there was no separation of the funds, and it did not apply here.<sup>4</sup> *Last's* case was no doubt against this view, but it was not binding on the Court, as this point did not go to the House of Lords, and besides, it did not appear that the 4th section of the Act of 1870, providing for a separation of businesses, applied to the company in that

<sup>1</sup> *Inland Revenue v. Scottish Mortgage and Land Investment Co. of New Mexico*, Nov. 19, 1886, 14 R. 98; *Inland Revenue v. The Northern Investment Co. of New Zealand*, May 31, 1887, 14 R. 734; *Smiles v. Australasian Mortgage and Agency Co.*, July 12, 1888, 15 R. 872.

<sup>2</sup> L. R., 21 Q. B. D. 339.

<sup>3</sup> *Smiles v. Australasian Mortgage and Agency Co.*, July 12, 1888, 15 R. 872.

<sup>4</sup> *Cf. Brown v. Watt*, Feb. 20, 1886, 13 R. 590.

case, the company having been in existence before the passing of the Act. The method of arriving at the £57,000—the amount of their life profits as calculated by the company upon their quinquennial investigation—had no warrant in the statute. What the company did was to make a series of calculations for the future, depending upon the rate of mortality and the rate of interest, and they admittedly took a rate of interest so safe as to represent in this company only 2 per cent as against £4, 7s. 6d. which they were actually receiving, thus falling far short of ascertaining their true profits. For instance, one of the appellant companies—the North British and Mercantile—contended that income-tax was to be paid only on profits so far as divided, and not upon profits which were carried to reserve; but this was quite inadmissible, because in revenue questions any distinction as to profits had no place. Accordingly the only just course was to take the interest simply as representing the profits. In any view, the *onus* was upon the companies to shew that they had adopted a system which was fair and within the statute. The figures produced by the company were not admitted, and all that the Court was asked to do was to adopt the principle taken by the surveyor.

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As to the deduction of 33 per cent per annum from the fire profits for future risks, although, so far as figures went, the matter might not be an important one, the case of the *Imperial Fire Company* was in point, and assessment ought to be allowed upon the full amount, without deduction, from year to year.

The case of the North British and Mercantile Insurance Company was not separately argued. That company admitted that interests on its investments was liable to income-tax, but on other points adopted the argument which had been presented for the Scottish Union and National Company.

The case of the Northern Insurance Company presented some features of difference. The assessment in that case had been made upon the profits of both the fire and life funds, without separating the two businesses, and it was left to the option of the Inland Revenue to assess either upon the profits proper of the year or upon the income derived from the company's investments, and to consider whether they would treat the company as a trader or as a capitalist and investor. The question of the principle of that assessment was now brought up, but was considered to be exhausted by the argument in the Scottish Union and National case. The only points on which additional argument was offered related to the question of what were proper profits to be taken into account in framing the balance-sheet, and ultimately the only point which was treated as being undisposed of by the argument in the Scottish Union and National case had regard to the right of the Inland Revenue (which had been given effect to by the Commissioners) to include among the profits of the business "profits on investments realised, £8863, 0s. 10d."

The appellants (The Northern Insurance Company) contended "that profits on investments realised were capital and not income; that their business was not that of buying and selling shares of other companies, but of fire and life insurance; that when they sold an investment at an enhanced price from that at which it was bought, this was not a transaction in the nature of their own business, but a capital transaction, and therefore not coming within the scope of the Income-Tax Acts."

The Surveyor of Taxes contended "that the company in their accounts treated profits on realised investments as income, that they brought the amount of such into their 'profit and loss account' out of which they paid their dividends, and that it was thus income assessable to income-tax."

Argued for the appellants;—The profit on the realisation of invest-

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ments no doubt entered the profit and loss account, and was carried from that account to reserve. But it could not be held to be profit, apart from the manner in which it was dealt with in the accounts. It was an elementary principle in regard to the incidence of the income-tax that no regard was to be had to either the increment or the depreciation of capital. At least no allowance could be made for diminution of capital,<sup>1</sup> and by implication it followed that no tax could be levied upon increment. It was said that this was to be accounted for by the fact that although a loss of capital could not enter income, yet a profit did. But that was a *non sequitur*. It was conceded that so much of the £8800 as was derived from the life fund was taken account of and entered into the calculations at the quinquennial investigation, and the present question could only relate to such investments as resulted from the fire fund. These investments were made outside the proper business of the company. If this assessment was justified in the case of profits realised, it must also apply to profits earned, and so if at the date of a man's death an investment which he held realised four times what he had paid for it, the Crown would be entitled to demand income-tax on it as for the year of his death. But such a claim had never been made. In any view, inquiry would be necessary in this case to determine what of the profits belonged to the fire fund, and what to the life fund.

In regard to the provision of the statute that a three years' and not the five years' average of the quinquennial investigation was to be taken, it would be impossible to work that in the case of large offices, as it took eighteen months to make the present investigation. The matter must be worked from the data of the quinquennial investigation.

Argued for the Inland Revenue;—It was admitted that with regard to the profits on investments realised, these were to be limited to fire profits so far as this question was concerned. As matter of fact, the company treated these as profits; they entered the profit and loss account, and they formed an item which went to swell the profits of the shareholders. It had been held that though the profits of a concern might be applied so that the shareholders got none of them, and they were expended on the extinction of debt, they were still liable to taxation.<sup>2</sup> Income-tax notices all contained a heading asking for a return of any profit made on realising investments.

The case of the Scottish Provincial Insurance Company was similar to that of the Northern Insurance Company, and was not separately argued.

At advising, the opinion of the Court (consisting of the LORD PRESIDENT, LORD MURE, LORD SHAND, and LORD ADAM) was delivered by the

LORD PRESIDENT.—The Court are of opinion that the assessment as originally imposed cannot be sustained. But the mode of ascertaining the profits and gain of the company in the department of the life business adopted by the Commissioners is fundamentally wrong, and quite inadmissible.

We shall therefore reverse the determination of the Commissioners, and remit the case to them with the following instructions, which sufficiently embody our reasons for differing both from the Assessor and from the Commissioners, and may at the same time form a useful guide to Revenue officers and the General Commissioners of Income-tax in dealing with cases of this description.

1. In assessing to the income-tax the profits and gains of a company carrying

<sup>1</sup> Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sch. D, First Case, Rule Third.

<sup>2</sup> *Mersey Docks v. Lucas*, June 1883, L. R., 8 App. Ca. 891.

on the businesses both of fire insurance and life insurance, the nett profits and gains from the two branches of the business must be massed together as one undivided income, assessable according to the rules applicable to the first case under schedule D (see *Smiles v. The Australasian Mortgage Company*, 15 Ret. 872, as contrasted with *The Scottish Mortgage Company of New Mexico v. Inland Revenue*, 14 Ret. 98).

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2. Interest on investments which has not suffered deduction of income-tax at its source must be taken into account in ascertaining the assessable amount of profits and gains of the company.

3. Seeing that fire insurance policies are contracts for one year only, the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period, and ordinary expenses, may be fairly taken as the profits and gains of the company, without taking into account or making any allowance for the balance of annual risks unexpired at the end of the financial year of the company (see *The Imperial Fire Insurance Company v. Wilson*).

4. But this rule is not applicable to the ascertainment of profits and gains on the life business. Life policies are contracts of most variable endurance, and the premiums are in many cases not annual payments. The contract may endure for the policyholder's life, or for a certain number of years stated, or till the holder attains a certain age, and the company may be bound, on the expiry of the fixed number of years, or on the attainment of a certain age by the policyholder, either to pay a lump sum or an annuity for the remainder of the policyholder's life.

The premiums paid for such insurance may be paid all in one sum or by instalments within a fixed number of years, or annually during the holder's life, or during the subsistence of the policy. The premiums therefore do in no sense represent the annual profits and gains of the company. In like manner the amount of claims in any one year arising on the death of persons insured or otherwise, as a deduction from the company's receipts for the year, cannot afford any criterion for ascertainment of profits. A recently established company will receive a large amount of premiums, and have few or no claims to meet. The profits and gains can be ascertained only by actuarial calculation. And this actuarial calculation may be obtained by taking the result of the quinquennial investigation prescribed by statute, or of the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by schedule D of the Income-Tax Acts.

In the case of the Northern Insurance Company,—

5. Where a gain is made by the company (within the year of assessment or the three years prescribed by the Income-Tax Act, schedule D), by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company.

THE COURT pronounced the following interlocutor in each of the cases:—"Reverse the determination of the Commissioners, and remit the case to them with the following instructions"—1 to 4 as above,—the 5th instruction being added in the case of the Northern Insurance Company: "Find the appellants entitled to expenses," &c.

COWAN & DALMAHOY, W.S.—J. & F. ANDERSON, W.S.—HENRY & SCOTT, S.S.C.—  
AULD & MACDONALD, W.S.—THE SOLICITOR OF INLAND REVENUE—Agents.



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DONALD MACRAE, Pursuer (Respondent).—*M'Kechnie—Forsyth.*  
ANGUS SUTHERLAND, Defender (Reclaimer).—*J. C. Thomson—Rhind.*

*Process—Caution for expenses—Pursuer resident in England—Notour bankruptcy—Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), sec. 6.*—In an action of damages for slander brought by a person residing in England, the defender averred that he had obtained a decree for payment of £20 against the pursuer, that a charge for payment had expired without payment, and that the pursuer was therefore notour bankrupt within the meaning of the Debtors (Scotland) Act, 1880. He pleaded that the pursuer should, *ante omnia*, be ordained to find caution for expenses.

The Court refused to ordain the pursuer to find caution.

*Reparation—Slander—Issue—Innuendo.*—The proprietor of a house wrote to the agent of his tenant (Macrae), who had ceased to occupy the premises,—“That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent, on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods.” In an action of damages for slander by the tenant, *held* that the words would bear the innuendo “that the pursuer is of dishonourable character.”

1st Division.  
Ld. Wellwood.  
B.

DONALD MACRAE, M.D., entered into possession at Whitsunday 1886 of a house called Lochiel Villa, Strathpeffer, under a lease for ten years at £100 per annum, from the proprietor, Angus Sutherland. He continued to occupy it until the end of November 1887, when, in consequence, as he alleged, of its being in an uninhabitable condition, he left it.

Sutherland afterwards brought an action against Macrae for payment of the rent of the house, and on 10th July 1888 obtained warrant of ejectment from the Sheriff.

Macrae thereafter removed to London, and when he was engaged in negotiating for the lease of a house there the landlord of the house received an anonymous letter, in the following terms:—“Sir,—I think it my duty to inform you that Dr Macrae, who is in negotiation with you about your house has left Strathpeffer very much in debt; his landlord there will give you his true character. I enclose his address. Dr Macrae has been followed to Dalston and his movements watched; he is a man of *no means*, and has swindled *many*. Such a man ought not to be allowed to take honest people in. From one who has suffered. Late landlord's address—Mr Sutherland, Little Ferry, Golspie, Sutherlandshire, Scotland, N.B.”

Subsequently Macrae's agent in Tain received the following letter:—“Little Ferry, Golspie, 21st June 1888.—Dear Sir,—Thanks for your attention, that horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent, on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods . . . Yours truly, A. SUTHERLAND.”

Macrae, in September 1888, brought an action of damages for slander against Sutherland, alleging that the first as well as the second of the two letters was written by him. With regard to the second, he alleged as follows:—“The statements here made are of and concerning the pursuer, and are false and calumnious and malicious. They were intended to mean, and do mean, that the pursuer is of fraudulent and dishonourable character, and that in consequence thereof if he visited Strathpeffer he would be mobbed by the people in that locality.”

The defender pleaded, *inter alia*;—(1) The pursuer having left the country and being notour bankrupt, the defender is entitled in the circumstances, to have him ordained, *ante omnia*, to find caution for expenses. (4) The letter of 21st June 1888 not being slanderous, the defender ought to be assoilzied.

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In support of his first plea he stated;—"On 12th October 1888 decree was granted against the pursuer for the sum of £20, 13s. 6d., expenses of said process and appeal" (i.e., of the action for payment of rent). "The decree was extracted on 15th October, and on the 17th of that month the pursuer was charged to pay the sums contained therein. The days of charge have expired without payment, and the pursuer is therefore notour bankrupt within the meaning of the Debtors (Scotland) Act, 1880. Further explained that the pursuer quitted the premises as stated, and left the country without informing the defender of his whereabouts."

The Lord Ordinary (Wellwood), on 16th January 1889, repelled the defender's first plea, and adjusted the following issues for the trial of the cause:—" (1) Whether, on or about 7th May 1888, the defender caused to be written and sent to Mr Bidgood, 117 Osbaldiston Road, Stoke-newinton Common, Clapton, a letter in the terms set forth in the appendix hereto, marked A, which letter was received by the said Mr Bidgood? Whether the same is of and concerning the pursuer, and is false and calumnious, to the loss, injury, and damage of the pursuer? (2) It being admitted that on or about the 21st June 1888 the defender wrote and sent to Robert Munro, writer, Tain, a letter in the terms set forth in the appendix hereto annexed, marked B, and received by the said Robert Munro, Whether the same is of and concerning the pursuer, and whether the words 'I do believe that he would be mobbed if he was appearing in the Strath,' were intended to mean, and do mean, that the pursuer is of fraudulent and dishonourable character, and that, in consequence thereof, if he visited Strathpeffer he would be mobbed by the people in that locality; and are false and calumnious, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

The defender reclaimed, and argued;—(1) In the circumstances stated by the defender, the pursuer was bound to find caution for expenses. This case was not so strong as that of *Clarke*.<sup>1</sup> There was notour bankruptcy under the provisions of the 6th section of the Debtors Act, 1880. It was not necessary that the pursuer should have been divested of his estate in order to have him taken bound to find caution,<sup>2</sup> and the fact that he had left the country, and that his present address was unknown, were sufficient to induce the Court to order him to find caution. (2) He had no objection to the first issue. As to the second, there was nothing actionable in the words which had been used in the second letter libelled, and therefore they could not be innuendoed.<sup>3</sup>

Argued for the respondent;—(1) The pursuer here was not divested of his estate; he was only notour bankrupt within the meaning of the Debtors Act, 1880, and for the purposes of that Act only. There was no reason for his being ordained to find caution,<sup>4</sup> and the fact that he was resident in England, although it might have been of importance previously, was not now of so much weight, since the passing of the Judgments

<sup>1</sup> *Clarke v. Muller*, Jan. 16, 1884, 11 R. 418.

<sup>2</sup> *Samuel v. Greig*, July 12, 1844, 6 D. 1259; *Maxwell v. Maxwell*, March 3, 1847, 9 D. 797, 19 Scot. Jur. 357.

<sup>3</sup> *Fraser v. Morris*, Feb. 24, 1888, 15 R. 454; *Broomfield v. Greig*, March 7, 1868, 6 Macph. 563, 40 Scot. Jur. 568; *Brydone v. Brechin*, May 17, 1881, 8 R. 697; *Capital and Counties Bank v. Henty & Sons*, 1882, L. R., 7 App. Ca. 741.

<sup>4</sup> *Scott v. Johnston*, June 2, 1885, 12 R. 1022.

No. 83. Extension Act, 1868.<sup>1</sup> (2) He was willing that the innuendo should be made to cover the whole of the second letter, and to amend the issue to that effect.

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LORD PRESIDENT.—I agree with the Lord Ordinary in so far as he has repelled the first plea for the defender. The circumstances under which the plea is repelled are to be found in the answer to the third article of the condescendence, in which the defender alleges that on 12th October 1888 decree was granted against the pursuer for £20, 13s. 6d., that on 15th October the decree was extracted, and on 17th October the pursuer was charged to pay. The statement then goes on—"The days of charge have expired without payment, and the pursuer is therefore notour bankrupt within the meaning of the Debtors (Scotland) Act, 1880." It is conceded that the definition of the term notour bankrupt in the 7th section of the Bankruptcy Act, 1856, does not cover such a case as the present. That section, it is to be observed, is not applicable to proceedings in a sequestration alone, but is a general provision as to the circumstances which shall be held to constitute notour bankruptcy. The 6th clause of the Debtors Act of 1880, to which the defender refers, was introduced in consequence of the abolition of imprisonment for debt, except in certain very special cases, and it was therefore necessary that there should be some extension of the modes of constituting notour bankruptcy, just because the mode of constituting it by imprisonment had been thereby removed.

The 6th clause of the Debtors Act of 1880 is,—“In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made.” I read that section as intended solely for the purposes of the Act in which it occurs. It is such notour bankruptcy as will enable a debtor or creditor to sue out a cessio, and I do not think the law relating to notour bankruptcy was intended to be altered for any other object. Accordingly, I think there is no notour bankruptcy in the circumstances of the present case. This is enough to enable us to dispose of the defender's first plea, for the notion that a person must find caution because he lives in another portion of the kingdom can receive no countenance now that the provisions of the Judgments Extension Act, 1868, allow of the enforcement of a Scotch decree for expenses in any part of the United Kingdom.

With regard to the second issue, I think it is objectionable as it stands, but if it is altered in the way proposed by Mr M'Kechnie, I think the objections are removed. The letter which has been put in issue bears,—“That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent, on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods.” The meaning of that letter is certainly far from clear, and it seems to me that various interpretations may be put upon it. The writer may have intended to convey, and perhaps he did convey, the meaning that Dr Macrae was a horrid man in the sense that he was disagree-

<sup>1</sup> Lawson's Trustees v. British Linen Co., June 20, 1874, 1 R. 1065.

able, and would be mobbed because he was unpopular, and that his statement of facts were not consistent with the truth as it appeared afterwards. If so, the words are not actionable. But may they not also mean, what the pursuer says he is ready to prove they did mean, that he was dishonest? That is a possible meaning, and I do not think it is a very forced meaning. The case is not like any of those which have been cited, where the innuendo put upon the language was so forced and unnatural that the pursuer was held not entitled to appeal to a jury. With the alteration now suggested, I am disposed to allow the second issue.

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LORD MURR concurred.

LORD SHAND.—I think the view which the Court now takes in every case where it is asked to order caution for expenses is, that the matter is one for the exercise of its discretion. Here, no doubt, there are circumstances which must be taken into account in considering the matter. The pursuer has left the country, he has not paid his debts, and he is notour bankrupt within the meaning of the Debtors Act, 1880. If the action had been an ordinary one for the recovery of money, it might have been different. But it is brought for the vindication of character, and the letters upon which it is founded were deliberately written. I think that in the exercise of our discretion we ought not to order the pursuer to find caution in such a case.

As the pursuer is willing to take the second issue, as he has now amended it, I have no objection.

LORD ADAM concurred.

The second issue was altered as follows:—"It being admitted," &c., "Whether the same is of and concerning the pursuer, and was intended to mean, and does mean, that the pursuer is of dishonourable character, and is false and calumnious, to the loss, injury, and damage of the pursuer."

THE COURT pronounced this interlocutor:—"Adhere to said interlocutor, in so far as it repels the first plea in law stated for the defender: *Quoad ultra* recall said interlocutor: Approve of the issues as now adjusted at the bar: Appoint the same to be the issues for the trial of the cause, and reserve all questions of expenses," &c.

DAVID BARCLAY, Solicitor—THOMAS DALGLEISH, S.S.C.—Agents.

THE DISTILLERS COMPANY, LIMITED, Appellants (Reclaimers).—*Balfour* No. 84.  
—*Goudy*.

ADAM DAWSON (W. & J. Russell's Trustee), Respondent.—*Jameson*—*Salvesen*.

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*Sale—Constructive delivery—Possession—Bonded warehouse*.—A, a distiller, sold certain parcels of whisky to B, who paid the price, leaving the whisky undelivered in A's bonded warehouse, where none but whisky from his own distillery was kept. The whisky was sold by B to a purchaser, and there were subsequently several other sub-sales, extending over a period of six years—a delivery-order being in each case intimated to A, who noted the transfer in his books and intimated to the transferee that he would be charged warehouse rent. C, the last subvendee, having become bankrupt, the trustee upon his sequestrated estate demanded delivery from A of the whisky, which had all along remained in A's warehouse at a specified rent. *Held* (by the Lord President, Lords Adam and

**No. 84.** *Kinnear, diss.* Lords Mure and Shand, and *rev.* judgment of Lord Trayner) that A continued undivested owner of the whisky, and therefore had a right to retain it for a debt due to him by C.

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ON 15th October 1887 the estates of the firm of W. & J. Russell, wine-merchants, Edinburgh, were sequestrated, and Mr Adam Dawson was appointed trustee.

Bill-Chamber.  
1st Division.  
Lord Trayner.  
C.

The Distillers Company, Limited, who carried on business as distillers of whisky at Edinburgh, Cambus, Cameron Bridge, Carsebridge, and other places, lodged a claim on the sequestrated estate for £2335, 15s. 4d., but deducted from that sum the value of certain parcels of whisky which were in their possession, and over which they claimed a right of retention. The trustee in his deliverance ranked the company for a nett balance of £946, 4s. 2d., but he added the following qualification:—"Before drawing a dividend the trustee calls on the claimants to deliver to him the following goods purchased by the bankrupts from third parties, and lying with the claimants in their capacity as warehousekeepers, the deduction or retention of which by the claimants the trustee has disallowed as above, or otherwise to pay to the trustee the value thereof, viz.,—

2 pipes Cambus, Jany. 1884,	.	.	.	£28 13 3
7 hhds. Cambus, Aug. 1884, .	.	.	.	57 14 6
2 qrs. Cameron Bridge, May 1881, .	.	.	.	18 6 4
12 do., Feby. 1884, .	.	.	.	56 11 10

£161 5 11

And also to deliver to him 20 qrs. Carsebridge, . . .

January 1886, . . . or otherwise to pay to him the sum of . . . . . 62 18 5

as the value thereof.

£224 4 4\*

The company appealed to the Lord Ordinary on the Bills against that qualification, and claimed to be ranked for a balance of £742, 13s. 10d. without the restriction proposed by the trustee. They stated,—(Cond. 1) " . . . . For the storage of whisky and other purposes of their business, bonded (or, as they are sometimes called, duty free) warehouses are owned and occupied by them at their distilleries. No whisky but such as is made by the appellants in the course of their business is kept by them in said warehouses, and, subject to the right of the Excise authorities to enter them for Excise purposes, the appellants retain the uncontrolled possession, both of the warehouses and the whisky stored therein." (Cond. 4) " . . . . The stocks or parcels of whisky, . . . . amounting in value to £224, 4s. 4d., were originally purchased from the appellants by third parties, by whom or their assignees they were subsold or assigned to the said W. & J. Russell prior to their sequestration.\* Although intimation of their having acquired said stocks was made by W. & J. Russell to the appellants by transmission of delivery-orders in their favour, . . . . and although acknowledgment of said intimation was made by appellants' representatives, transferring said stocks in the appellants' books to the name of the said firm, yet said stocks were never removed out of appellants' possession but continued all along to lie in their bonded warehouses, and delivery

\* A memorandum lodged by the parties shewed the various transmissions. The first lot was sold by the Distillers Company to J. & G. Stewart on 12th January 1884 and paid for by them, and transferred to Watters on 25th February 1886, who transferred to W. & J. Russell on 2d March 1887.

thereof was never demanded prior to the sequestration. Forms of the appellants' acknowledgments of delivery-orders in use at Cambus, Cameron Bridge, and Carsebridge respectively are produced." \*

The trustee stated, *inter alia*, in answer,—(Ans. 4) " . . . Explained that by the custom and practice of the whisky trade throughout Scotland, as well as at common law, delivery-orders, such as those above referred to, followed by acknowledgments thereof by warehousekeepers, constitute an absolute conveyance of the property of the whisky therein mentioned (which is specified and distinguished by the Excise numbers of the casks) from the person in whose name the whisky formerly stood in the bonded warehouse to the person in whose favour the delivery-order is granted, and that after the intimation of said delivery-order the distiller or other warehouseman in whose warehouse the whisky may be deposited holds the whisky for the person in whose favour the delivery-order is granted, as warehouseman for him. . . ."

The appellants pleaded;—(1) The appellants having a right of retention over the said stocks of whisky specified . . . are entitled to hold the same in security of W. & J. Russell's general debt, subject to their deducting the value thereof in ranking. (2) The said stocks of whisky being the undelivered property of the appellants, they are entitled to retain it against the subpurchasers' trustee for any debts due to them by the subpurchasers on general account.

The respondent pleaded, *inter alia*;—(3) Constructive delivery of the said whisky to the bankrupts having taken place by means of the intimated delivery-orders and acknowledgments and entries following thereon, and the appellants' former possession of said whisky having been converted into possession for the bankrupts or their trustee, the appellants have no lien or right of retention over said whisky for general account. (4) The appellants having no right of retention such as claimed by them over the said whisky, are bound to deliver the same to the trustee, or pay to him the value thereof as claimed in the deliverance, by way of set-off against their dividend or otherwise.

The Lord Ordinary (Trayner), on 4th July 1888, dismissed the appeal, and sustained the deliverance appealed against.†

\* The delivery-orders were in these terms:—"Messrs The Distillers Company, Limited.— . . . Please deliver to the order of . . . the under-mentioned . . . butts, &c. whisky, and oblige, yours truly, . . ." The acknowledgments were in these terms:—"Dear Sir,—We beg to acknowledge receipt of delivery-order, dated 18 , granted by in your favour, and we have to intimate that rent on the casks therein specified will be charged to you from .—We are, yours obediently., THE DISTILLERS COMPANY."

† "OPINION.— . . . The facts are shortly these: The appellants sold the stocks or parcels of whisky now in question to certain persons, who paid the full price thereof. The whisky was not delivered to the purchasers, but remained in the possession of the appellants (the sellers) in their bonded store. It was quite distinguishable (by Excise marks and otherwise) from the whisky in the same store belonging to the appellants. The purchasers of the whisky in turn sold the same to the bankrupts, and received payment of the price, in return for which they granted a delivery-order addressed to the appellants intimating the sale to the bankrupts. These delivery-orders were duly intimated to the appellants, who acknowledged their receipt, and in consequence thereof transferred the said whisky in their books from the name of the original purchasers to that of the bankrupts. The whisky accordingly stood at the date of the bankruptcy in the name of the bankrupts, who were entitled to demand and obtain delivery thereof on payment of any warehouse rent or other charges due in connection therewith. At the date of the bankruptcy the bankrupts were indebted to the appellants in

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## No. 84.

The Distillers Company reclaimed.

After the case had been argued before the First Division, consisting of

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the sum for which a ranking has been allowed by the trustee. In these circumstances, the appellants claim a right of retention over the whisky in question, not merely for warehouse charges, but also for the debt due by the bankrupts to them. The trustee disputes this right, and claims delivery of the whisky, subject to payment of warehouse charges only.

"The ground on which the appellants maintain that they have a right of retention for the debt due by the bankrupts is, that they were not merely warehousemen or custodiers of the whisky, but were at the date of the bankruptcy the undivested owners of the same. Never having delivered the whisky to the original purchasers, the property in the whisky did not pass to them, and they could not confer on the bankrupts a higher right than they had themselves, namely, a right to demand delivery. Therefore, as owners of the whisky, they plead the right to retain it on account of debt due to them by the person demanding delivery, on the authority of *Melrose v. Hastie* (13 D. 880), *Harvey v. Wyper* (23 D. 606), and other cases. I am of opinion that the right of retention claimed by the appellants cannot be sustained.

"It is undoubtedly still the law of Scotland (notwithstanding the provisions of the Mercantile Law Amendment (Scotland) Act, 1856) that the property in moveables does not pass to a purchaser without delivery; and if the appellants were here in a question with the original purchasers of the whisky the doctrines laid down in *Melrose v. Hastie* and other cases would fall to be applied. But these doctrines are plainly inapplicable to a case where delivery has taken place; and I think, in the present case, that there was delivery of the whisky to the bankrupts. The intimation of the delivery-order to the appellants, and the consequent transfer in their books of the whisky to the name of the bankrupts, operated, in my opinion, constructive delivery. 'When a delivery-order in absolute terms is presented to a warehousekeeper, and given effect to by him in the warehouse-books, that makes a complete transfer of the goods sold from the previous owner to the possessor of the delivery-order, and puts the possessor of the delivery-order in possession of the goods to the same effect as if he had bought the goods and obtained actual delivery on a contract of sale' (per L. J. C. Inglis in *Anderson v. M'Call*, 4 Macph. 768). The case I have just quoted from was cited to me as an authority, shewing that an intimated delivery-order was insufficient to pass the property, for in that case the delivery-order was held not to have that effect. But *Anderson v. M'Call* differs materially from the present case. In that case there was no sale at all; what was really attempted was to effect a security over moveables *retenta possessione*. Dealing with it, however, as a case of sale, it was held that the delivery-order was insufficient to pass the property, because it was a delivery-order by the seller, intimated to the seller himself, in whose custody the goods were. There was no more effected towards passing the property by entering the delivery-order in the seller's books than was effected by the entry in the seller's books debiting the purchaser with the price of the goods. The judgment in that case proceeded on the identity of the seller with the warehouseman; and in reference to that fact in its legal consequences the Lord Justice-Clerk observed,—'In order to operate constructive delivery by means of a delivery-order there must be three independent persons—the vendor, the vendee, and the custodian of the goods; and if the custodian of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order.' I think the conditions thus stated as necessary to constructive delivery are fulfilled here. There were three independent persons—Watters, the vendor; the bankrupts, vendees; and the appellants, warehousemen. The appellants were not both sellers and warehousemen *quoad* the bankrupts. They had sold to Watters, and been warehousemen for Watters, but the only relation in which they ever stood to the bankrupts was that of warehousemen or custodians of the goods. Whatever right remained in the appellants, arising from non-delivery to the original purchaser, was surrendered or lost when they de-

Lords Mure, Adam, and Kinnear, a joint minute was put in for the parties, No. 84. in which they concurred in the following statement:—“(1) That the parcels of whisky in question, . . . were at the date of the original sale by the appellants lying stored in bonded warehouses which belong Feb. 9, 1889. Distillers Co., Limited, v. Russell's Trustee. to the appellants at their distilleries of Cambus, Cameron Bridge, and Carsebridge; that said parcels of whisky continued to lie in said warehouses at the dates of the several subsales and of the bankruptcy of Messrs W. & J. Russell, and are still there lying; that said warehouses are occupied solely by the appellants, but are subject to the surveillance of the officers of Excise for payment of the Excise duties, and are known in Excise law as ‘distillers’ bonded warehouses’; that the appellants do not keep, and under the Excise rules it is not lawful for them to keep, any whisky in the said ‘bonded warehouses’ but such as is manufactured by themselves, but that they own and occupy a general bonded warehouse at Queensferry, in which they keep whiskies purchased by themselves for the purpose of blending, and which are there blended; that the appellants do not store any whisky except what has been, as above mentioned, either manufactured by them or purchased by them for blending. (2) That the books of the said warehouses are kept by the company's clerks as a part of their office work, and that the Excise authorities have a clerk of their own at the several warehouses for the purpose of making out and granting warrants for removal of spirits; that the appellants' clerks keep a warehouse ledger, in which is entered in separate columns the whiskies sold (described by separate numbers, indicating the quality and amount in gallons), the name and residence of the purchaser, the date of the sale, and the date from which warehouse rent is charged (it being explained that the appellants do not as a rule charge any warehouse rent for whisky unless it lies for more than six months), the date of delivery, any transfer or transfers which may take place, with the date of the transfer, and the date from which warehouse rent is charged against the transferee—these last-mentioned entries being made upon presentation by purchasers of delivery-orders by sellers in their favour.”\*

It further appeared from the company's books that in the case of the first four parcels of whisky in question there had been respectively 3, 5, 7, 3, and 5 transfers, the last in each case being to W. & J. Russell.

The case was subsequently reheard by Lords Mure, Adam, and Kinnear, and was ultimately again argued before these Judges, along with the Lord President and Lord Shand.

Argued for the reclaimers;—There was no room in this case for the doctrine of constructive delivery. It had no place where, as here, there was actual possession on the part of the person to whom it fell to make delivery. It was only where the custodier was a neutral person—some

livered the goods constructively to a third and independent party, who had no connection with the original sale. I am of opinion, therefore, that constructive delivery of the whisky was given to the bankrupts when it was transferred, in respect of the delivery-order to their name in the appellants' books. It follows that the appellants have no right to retain the whisky; their only right is the warehousemen's lien for warehouse charges connected therewith.”

\* The following “conditions of sale” were, *inter alia*, intimated to all purchasers, and were printed on the back of the acknowledgments of delivery-orders granted by the company:—“*Spirits in Bond*.—All spirits sold and stored in the company's bonded warehouses are subject to the following conditions:— . . .  
II. The spirits will be subject to a rent-charge as follows:—For casks 80 gallons and upwards, 2d. a-week; and for smaller casks, 1d. a-week, payable on demand.  
III. The company reserves power to order removal of spirits from their warehouses when from want of room or other cause they find it necessary to do so. . . .”



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one other than the original seller—that the doctrine was recognised. Here the original seller remained undivested owner, and he could give delivery in no other way than by tradition. This at anyrate was clear as in a question with the original purchaser, and it made no difference that the goods were marked off and that warehouse rent was paid for them. All that the original purchaser could give to a subpurchaser was a personal right to demand delivery of the goods—a *jus ad rem*, not a *jus in re*.<sup>1</sup> The respondent's contention came to this, that the fact of a sub-sale by the first purchaser and the acknowledgment of the receipt of the intimation of his delivery-order and the corresponding entry in the reclaimers' books of the name of the subpurchaser converted the undivested owner into a warehouseman. But why should the granting of a delivery-order give the subpurchaser a higher right than the first purchaser had had? All that the subpurchaser got from the original purchaser was, as had been argued, an assignation to a personal right to demand delivery. It was an assignation to a *jus crediti*, and nothing more. The cases of *M'Ewan* and of *Melrose* were cases where the goods were held in neutral custody; but that of *Mathison* was exactly similar to the present, only it was the seller there and not the buyer who was sequestered, and there were no subpurchasers. The Lord Ordinary in his note had misapprehended the opinion of the Lord Justice-Clerk (Inglis) in *Anderson v. M'Call*.<sup>2</sup> There were only two persons in the present case, because the seller and the custodier were the same. It made no difference that the warehouse here contained private goods only. That fact was rather in the reclaimers' favour. And the *concursum* and right of retention existed all the same, however numerous the transfers were. The respondent must admit that as in a question with the original purchaser the right of retention existed. It was therefore necessary for him to say when and how the original seller became divested of his title of ownership, and this he had failed to do. The Mercantile Law Amendment Act, 1856, did not touch the present question, and so far from its infringing upon the law of retention as contended for, it was an exception which was carved out of it, and was to be confined strictly within its own limits.

Argued for the respondent;—The Lord Ordinary's opinion was well founded. I. There was constructive delivery as between the original seller and purchaser. The decision in the case of *Gibson*<sup>3</sup> was not applicable to the present case, but the principles of law laid down there by Lord Moncreiff (13 S. 921) were in point. *Mathison's* case<sup>4</sup> did not alter that law, for the decision in that case was founded upon the doctrine of reputed ownership, which had no application here. But it was to be observed that the opinions of Lords Deas and Benholme in that case seemed to recognise that the creditors of the sellers had a higher right than the sellers themselves; and this was a view which was supported by some later authorities.<sup>5</sup> II. At anyrate, there was constructive delivery here as

<sup>1</sup> Wyper v. Harveys, Feb. 27, 1861, 23 D. 606, 33 Scot. Jur. 398; Bell's Comma. i. (5th ed.) p. 180 (7th ed. p. 191), and observations there on Broughton v. Aitchison, Nov. 18, 1809, F. C., and on Gibson v. Forbes, July 9, 1833, 11 S. 916; M'Ewan v. Smith, Jan. 14, 1847, 9 D. 434, 19 Scot. Jur. 173, aff. H. of L., 6 Bell's Appa. 340; Melrose & Co. v. Hastie & Co., March 7, 1851, 13 D. 880, 23 Scot. Jur. 398; Mathison v. Alison, Dec. 23, 1854, 17 D. 274, 27 Scot. Jur. 111.

<sup>2</sup> Anderson v. M'Call, June 1, 1866, 4 Macph. 765, 38 Scot. Jur. 405; cf. also Pochin & Co. v. Robinows & Marjoribanks, March 11, 1869, 7 Macph. 622, Lord President, p. 628, 41 Scot. Jur. 334.

<sup>3</sup> Gibson v. Forbes, 13 S. 916.

<sup>4</sup> Mathison v. Alison, 17 D. 274.

<sup>5</sup> Orr's Trustee v. Tullis, July 2, 1870, 8 Macph. 936, 42 Scot. Jur. 566; Dun-

in a question with subpurchasers. The only relation which the original sellers held to the subpurchasers was that of warehousemen, and from the date of the second sale they held the goods under a limited and lower title than that of owners. The contention of the reclaimers came to this, that what was sold was not the whisky, but a *jus ad rem*, a right to demand delivery of it, a result which could be supported by no authority. In *M'Ewan's* case,<sup>1</sup> and also in that of *Melrose*,<sup>2</sup> there was neither actual nor constructive delivery, for the goods were in the hands of independent storekeepers. The case of *Wyper*<sup>3</sup> fell within the category of *Mathison's* case, and the law of all these cases had been modified in *Orr's Trustee v. Tullis*.<sup>4</sup> Taking the Lord President's definition in *Anderson v. McCall* of what was required to make constructive delivery, everything was satisfied here.

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LORD PRESIDENT.—The question we have to decide in this case arises upon a balancing of accounts in bankruptcy, and of course what is to be done in a case of that kind is to state both sides of the account as they stood at the date of the sequestration, and to strike a balance accordingly. The trustee and the appellants (the Distillers' Company) have adjusted the accounts so far between them with one exception. The bankrupts were owing the appellants considerable sums of money, and the appellants held in their hands parcels of whisky which had been bought by the bankrupts from them, but the price of which had not been paid, and in regard to these there is no question at all.

But there were other whiskies in the hands of the appellants which stood in a different position, and with reference to which this question has arisen. These parcels of whisky were sold some time ago by the appellants to a person in the trade, and the price was paid, but the goods remained in the hands of the appellants, the sellers. There are certain very important admissions in regard to this matter which it is necessary to keep in view at the outset.

In the joint minute of admissions for the parties it is stated "that the parcels of whisky in question were at the date of the original sale by the appellants lying stored in bonded warehouses which belong to the appellants at their distilleries of Cambus, Cameron Bridge, and Carsebridge; that said parcels of whisky continued to lie in said warehouses at the dates of the several sales and of the bankruptcy of Messrs W. & J. Russell, and are still there lying; that said warehouses are occupied solely by the appellants, but are subject to the surveillance of the officers of Excise for payment of the Excise duties, and are known in Excise law as 'distillers' bonded warehouses'; that the appellants do not keep, and under the Excise rules it is not lawful for them to keep, any whisky in the said 'bonded warehouses' but such as is manufactured by themselves, but that they own and occupy a general bonded warehouse at Queensferry, in which they keep whiskies purchased by themselves for the purpose of blending, and which are there blended; that the appellants do not store any whisky except what has been, as above mentioned, either manufactured by them or purchased by them for blending."

*Anderson v. Jefferies' Trustees*, March 4, 1881, 8 R. 563; *Robertson v. M'Intyre*, March 17, 1882, 9 R. 772; *cf.* also *Bell's Comma.* i. 5th edn. 183 (7th edn. 194), and English cases there quoted.

<sup>1</sup> *M'Ewan v. Smith*, 9 D. 434.

<sup>2</sup> *Melrose & Co. v. Hastie*, 13 D. 880.

<sup>3</sup> *Wyper v. Harveys*, 23 D. 606.

<sup>4</sup> *Orr's Trustee v. Tullis*, 8 Macph. 936.

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Now, with regard to the bonded warehouses at the appellants' distilleries, it is necessary to keep in view that these are, in a question like the present, simply the premises of the sellers. They are "bonded warehouses" in this sense, that the goods have not paid duty, and they are therefore under the control of the officers of Excise in this sense, that the appellants cannot deliver goods out of these warehouses except upon payment of the Excise duties. That is the single particular in which a warehouse of this description differs from the premises of an ordinary dealer in spirits. In the next place, this admission establishes one very important fact—that from the date of the original sale no delivery of these goods had been made in any sense whatever. The goods were lying at the date of the original sale in the very same warehouse in which they are now. This warehouse is not a warehouse in any other sense than this, that it is a place of custody for the use of the appellants, and of no one else. It is not a warehouse in the sense that the appellants store the goods of other people in it. That is very distinctly admitted in the passage I have just read from the joint minute. Therefore it seems to me that the state of the fact as regards the original sale is just this, that the goods were sold but not delivered.

But the party who originally purchased the goods resold them, and the question comes to be, what is the condition and what are the rights of the subvendee in such a case. The original purchaser cannot sell the goods in any proper sense, because they do not belong to him. They belong to the undivested owner, and therefore the only thing which the original purchaser can give to the subvendee is a personal right to demand delivery of the goods,—that is to say, a *jus ad rem*; but the original purchaser having no *jus in re*, he cannot give anything more. So that the goods still remain the property of the original seller. No doubt the subvendee, having received a delivery-order from the original purchaser, intimated that delivery-order to the original seller, in whose hands the goods were. What is the effect of that? Nothing but this, so far as I can see, that it is an intimation to the original seller that the original purchaser has parted with the right he had to demand delivery. He could give no more to the subvendee than he had himself. If he himself had only a *jus ad rem*, he could not convey to the subvendee a *jus in re*. The delivery-order was intimated to the original seller, and the intimation was acknowledged, and a note was made in the original seller's books that the right to ask for delivery of the goods had passed from the original purchaser to the subvendee. It is plain that that cannot operate constructive delivery, because the goods were not in the custody of a third party, but were still in the hands of the original owner of the goods, who remained undivested. Suppose that process of subvencion were repeated seven or even twenty times over, the effect would have been just the same in each case. What was passed in each subsale was just the same right that the original vendee had, and nothing more,—that is to say, the *jus ad rem*—the right to ask for delivery. The goods could not pass by constructive delivery, because they remained in the possession and control of the original seller.

The Lord Ordinary has, I think, somewhat misunderstood the position of the case in this respect. His Lordship quotes an observation which I made in the case of *Anderson v. M'Call* to this effect (4 Macph. 768),—"In order to operate constructive delivery by means of a delivery-order, there must be three independent persons—the vendor, the vendee, and the custodier of the goods; and if the custodier of the goods be identical with the vendor, there ceases to

be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order." His Lordship then goes on to say,—  
 "I think the conditions thus stated as necessary to constructive delivery are fulfilled here. There were three independent persons—Watters, the vendor; the bankrupts, vendees; and the appellants, warehousemen. The appellants were not both sellers and warehousemen *quoad* the bankrupts. They had sold to Watters, and been warehousemen for Watters, but the only relation in which they ever stood to the bankrupts was that of warehousemen, or custodiers of the goods." Now, there, I think, the Lord Ordinary is in error. There are not three independent persons in this case, but only two, because the vendor and the custodian of the goods are identical; and while that continues to be the case there cannot be three independent persons. There are only two—the vendor and the vendee or his representative, the subvendee—for the subvendee is only the representative of the original vendee, and comes precisely into his shoes.

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Upon these grounds it appears to me that the Lord Ordinary is in error, and I think the goods in this case, according to all the authorities, remain the property of the original vendor. Therefore in balancing accounts with the bankrupts he is entitled to set off the security which he held over these goods by way of retention against any claim made against him on behalf of the bankrupt estate.

**LORD MURK.**—The whisky here in question belonged at one time to the appellants. It was sold by them several years ago, some of it as far back as 1881, to various parties, by all of whom the price was paid at the time of sale. None of it was actually delivered, but, upon the sales being effected the whisky was duly invoiced to each of the purchasers, and entered in the books of a bonded warehouse belonging to the appellants as having been sold to those purchasers, who were charged with warehouse-rent by the appellants. When stored in this warehouse the casks were so marked and numbered as to admit of their being easily identified and distinguished from casks belonging to other parties which were stored in the same warehouse, and the appellants thus became custodiers of the whisky for the purchasers.

Some time after the whiskies were so stored, they were sold by the original purchasers, and the price paid to them. On the respective sales taking place an order was given by the original purchaser, who had then become the seller, upon the appellants to deliver to the new purchaser the whisky then sold, which was duly accepted by the appellants. The name of the new purchaser was then entered by the appellants in their warehouse-book as the party to whom the whisky had been transferred, with a notandum as to the time from which warehouse rent was to be charged against him.

On that being done a letter of acknowledgment of the delivery-order in the form used by the appellants, of which copies have been produced, was sent by the appellants to the purchaser, who had presented the order, intimating that "rent on the casks therein specified will be charged" against the new purchaser by the company, which was accordingly done. The appellants in so acting were in all material respects acting as warehousemen, and as such, became custodiers of the whisky for the party who had purchased it. Each of the five parcels of whisky in question were in this way transferred by the appellants to various purchasers, whose names were entered as transferees in the appellants'

No. 84. books. By the month of May 1887 the whole five parcels had been acquired by the bankrupts, W. & J. Russell, wine-merchants in Edinburgh, and so the matter stood till the sequestration of that firm in October 1887.

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Since then the respondent, the trustee on the bankrupt estate, has applied to the appellants to hand over the whisky to him, as carried to him by the sequestration, with a view to the division of the proceeds among the creditors of the bankrupts, including the appellants. This the appellants have declined to do, on the ground that at the time of the original sale the whisky belonged to them, that it had never been actually removed from their warehouse, and was consequently never delivered, so that the property had never actually passed from them either to the first or any of the other purchasers.

The ground of the claim of retention, therefore, is that the right of property is still in the appellants, and that they are entitled to retain the whisky in payment *pro tanto* of their claim against the bankrupts on a general account, and to that extent to obtain a preference over the other creditors of the bankrupts. This plea has been rejected by the Lord Ordinary, on the ground that there had been constructive delivery of the whisky, as explained in his note, and in that judgment I concur.

The case is attended with some nicety and difficulty, arising from the circumstance that the appellants were the proprietors of the whisky at the time of the first sales. But apart from that circumstance, to which I will immediately advert, it was not, and I do not think it can be, disputed that what was done by the appellants, in acknowledging and giving effect to the delivery-orders in the way I have described amounted to what is called constructive delivery.

In dealing with this question Mr Bell, in the part of his work to which we were referred (vol. i. p. 183, 5th ed.), thus expresses himself,—“Where goods are lying in the hands of a warehouseman or wharfinger at the time of the sale, the transfer of them in the wharfinger's books to the name of the buyer, by order of the seller, completes the delivery, making the wharfinger henceforward the custodier for the buyer.”

In support of this view he refers to various cases both in this country and in England, and in particular, to the opinion of Lord Ellenborough in a case of this description, that of *Harman v. Anderson* (2 Camp. p. 243), where his Lordship said,—“The goods having been transferred into the name of the purchaser, it would shake the best established principles still to allow a stoppage *in transitu*. From that moment the defendants became the trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands. The payment of the rent in these cases is a circumstance to shew on whose account the goods are held; but it is immaterial here, the transfer in the books being in itself decisive. I am clearly of opinion that the assignees are entitled to recover.” And the law is laid down to the same effect in the passage in your Lordship's opinion in the case of *Anderson* (4 Macph. p. 765) quoted in the Lord Ordinary's note.

Applying this rule to the present case, it is of importance to attend to what occurred at each of the transferences in question, and I take, by way of illustration, the first of the five transfers mentioned in the joint minute for the parties, that of J. & G. Stewart, the original purchasers. They sell their whisky, which was in the appellants' custody as warehousemen, to Watters, and grant an order on the appellants as their custodiers to deliver it to Watters, and that order is accepted. This the appellants could not refuse to do, for the price

had been paid, and they had no claim to hold as against J. & G. Stewart. They were therefore bound to deliver, either actually or constructively, whichever was required. Watters did not want actual delivery at the time, and knowing that the appellants kept a bonded warehouse in which they stored, and held themselves out to the trade as warehousemen ready to store, whisky on payment of warehouse-rent, it was arranged that he was to get constructive delivery in the manner I have described, and that delivery is given by the appellants as in compliance with the order.

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Now, the effect of this was to give Watters constructively full possession of the whisky, "just as much," to use the words of Lord Ellenborough, "as if the goods had been delivered into his own hands." After that delivery the right, which in the person of J. & G. Stewart was a *jus ad rem*, became in Watters a *jus in re*, by the joint action of J. & G. Stewart and of the appellants, who were custodiers for Stewart. The appellants were thus by their own act divested in favour of Watters of the right of property in respect of which they now claim to retain the whisky; and the full and complete right of property passed to Watters, and through him to the bankrupts, and so was transferred to the trustee by the sequestration. The appellants therefore cannot now, in my opinion, be allowed to revert to and found upon their original right of property in the whisky as still to any extent remaining in them. It passed from them, as I have explained, and the whisky now belongs to the trustee for the general creditors of the bankrupt.

This appears to me to have been beyond doubt what must have been held to have been effected in the case of an ordinary warehouseman. The question is, Was there constructive delivery to Watters? If the whisky had been stored by J. & G. Stewart in a warehouse belonging to another party than the appellants, such a transfer as was here made would admittedly have been constructive delivery of the whisky. But it is said not to be constructive delivery, because the forms of delivery were gone through by warehousemen who had been owners of the whisky, which was still in their possession. Now, it humbly appears to me that the present is on that account rather an *a fortiori* case. I can myself see no good reason why the original sellers should not be allowed to make constructive delivery to Watters of property, the price of which had been paid to them, and which they had then no right to retain. They were at the time bound to deliver, for they had, by accepting the delivery-orders, agreed to deliver either actually or constructively. It is admitted that they could have done so actually, and why they should not be held to have done so constructively I must confess myself unable to comprehend. In the view I take of the case, I do not consider myself entitled in justice to parties situated as Watters then was to interpose such a difficulty in the way of a man getting possession constructively of the goods he had paid for, and of which he was entitled to get full possession; and yet that is what the appellants now contend for, and on this broad ground, as I understood the argument, that in no case could constructive delivery be given by a seller of goods which remained in his possession. But this is, I think, a misapprehension of the law in this respect.

In the part of Mr Bell's work to which I have already referred, he gives (p. 176) several instances of cases of that description to which the rule of constructive delivery would apply. One case is that of trees sold standing, which it is the practice to mark for the buyer, as to which he says,—"Such marking is good constructive delivery." Another case is that of cattle sold in a field, which

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it is the practice "to mark with the buyer's mark, and to leave them for grazing in the enclosure of the seller, the buyer paying the rent." In England a similar rule seems to prevail. For in the case of *Hurry* (1 Camp. p. 462), quoted in a note by Mr Bell, goods sold and warehoused by the seller, who also kept a warehouse and charged rent against the buyer, were held to be constructively delivered. Mr Bell doubts the authority of that case, in so far as the charging of rent was of itself held to be sufficient to constitute constructive delivery; but, assuming the charging of warehouse-rent to be constructive delivery, it is a distinct decision to the effect that the circumstance that the goods warehoused had belonged to the seller, and had never been removed from his warehouse, was no bar to the application of the doctrine of constructive delivery.

So also in the case of *Elmore v. Stone* (1 Taunton, p. 460) where a horse-dealer who also took horses in at livery, sold a horse, and at the request of the purchaser immediately took the horse into livery at his stables, where it was taken charge of by the horsedealer's servants. In a dispute about the price the question turned on whether there had been delivery, and it was held that the horsedealer's charge of it when at livery must be held as possession for the purchaser, although the horse had never been out of the seller's possession. In giving judgment Mansfield, C. J., said—"In the present case after the defendant had said that the horses must stand at livery, and the plaintiff had accepted that order, it made no difference whether they stood at livery at the vendor's stables, or whether they had been taken away, and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses but as any other livery stables' keeper might have them to keep."

Plainly therefore there is no fixed rule of law, to the effect contended for by the appellants, as applicable to their position; and, holding the question thus raised by them to be open, I am quite unable to see any grounds in law, and there are certainly none in equity, for holding that their proceedings in acting as warehousemen, and giving, in obedience to delivery-orders served on them by the sellers of goods of which they were the paid custodiers, what in law is constructive delivery of those goods, are not to receive effect.

The appellants have been holding themselves out to the trade as warehousemen who store goods on certain conditions as to payment of warehouse-rent as other warehousemen do, and goods are stored with them on those conditions, and warehouse-rent paid. They accept orders made upon them for delivery of those goods, and by doing so they undertake and contract to deliver them, and, as I have already remarked in regard to the case of *Watters* (and the same observation applies to all the other cases of transfers by the first purchaser), they could not have refused delivery, for they had received payment of the price of the goods, and had no grounds for refusing to act upon the orders or for withholding delivery. *Watters* did not require actual but asked for constructive delivery and they gave it, in a form which in law was good constructive delivery, and so passed the full right of property to *Watters*, which was transferred by him to the bankrupts. By so acting the appellants gave up, as it appears to me, any right of property that remained to them in the goods. Now, all this was done by the appellants in their character of ordinary warehousemen, and they cannot, as I conceive, now be allowed to set up their alleged right of property, as a ground for refusing to hand over the goods to the trustee. I am therefore of opinion with the Lord Ordinary that their plea to that effect should be repelled.

In coming to this conclusion, I do not think that I am in any respect disre-

garding the decisions in the cases of *Mathison* (17 D. p. 274) or of *Anderson* No. 84. (4 Macph. p. 765) founded on by the appellants, in both of which judgments I should have concurred. In the case of *Mathison* there were only two parties concerned, viz., *Mathison* and *Alison*, the trustee on *Dunlop & Company's* estate, who had sold the whisky to *Mathison*. The sale had been entered in the sellers' books, but nothing more had been done. There had been no resale to any other party, and no delivery-order granted. The Court were unanimous in preferring the trustee on *Dunlop & Company's* estate, on the ground that there had been no constructive delivery, and held that the purchaser must just rank as an ordinary creditor of the bankrupt. And so also in the case of *Anderson* there were only two parties, viz., the trustee on the sequestrated estate of the seller and *McCall & Company* the purchasers. An attempt was made to shew that the goods had been transferred by an order on a third party, *Angus*, a storekeeper, who had entered the purchasers' name in his books. On inquiry, however, it turned out that the alleged storekeeper was only a servant acting for the seller, and that the form he had gone through could not be held to amount to more than a mere entry of the sale, and of the purchasers' name by the seller in his own books, so that there was in reality no third party concerned. The claim of the purchaser was therefore rejected.

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In the present case, however, the facts are altogether different. In each transaction, after the date of the first purchase, there have been three separate parties concerned, taking the transaction I have already given in illustration, viz., *J. & G. Stewart*, the original purchasers, who resold the whisky; *Watters*, who purchased it from them; and the appellants, who had assumed the character of the paid custodiers of the whisky for the *Stewarts*, and who accepted, and undertook to act upon, the delivery-order granted by the *Stewarts*, and in obedience to and in implement, as I think, of that order, had constructively delivered the whisky to *Watters* by transferring it to his name in their warehouse-books under an arrangement by which he was to be charged with the payment of warehouse-rent. This, on the grounds I have explained, completely divested the appellants, and passed the full right of property in the whisky to *Watters*.

On the whole matter therefore I have come to the conclusion that the interlocutor of the Lord Ordinary should be adhered to.

**LORD SHAND.**—The question in this case is, whether the appellants, the *Distillers Company Limited*, were entitled to retain certain parcels of whisky lying in their stores or warehouses, standing entered in their books as belonging to *Messrs W. & J. Russell*, who are now represented by *Mr Dawson*, the trustee on their sequestrated estate. They claim a right of retention, for the payment of a general balance on an account arising out of transactions between them and *Messrs Russell* entirely unconnected with the transactions by which the latter acquired right to the whisky in question. *Mr Dawson*, as trustee on the estate of *Messrs Russell*, and as representing their creditors, is willing to pay all warehouse charges which the *Distillery Company* may have for storing the goods, but he disputes their right to retain the goods for their general balance on account.

The decision of the case depends on the question whether the goods are the property of the appellants. If the goods be their property, then the appellants are entitled to plead retention as against the debt due to them by the bankrupts; if not,—if the appellants were custodiers merely at the date of *Messrs Russell's*



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it is the practice "to mark with the buyer's mark, and to leave them for grazing in the enclosure of the seller, the buyer paying the rent." In England a similar rule seems to prevail. For in the case of *Hurry* (1 Camp. p. 462), quoted in a note by Mr Bell, goods sold and warehoused by the seller, who also kept a warehouse and charged rent against the buyer, were held to be constructively delivered. Mr Bell doubts the authority of that case, in so far as the charging of rent was of itself held to be sufficient to constitute constructive delivery; but, assuming the charging of warehouse-rent to be constructive delivery, it is a distinct decision to the effect that the circumstance that the goods warehoused had belonged to the seller, and had never been removed from his warehouse, was no bar to the application of the doctrine of constructive delivery.

So also in the case of *Elmore v. Stone* (1 Taunton, p. 460) where a horse-dealer who also took horses in at livery, sold a horse, and at the request of the purchaser immediately took the horse into livery at his stables, where it was taken charge of by the horsedealer's servants. In a dispute about the price, the question turned on whether there had been delivery, and it was held that the horsedealer's charge of it when at livery must be held as possession for the purchaser, although the horse had never been out of the seller's possession. In giving judgment Mansfield, C. J., said—"In the present case after the defendant had said that the horses must stand at livery, and the plaintiff had accepted that order, it made no difference whether they stood at livery at the vendor's stables, or whether they had been taken away, and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses but as any other livery stables' keeper might have them to keep."

Plainly therefore there is no fixed rule of law, to the effect contended for by the appellants, as applicable to their position; and, holding the question thus raised by them to be open, I am quite unable to see any grounds in law, and there are certainly none in equity, for holding that their proceedings in acting as warehousemen, and giving, in obedience to delivery-orders served on them by the sellers of goods of which they were the paid custodiers, what in law is constructive delivery of those goods, are not to receive effect.

The appellants have been holding themselves out to the trade as warehousemen who store goods on certain conditions as to payment of warehouse-rent as other warehousemen do, and goods are stored with them on those conditions, and warehouse-rent paid. They accept orders made upon them for delivery of those goods, and by doing so they undertake and contract to deliver them, and, as I have already remarked in regard to the case of *Watters* (and the same observation applies to all the other cases of transfers by the first purchaser), they could not have refused delivery, for they had received payment of the price of the goods, and had no grounds for refusing to act upon the orders or for withholding delivery. *Watters* did not require actual but asked for constructive delivery and they gave it, in a form which in law was good constructive delivery, and so passed the full right of property to *Watters*, which was transferred by him to the bankrupts. By so acting the appellants gave up, as it appears to me, any right of property that remained to them in the goods. Now, all this was done by the appellants in their character of ordinary warehousemen, and they cannot, as I conceive, now be allowed to set up their alleged right of property, as a ground for refusing to hand over the goods to the trustee. I am therefore of opinion with the Lord Ordinary that their plea to that effect should be repelled.

In coming to this conclusion, I do not think that I am in any respect disre-

garding the decisions in the cases of *Mathison* (17 D. p. 274) or of *Anderson* No. 84: (4 Macph. p. 765) founded on by the appellants, in both of which judgments I should have concurred. In the case of *Mathison* there were only two parties concerned, viz., *Mathison* and *Alison*, the trustee on *Dunlop & Company's* estate, who had sold the whisky to *Mathison*. The sale had been entered in the sellers' books, but nothing more had been done. There had been no resale to any other party, and no delivery-order granted. The Court were unanimous in preferring the trustee on *Dunlop & Company's* estate, on the ground that there had been no constructive delivery, and held that the purchaser must just rank as an ordinary creditor of the bankrupt. And so also in the case of *Anderson* there were only two parties, viz., the trustee on the sequestrated estate of the seller and *M'Call & Company* the purchasers. An attempt was made to shew that the goods had been transferred by an order on a third party, *Angus*, a storekeeper, who had entered the purchasers' name in his books. On inquiry, however, it turned out that the alleged storekeeper was only a servant acting for the seller, and that the form he had gone through could not be held to amount to more than a mere entry of the sale, and of the purchasers' name by the seller in his own books, so that there was in reality no third party concerned. The claim of the purchaser was therefore rejected.

In the present case, however, the facts are altogether different. In each transaction, after the date of the first purchase, there have been three separate parties concerned, taking the transaction I have already given in illustration, viz., *J. & G. Stewart*, the original purchasers, who resold the whisky; *Watters*, who purchased it from them; and the appellants, who had assumed the character of the paid custodiers of the whisky for the *Stewarts*, and who accepted, and undertook to act upon, the delivery-order granted by the *Stewarts*, and in obedience to and in implement, as I think, of that order, had constructively delivered the whisky to *Watters* by transferring it to his name in their warehouse-books under an arrangement by which he was to be charged with the payment of warehouse-rent. This, on the grounds I have explained, completely divested the appellants, and passed the full right of property in the whisky to *Watters*.

On the whole matter therefore I have come to the conclusion that the interlocutor of the Lord Ordinary should be adhered to.

**LORD SHAND.**—The question in this case is, whether the appellants, the *Distillers Company Limited*, were entitled to retain certain parcels of whisky lying in their stores or warehouses, standing entered in their books as belonging to *Messrs W. & J. Russell*, who are now represented by *Mr Dawson*, the trustee on their sequestrated estate. They claim a right of retention, for the payment of a general balance on an account arising out of transactions between them and *Messrs Russell* entirely unconnected with the transactions by which the latter acquired right to the whisky in question. *Mr Dawson*, as trustee on the estate of *Messrs Russell*, and as representing their creditors, is willing to pay all warehouse charges which the *Distillery Company* may have for storing the goods, but he disputes their right to retain the goods for their general balance on account.

The decision of the case depends on the question whether the goods are the property of the appellants. If the goods be their property, then the appellants are entitled to plead retention as against the debt due to them by the bankrupts; if not,—if the appellants were custodiers merely at the date of *Messrs Russell's*

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The question raised is important, and I think it is a new question. Hitherto, so far as I am aware, the Court in the cases which have occurred for decision has had to deal only with rights of retention pleaded by a seller in respect of claims by him against the original buyer. The right of retention for that class of debts has been maintained against the buyer's creditors, where the seller has become bankrupt, and also against subpurchasers. In this case no such claim is made, and no such claim exists. The appellants, the original sellers of the whisky, have no right of retention in respect of claims against the original purchaser. But although the right to the goods has been acquired by a series of subpurchasers, and was ultimately acquired by Messrs Russell, the appellants, founding on an alleged right of property in the goods, claim a right of retention against Messrs Russell, the last of the subpurchasers, because of a debt due by them on general account.

The position of the different parcels of whisky is detailed in the appendix No. 2 and joint minute for the parties, boxed 22d November last. In all of the cases the appellants sold the goods several years ago, and at the time of the sale, or shortly afterwards, they received the price of each parcel sold. From that date down to 1887 a variety of transfers of the goods have taken place. In the case of one of the parcels, consisting of two quarters of whisky, there have been six transferences since the goods were originally purchased from the appellants in May 1881. In two other cases there have been four such transfers and in the remaining cases two transfers. In each of these cases the original purchaser, having paid the price and resold the goods, granted a delivery-order addressed to the appellants in the terms stated in the joint minute, and this order having been intimated to them the appellants immediately made entries of the transfer in their warehouse-ledger, taking the goods out of the name of the original purchaser, and entering them in the name of the subpurchaser. At the same time they granted an acknowledgment by letter to the subpurchaser of the receipt of the delivery-order, adding—"And we have to intimate that rent on the casks" therein specified will "be charged to you" from a date specified, being the day on which the delivery-order was intimated to them; and appended to these letters were certain conditions specifying the rate of rent to be thereafter charged against the transferee for warehousing the goods. In the case of each transfer by the subpurchaser in favour of another subpurchaser the same course was pursued—the delivery-order intimated, the transfer of the goods recorded in the appellants' books, and the goods transferred to the name of the transferee, and an acknowledgment of the delivery-order issued with an intimation that the new subpurchaser would be charged rent at the rate specified.

The appellants are possessed of large bonded warehouses at their different distilleries of Cambus, Cameron Bridge, and Carsebridge, in which whisky manufactured by them is stored. In these bonded warehouses they have been in use for a number of years, by arrangement with persons dealing with them, to allow the goods to remain on storage rent, and each quantity of whisky as purchased is not only entered in the name of the purchaser, and transferred from time to time to subpurchasers in the manner just explained, but the different casks are marked so as to be readily identified as being the goods speci-

fully described in the delivery-orders and transfer entries. The information furnished by the parties does not shew in detail the extent to which the company store or warehouse the goods of others as compared with their own stock ; but there can, I think, be no doubt that whisky belonging to themselves and unsold must form a small proportion of the total quantity of goods in their bonded warehouses. Goods sold by them during a number of years have been constantly in use to be left in their custody for payment of warehouse-rents, while I should suppose that as manufacturers they will endeavour to make sales of their own goods as soon after they are manufactured as possible.

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In considering the effect of the appellants' sales, the delivery-orders and acknowledgments in the terms already mentioned, and transfer entries in their books, as bearing on their claim to be now proprietors of all the whisky in their warehouses, it appears to me to be of much importance to have in view the provisions of the Mercantile Law Amendment Act of 1856. Prior to that statute several cases had occurred in which, although the sellers of goods had received full payment of the price and implement of the contract on the part of the buyer, their creditors on their bankruptcy were held entitled to refuse delivery to the buyer or his creditors, and thus they got the benefit first of the price of the goods, which the bankrupt had received, and next of the value of the goods themselves. Even in the case of a subpurchaser, who in his turn had paid the price of the goods to the first purchaser, and had obtained and intimated a delivery-order, the original seller, notwithstanding the receipt of the price due to him, and the fact that he held the goods merely as an accommodation to the buyer and for his behoof, was held entitled to a right of retention for a balance due to him by the first purchaser on new and different transactions. It appears to me to be impossible to dispute that these cases resulted in serious injustice. I am humbly of opinion that it was not a creditable state of the law that in such circumstances the rights of purchasers who had paid for their goods should have been defeated, and that the sellers, who had obtained payment of the price of the goods, which were left in their possession admittedly by arrangement for custody only, or their creditors, should still be entitled to refuse delivery. The decisions were rested partly on the doctrine that until delivery of goods under a contract of sale was made, the right of property or *jus in re* remained with the seller, and partly on the doctrine of reputed ownership, or at least on the view that merchants were entitled to assume that goods which were in their debtors' possession were their property—that to hold otherwise would enable sellers to obtain fictitious credit,—and that this was a good reason for refusing to give effect to constructive delivery. This last was the express ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison v. Alison*. In regard to the first of these grounds the result was arrived at by the application of the principle expressed in the brocard, *traditionibus non nudis pactis transferuntur rerum dominia*.

It has always seemed to me that that principle was carried to an extreme length in the cases I refer to—I mean more particularly the cases of *Melrose v. Hastie* and *Mathison v. Alison*, neither of which unfortunately was reviewed in the House of Lords—that in these cases the principle received effect in circumstances which did not warrant its application. I assume it to have been clearly established in the law of Scotland—as I believe it to have been properly so established—that where there was a simple contract of sale with nothing following on it the property should remain with the seller. But where some-

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thing material had followed beyond the *nudum pactum*, where the seller had been actually paid the price of the goods, had entered the goods in his books as belonging to the purchaser, and had set them aside and earmarked and retained them in his premises by arrangement with the buyer for custody only, I am humbly of opinion that that the brocard *traditionibus non nudis pactis transferuntur rerum dominia* had no proper application. I should perhaps rather say it had been fully satisfied, because the bare agreement, the *nudum pactum*, had been followed and clothed by implement on the part of the buyer, and by acts on the part of the contracting parties, which constituted constructive delivery. Happily, however, by the legislation of 1856 the gross injustice which had been done to buyers who had not only bought but paid for their goods was in a great measure removed as regards the subsequent dealings of traders; and in the case of subpurchasers who had intimated their purchases by delivery-orders or otherwise to the original seller all possible right of retention on the seller's part on the ground of any claim of indebtedness against the original buyer on other transactions was abolished. It is true that the enactments of the statute do not alter the legal principle that the seller of goods retains a right of property in them, or *jus in re* until delivery, actual or constructive; but the statute provided a remedy for the injustice, and, as I think, the mischief of the law, as it had been interpreted by decisions, to an extent which it appears to me materially affects the decision of the present case. After an examination of the statute with reference to the change effected in the law, Lord Blackburn observed in the case of *M'Bean v. Wallace & Company*, 8 R. (H. of L.) 112—"The chief practical difference arising from the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser was that the vendor's creditors by poinding and by sequestration could take the goods. There is a nominal difference still between the law of England and the law of Scotland; but for all practical purposes the law of Scotland, where there has been a contract of sale though no delivery, is made identical with the law of England in the actual result." In the case of a subpurchaser particularly who has intimated his subpurchase, it seems to me that his Lordship's words are literally true.

The appellants in this case set up a claim of property to the goods which they sold years ago, and the right to which in some cases has, as I have observed, passed through several parties till it became vested in the bankrupts. They have admittedly no claim whatever to hold the goods against the purchaser from them. They have received the price, and even if the original purchasers were debtors to them in account, they cannot on that ground maintain any right to retain the goods against a subpurchaser who by intimation of the delivery-order has intimated his subpurchase. The only means by which the appellants could have acquired such a right was not by asserting any right of property in the goods, but by resorting to the diligence of arrestment of their debtor's goods—i.e., the goods of the original purchaser—in their own hands, a diligence which is competent to all other creditors of the purchaser, but which must be resorted to before intimation of the subsale.

It is in these circumstances that the legal effect of the intimated subpurchase, the transfer of the goods in the books of the company, and the intimation of a charge for rent is to be considered,—and that in a question with persons who, as part of their ordinary business, store goods for rent. It humbly appears to me that the result of the dealing between the appellants as the original sellers

—who can no longer retain the goods on account of any obligation of the purchaser from them—and subpurchasers, is that constructive delivery of the goods has been given to the latter. The system on which the company acts, and has acted for years, in my opinion makes them (as the Lord Ordinary has held) warehousemen or storekeepers in a question with subpurchasers with whom they have dealings; and it is only right that this should be so, for much the greater part of the goods in their warehouse is held for subpurchasers and for payment of warehouse rent. There is no doubt that if the delivery-orders and relative intimations and transfer entries in the company's books had occurred in the case of goods stored in an ordinary public warehouse, that would have been conclusive in the respondents' favour. Why should the result be different in the case of the appellants, who are to a large extent warehouse or storekeepers, although they do not receive and store whisky other than their own manufacture? It is said that the legal effect is different because they were originally sellers of the goods. The provisions of the statute have destroyed the rights of retention which persons in their position formerly had, at least to the extent I have already stated; and these provisions have at the same time, as it appears to me, made it also more easy than formerly for persons buying from the original purchasers to obtain from the appellants constructive delivery of the goods so bought and warehoused with them; and for the appellants to give such delivery. The appellants were bound to give actual delivery if asked, as they could not retain the goods even if the original purchaser owed them a general balance, and there is every presumption in favour of constructive delivery and against the notion that the subpurchaser would elect so to transact as to leave the appellants owners of the goods which he merely stored with them.

I do not know whether it is maintained by the appellants that they cannot give constructive delivery of goods of which they were the original sellers, and which have continued to lie in their warehouse. If that be maintained, I think the contention is clearly unsound. Lord Mure has given several instances of constructive delivery of subjects purchased and left with the seller, even where the seller did not hold himself out, as the appellants do, as warehousekeepers for rent. Professor Bell mentions the case of the purchaser of a vase who, having paid for it, leaves it with the seller to have certain work executed on it. A person may purchase a horse, and having paid the price, may leave the animal with the seller at livery, or let it to the seller on hire. Surely it could not be successfully maintained that the purchaser of the vase must take it up and carry it outside the seller's premises and return with it, or that the purchaser must take his horse outside of the stable, when he may take it back again, in order to have effectual delivery. The constructive delivery is surely complete without any such proceeding of personal apprehension and removal of the subject from the seller's premises. The law, as I understand it, does not require this form to be gone through, for it would be little more than a mere form. Constructive delivery is complete by payment, followed by the new contract or arrangement made with the seller, which entirely changes his title to the goods from one of property to one of depositary, hirer, or otherwise. So also with a purchaser of cattle who, having paid the price, agrees to leave the cattle for grazing at a rent or charge agreed on. The constructive delivery, I cannot doubt, would be quite as effectual as actual delivery by the removal of the cattle by the purchaser outside of the seller's field and putting them back

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again. A purchaser of books may leave them to be bound with a seller who also carries on business as a bookbinder; and such instances might be indefinitely multiplied. Whether anything can be maintained against constructive delivery being allowed by the law or not, because of the doctrine of reputed ownership, is a different matter, to which I shall refer immediately. But apart from this, I can see no reason to doubt that in the cases which I have mentioned constructive delivery would, in *bona fide* transactions, be quite as effectual as actual delivery by the removal of the subjects purchased from the custody of the seller.

And so also in the case of a general warehouse or store. A purchaser of goods, desirous of leaving them with the warehouseman and willing to pay rent for them, intimates his delivery-order and gets the goods transferred in the warehouse books to his name. There has been no actual delivery or personal taking possession of the goods. But the constructive delivery is complete, because the contract of deposit with the subpurchaser has been completed. This illustration shews, as the other illustrations do, that it is not correct or true to say that the purchaser must take physical possession of goods purchased. That is certainly not required, and if delivery with its legal consequences be effected in the case of a warehouseman, or in the other cases I have mentioned, it must, as it appears to me, be equally effected in the case of goods lying with a seller where the price is paid and the goods are left, entirely because of a new arrangement, that the seller shall hold them on deposit, or shall so hold them and store them in return for a certain charge or rent. I cannot assent to the view that a seller, by the law of this country, cannot effectually make such an arrangement, nor can I believe that such constructive delivery, if the facts are clear and the *bona fides* of the parties is evident, is not as effectual as actual delivery would be. I do not regard an arrangement to pay rent as at all essential or necessary, though the payment of rent is a clear piece of evidence as to the true nature of the agreement of the parties. If the purchaser were by his servants, in his dealings with the appellants (and I say the same of subpurchasers), to roll the puncheons of whisky out of the store in order to take actual possession and to roll them back again, but clearly on an arrangement for custody and deposit only, this would be taking actual delivery. Surely constructive delivery can be given and taken without going through this process. I cannot doubt that if on the occasion of the intimation of the delivery-orders by the original purchasers of the goods in question being intimated to the appellants—who, as I have shewn, were bound to give actual delivery if asked, because they could have no claim to retain the goods for a debt due by the purchaser—the appellants had acknowledged the order, and in their letter had undertaken expressly to hold the goods for the subpurchasers as warehousemen or custodiers for rent for their accommodation, the delivery would have been effectual. But this would only have been the giving and taking of constructive and not actual delivery.

And in effect this in my opinion was what occurred in reference to the goods now in question. The appellants had no power to hold them for a day after the original buyer demanded them, and his subpurchaser was in a position to take either actual or constructive delivery as he chose. Is there any reason for saying he preferred to take neither, but to leave his original sellers that *jus in re* which they now seek to plead and enforce after all that has occurred? The appellants are warehousemen—though they only agree to store goods of their own manufacture—for they have regular stores which are largely used by third

parties who arrange to pay storage rents or charges ; and when goods are transferred by the original buyer, who, having paid the price and been under no obligation of any kind to the seller, is under the statute to all practical effects the owner (the seller having no possible right of retention of the goods)—when the transfer is duly recorded in the warehouse books—and an intimation given to the subpurchaser that henceforth “rent” will be charged against him for the goods—I am of opinion that the goods are then left with the appellants and accepted by them as custodiers or warehousemen for custody on rent. Under this arrangement they cannot, in my opinion, rear up or revert to their former right of ownership,—an empty right which, if it existed at all when the subsale was intimated, had then no legal effect or consequences even in a question with the original purchaser. If I be right in so thinking, of course they cannot obtain the preference they now seek to gain over the general creditors of Messrs Russell.

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The view I have now stated does not conflict with the decision in the case of *Anderson v. McCall & Company*, on which much of the appellants' argument was based. I should without difficulty have concurred in the decision of that case—for as soon as it was settled that the storekeeper Angus was merely a servant of Jackson & Son, the owners of the goods there in dispute, and that, therefore, in giving a delivery-order on him they were merely giving an order on themselves, the case resolved into an attempt on the part of persons giving an advance on moveable property to have an effectual pledge although the property was left entirely in the debtors' hands. Jackson & Son continued themselves to hold the sugars, on the security of which their creditors made the advances, and an undertaking to hold these sugars, which were their own property in every sense of the word, in their own possession for behoof of a particular creditor was of course ineffectual, because a pledge cannot be given by a debtor who continues in possession of it. The law is entirely different in a case of purchase and sale where the price has been paid. It seems to me accordingly, that the dicta in the case of *Anderson v. McCall*, founded on by the appellants, must be regarded as *obiter* in a question like this of purchase and sale and subsales followed by the dealings above detailed. The passage mainly founded on in the opinion of your Lordship is as follows :—“In order to operate constructive delivery by means of a delivery-order there must be three independent persons,—the vendor, the vendee, and the custodian of the goods ; and if the custodian of the goods be identical with the vendor there ceases to be a third independent person ; and therefore constructive delivery cannot in that case be effected by a delivery-order. That is the clear law of Scotland, which is well established, and has received effect in a number of cases. Applying that rule of law, I am of opinion that this verdict is for the pursuers.” If that passage be read as limited in its application to such a case as that of *McCall*, where it was attempted to make a security effectual over moveables *retenta possessione* of the owner, I entirely agree with it. But it has no relation, I think, to a case like this, where subpurchasers' rights at common law and under the statute are in question. In that case there was no subpurchase and no delivery-order by the first purchaser to a subpurchaser who had paid for the goods. In this case in each subpurchase there were three parties concerned, and for the reasons I have explained I think the appellants, who were one of these parties, and who were the custodians of the goods, were truly third parties, although they had at one time been owners and sellers of the goods. It is said there were only two persons, viz., the original



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sellers or owners and the buyers or their mandatories or assignees. This seems to me to be begging the whole question. The original sellers had in my opinion become custodiers or warehousemen of the goods by contract. In any case they had a double character. The subpurchasers had acquired an independent position. It is only by regarding the appellants as sellers and owners only that their argument can be maintained, for they could not be custodiers of their own property. But if the appellants were custodiers only, as I think they were by contract, having lost any right of property after constructive delivery of the goods, there were plainly three persons taking part in each subseal and delivery.

In my opinion, however, as already explained, I do not think that it is in the least degree necessary to constructive delivery that three persons shall take part in the transaction.

No question arises here of reputed ownership, or of the supposed inference as to ownership, to be drawn from the mere possession of goods, which to a large extent entered into the decision of the cases of *Melrose v. Hastie* and *Mathison v. Alison*, and formed the ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison*. The appellants are here themselves only claiming their contract rights. They are not represented by creditors who might plead that they had been induced to give credit because of continued possession of goods allowed to their debtor. But even if the question had occurred with creditors of the appellants seeking to gain the preference over the general creditors of the subpurchasers which the appellants now do, I am clearly of opinion that the plea of apparent or reputed ownership would not avail. If the appellants are the owners they must succeed in their plea of retention on that ground. If they are not, there is no room for saying that the subpurchasers have so acted as to warrant third parties to assume or believe that the appellants were the owners. In the case of *M'Bain v. Wallace & Company* this subject was discussed in reference to a ship in the course of being built in the shipbuilders' yard, and the plea did not receive much countenance—and the cases of *Orr's Trustee*, 8 Macph. 936, and *Robertson*, 9 R. 772, are recent authorities shewing that the title of possession is the point to which persons must look in giving credit to others. In Professor Bell's Principles, sec. 1315, he says,—“Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor, or on which creditors are entitled to rely, for the goods in their debtor's possession may be with him, not as owner, but under some contract requiring temporary possession. Hence every legitimate cause of possession makes an exception to the credit of apparent ownership. So, in *Commodate*, the possession of the borrower is no lawful ground of credit to him. In *Hiring*, neither the subject let nor materials in the hands of a workman under *locatio operis* can afford a fair ground of enlarged credit to the possessor. In *Deposit*, though the thing deposited may appear as part of the custodian's stock, it remains separate on his bankruptcy as the property of the depositor.” This seems to me to be quite applicable to the present case, and to be conclusive. I do not think that because goods for the buyer's convenience are left in a seller's warehouse after being sold and the price paid, there is ground for reputed ownership,—especially now, having regard to the provisions of the Mercantile Law Amendment Act as affecting the rights of sellers and their creditors. And in so far as the judgments of *Melrose v. Hastie* and *Mathison v. Alison* proceeded on that view, they were, I think, unwarranted. In some of the cases on this branch of the law Judges have said it was the buyers' own fault that they did not take actual delivery, and

that they must take the consequence. I see no fault in the matter, nor do I see any reason for this consequence, viz., that they should lose the goods they had paid for. The exigencies of business and the convenience of merchants (and I think the convenience of trade should have great weight in such questions) often require, or at least make it highly desirable, that goods bought and paid for should remain with the original seller, not as his goods, but on the contract of deposit. If this be arranged, constructive delivery results. The transaction cannot be held invalid or ineffectual because third parties choose to infer without warrant that the possession of an original seller is necessarily continuous as the possession arising from ownership, whatever may have been the seller's contracts or dealing with his goods.

Finally, I think reputed ownership is out of the question with reference to such a business as that of the appellants, whose warehouses in the knowledge of everyone dealing with them are so much used for the storing of goods sold often years before by the appellants to third parties.

I am on the whole of opinion that the judgment of the Lord Ordinary is sound, and that it should be affirmed.

**LORD ADAM.**—By the law of Scotland the property of goods sold but not delivered remains with the seller.

Nothing but delivery, actual or constructive, will pass the property.

There has been no actual delivery in this case. The whisky sold is now, and has all along been, in the possession of the Distillers Company. It lies now, and has lain all along, in the cellars or warehouse of the company.

Has there, then, been constructive delivery? The Lord Ordinary is of opinion that if the company were here in a question with the original purchaser, they must have prevailed. I agree with him, for I think that the cases of *Mathison v. Alison* and *Wyper v. Harvey* rule this case. In the case of *Mathison v. Alison*, as in this case, the whisky sold remained in the seller's warehouse, but the price of the whisky was paid by the vendee, an invoice was sent to him, and the sale recorded in the warehouse-books of the seller. But the Court held that all this did not operate constructive delivery, that the vendor remained the undivested owner of the goods, and that what passed to the vendee was a right to demand delivery of the goods sold.

The only difference that I see between this case and that of *Mathison v. Alison* is that on the invoice sent to the vendee there is endorsed, as a condition of the sale, that the spirits would be held free of rent-charge for six months in the company's casks, and twelve months in customer's casks, from date of invoice, and that thereafter the spirits should be subject to a rent-charge of 1d. or 2d. a-week, as the case might be.

It is said, as I understand, that the effect of this condition was that thereafter the vendor held the goods, not in his title of undivested owner, but as a warehouseman under an implied contract to that effect.

It is, I think, quite settled that, if the owner of goods delivers them to a warehouseman, or other neutral custodian, to hold them for him, an order by the owner to the custodian to deliver them to the purchaser, intimated to the custodian, will operate as constructive delivery of the goods, and transfer the property of them to the purchaser.

Your Lordship, in the case of *Pochin v. Robinow*, 7 Macph. 622, thus states the law in this respect,—“Constructive delivery may take place, and generally does

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sellers or owners and the buyers or their mandatories or assignees. This seems to me to be begging the whole question. The original sellers had in my opinion become custodiers or warehousemen of the goods by contract. In any case they had a double character. The subpurchasers had acquired an independent position. It is only by regarding the appellants as sellers and owners only that their argument can be maintained, for they could not be custodiers of their own property. But if the appellants were custodiers only, as I think they were by contract, having lost any right of property after constructive delivery of the goods, there were plainly three persons taking part in each subseal and delivery.

In my opinion, however, as already explained, I do not think that it is in the least degree necessary to constructive delivery that three persons shall take part in the transaction.

No question arises here of reputed ownership, or of the supposed inference as to ownership, to be drawn from the mere possession of goods, which to a large extent entered into the decision of the cases of *Melrose v. Hastie* and *Mathison v. Alison*, and formed the ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison*. The appellants are here themselves only claiming their contract rights. They are not represented by creditors who might plead that they had been induced to give credit because of continued possession of goods allowed to their debtor. But even if the question had occurred with creditors of the appellants seeking to gain the preference over the general creditors of the subpurchasers which the appellants now do, I am clearly of opinion that the plea of apparent or reputed ownership would not avail. If the appellants are the owners they must succeed in their plea of retention on that ground. If they are not, there is no room for saying that the subpurchasers have so acted as to warrant third parties to assume or believe that the appellants were the owners. In the case of *M'Bain v. Wallace & Company* this subject was discussed in reference to a ship in the course of being built in the shipbuilders' yard, and the plea did not receive much countenance—and the cases of *Orr's Trustee*, 8 Macph. 936, and *Robertson*, 9 R. 772, are recent authorities shewing that the title of possession is the point to which persons must look in giving credit to others. In Professor Bell's Principles, sec. 1315, he says,—“Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor, or on which creditors are entitled to rely, for the goods in their debtor's possession may be with him, not as owner, but under some contract requiring temporary possession. Hence every legitimate cause of possession makes an exception to the credit of apparent ownership. So, in *Commodate*, the possession of the borrower is no lawful ground of credit to him. In *Hiring*, neither the subject let nor materials in the hands of a workman under *locatio operis* can afford a fair ground of enlarged credit to the possessor. In *Deposit*, though the thing deposited may appear as part of the custodier's stock, it remains separate on his bankruptcy as the property of the depositor.” This seems to me to be quite applicable to the present case, and to be conclusive. I do not think that because goods for the buyer's convenience are left in a seller's warehouse after being sold and the price paid, there is ground for reputed ownership,—especially now, having regard to the provisions of the Mercantile Law Amendment Act as affecting the rights of sellers and their creditors. And in so far as the judgments of *Melrose v. Hastie* and *Mathison v. Alison* proceeded on that view, they were, I think, unwarranted. In some of the cases on this branch of the law Judges have said it was the buyers' own fault that they did not take actual delivery, and

vendor and the subvendee, as coming in place of the original vendee. There is No. 84.  
no third party concerned, independent or otherwise.

On the whole matter I am of opinion that the Distillers Company have all  
along been in possession of the goods in question on their title of undivested  
owners, and that they are entitled to retain them against the general balance  
due to them by the bankrupts.

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Of course the number of times any particular parcel of whisky may have been  
transferred can make no difference in the result.

LORD KINNEAR.—I agree with your Lordship in the chair, and therefore I  
need hardly say that I also agree with Lord Shand in thinking that the doctrine  
of reputed ownership has no bearing whatever on this question. The only point  
which we have to consider is, whether the goods have or have not been delivered  
to the bankrupts who are now represented by the trustee on their sequestrated  
estate.

If it could have been considered an open question whether the property of  
the goods had passed to the first purchaser, it might have been a question of  
some difficulty, and at all events it would have required serious consideration.  
But all your Lordships are of opinion, along with the Lord Ordinary, that that  
question is absolutely concluded by authority, and accordingly we are all agreed,  
as I understand, that the goods were not delivered to the first purchaser, and  
that they remained with the sellers as undivested owners. Now, that being so,  
it follows as a necessary consequence that the position of the first purchaser was  
that of creditor in a personal obligation binding upon the seller to deliver the  
goods, and that was the only right which the first purchaser could give to any  
subpurchaser from him. He could not deliver the goods to his own purchaser,  
because they had not been delivered to him, and were not in his possession.  
All he could do was to put the subpurchaser in his place, and enable him to go  
to the seller and ask for delivery. And accordingly I do not understand that  
those of your Lordships who agree with the Lord Ordinary are prepared to hold  
that delivery was given by the first purchaser to the subpurchaser. I rather  
think that the view which your Lordships have adopted is, that the original  
vendor must be held to have made delivery to the subpurchaser upon intimation  
being given to him of the first purchaser's assignation. But then the original  
vendor did nothing more upon that assignation being intimated to him than he  
was bound to do whether he intended to deliver to the subpurchaser or not, be-  
cause, as both Lord Mure and Lord Shand have pointed out, he had no alterna-  
tive after the intimation to him that the goods which he held for the first  
purchaser had been assigned by that purchaser to a subpurchaser, except to  
acknowledge that he had received that intimation, and to make the correspond-  
ing entries in his books, which placed the subpurchaser in the position of the  
original buyer. Now, if that was what he was bound to do whether he de-  
livered or not, I have great difficulty in seeing how constructive delivery could  
thereby be effected. But there is a further difficulty, because the reason why  
it is held that the property had not passed to the first purchaser is that no  
written obligation or book entry will make delivery, so long as the goods  
remain in the uncontrolled possession of the vendor; and if the vendor's writ-  
ing does not constitute delivery to the first purchaser, it would seem to follow  
that it cannot operate as delivery to a second or third.

I cannot help thinking that some perplexity has been introduced into the argu-

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ment by the confusion of questions of law with questions of fact. Whether delivery is or is not necessary to pass the property, is a question of law. But when it has been held that delivery is necessary in law,—and we are all agreed that it is necessary,—then the question whether it has taken place or not is a mere question of fact. Constructive delivery, as that term is used in our law, is delivery in fact, just as much as actual delivery, because delivery with us must always mean change of possession. When goods sold are in the natural possession of the seller, the only way of delivering them is to hand them over to the buyer, or to somebody who shall hold for him. When they are not in the seller's hands, but in the hands of a third person subject to the seller's order, then delivery of an order upon the custodier, and intimation of that order to him, is just as much delivery in fact as if goods which had not previously passed out of the hands of the seller had been handed over by him to the buyer in performance of the contract of sale, because the intimation of the delivery-order determines the possession of the seller and gives to the buyer the same kind of possession as the seller had before. And, therefore, as your Lordship pointed out in the case of *Pochin*, 7 Macph. 622, it is essential to the completion of constructive delivery that the goods should be in the hands of an independent third person, and not of the owner.

I think there is an unfortunate confusion in the argument, arising from the use of the term "delivery" as if it meant transfer of title and not change of possession. It is so used in several of the cases in which it has been held that delivery may be dispensed with, from necessity; and it appears to be with this signification that it is used in the English case to which we have been referred. But, as the law is now settled, by decisions binding upon us, I understand constructive delivery to import, like actual delivery, that the goods which have been bought and sold are taken out of the possession of the seller and put into the possession of the buyer. And there can be no question that where goods are in the hands of an independent custodier there is a very effectual change of possession by the intimation of a delivery-order, because the seller's control and power of disposal is transferred to the buyer. The civil possession which he had held, through the custodier, is transferred in performance of the contract. But where the goods are in the custody of the seller himself, there can be no change of possession so long as they remain in his custody, unless it be assumed, contrary to the fundamental principle of our law, that the property has passed by the contract of sale without delivery. If that were the law, it might be accurate enough to say that the buyer was in the civil possession of goods which remained in the custody of the seller, and the term delivery might, without impropriety, be referred to the transference of the title, and not merely to the transference of the goods themselves. But if delivery of the subject of the contract of sale is necessary to transfer the property, and the only question is, whether it has taken place in fact, it cannot, with any accurate use of language, be said that delivery has been effected by written documents, which merely repeat or acknowledge the personal obligations of the contract of sale.

It is, however, quite possible that the sellers of goods in the position in which this Distillers Company stands may place themselves by contract, or by a course of conduct, in such a position towards a buyer that they would be precluded from maintaining the right of retention which would otherwise arise from their right of property as undivested owners of goods sold but not delivered. If a seller had undertaken to deliver in terms that would prevent him from pleading a right

of retention against a subpurchaser, he must deliver according to his undertaking. And therefore the question comes to be whether there is anything in the letter of acknowledgment to suggest such an obligation as that. For the reasons to which I have already referred I think there is nothing, because the sellers have done nothing which they were not bound to do, whether they were to give delivery or not. They admit that they hold for the subpurchaser, but they hold for him in the place of the original purchaser; and the effect of their acknowledgment that they hold for him must depend upon the extent of their antecedent right.

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They hold for the subpurchaser as the assignee under an intimated assignation. But the assignee is in the same position as his cedent as regards the vendor. The vendor still remains undivested owner under obligation to deliver when called on to do so unless he is entitled to retain for the performance of the obligations of the assignee.

If that is the position at common law I do not think that the Mercantile Law Amendment Act, 1856, makes any difference. The effect of that Act has been repeatedly considered, and its effect in a question of this kind was fully discussed in the case of *Wyper v. Harveys*. According to that judgment the statute makes the following changes upon the common law. Where goods have been sold, but not delivered, it excludes the diligence of the seller's creditors, and the title of a trustee in a sequestration of his estates, in competition with the purchaser, or anyone in his right, enforcing delivery in terms of the contract of sale. In the case of a subpurchase the effect is that when a subpurchaser has intimated his subpurchase to the seller, the seller is precluded from pleading against him a right of retention against the first purchaser for a general balance, and he is no longer entitled upon that ground to refuse delivery to the subpurchaser. But these are the only restrictions introduced by that Act upon the rules of the common law, and therefore although the statute prevents the seller from pleading in a question with a subpurchaser the right of retention which he had against the first purchaser, it does not prevent him from pleading retention for a general balance due by the subpurchaser himself. I am very sensible of the weight which is due to the considerations of mercantile convenience to which Lord Shand has adverted. But that is a question for the Legislature, not for us. If the Legislature, when it amended the common law with reference to the rights of seller and purchaser, restricted these in one respect and not in another, we must give effect to the common law, so far as it remains unaltered. I am therefore of opinion that the Mercantile Law Amendment Act does not affect this case. The only question is whether there has been delivery in point of fact, and since there has been no delivery, I think the appellants are entitled to retain the goods for the general balance due to them by the sequestrated estate.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against, and the deliverance of the trustee appealed from, and remit to the trustee to rank the appellants for the sum of £742, 13s. 10d., and to allow them to retain the whisky in dispute as their own property: Find the appellants entitled to expenses," &c.

FLAHER, STODART, & BALLINGALL, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

No. 85. MRS MARY GOUK OR SCOTT AND OTHERS, Pursuers (Appellants).—*Law.*  
 HENRY MONCREIFF HORSBRUGH (William Begg Scott's Trustee),  
 Defendant (Respondent).—*C. K. Mackenzie.*

Feb. 20, 1889.  
 Scott v.  
 Scott's Trust-  
 tees.

*Salæ retenta possessione—Reputed ownership—Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), sec. 1.*—Certain creditors of an insolvent agreed to accept a composition of 8s. per pound in full of their claims. A, the insolvent's mother-in-law, one of the creditors, took his furniture, as valued by an appraiser, in part payment of her composition. The furniture remained in his possession on a verbal agreement that his wife and he should have the use of it. Two years afterwards his estates were sequestrated under the Bankruptcy Act. In a question between A's representatives and the trustee in the sequestration held that under section 1 of the Mercantile Law Amendment Act, 1856, the former were entitled to delivery of the furniture, as having been sold to A but not delivered.

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 Sheriff of  
 Aberdeen,  
 Kincardine,  
 and Banff.  
 I.

IN 1885 William Begg Scott, finding himself in difficulties, offered to settle with his creditors on the footing of paying 8s. in the pound on his ordinary debts. Most of the creditors accepted this offer, and among others, Mrs Gouk, Scott's mother-in-law, who claimed a preference for £25 as the rent of his house, which belonged to her, and an ordinary ranking for a loan by her to him of £100. Scott admitted both claims, which thus, on the footing of taking 8s. in the pound on the debt of £100, amounted together to £65. Scott's furniture had been valued at £50, 7s. 6d. by an appraiser, and Mrs Gouk agreed to take the furniture at that valuation in partial discharge of her claim for £65, and to take Scott's cheque for the balance of £14, 12s. 6d.

IN 1887 Scott's estates were sequestrated under the Bankruptcy Acts, and H. M. Horsbrugh, C.A., Edinburgh, was appointed trustee.

The furniture above mentioned had remained in Scott's possession from the date of the arrangement with Mrs Gouk until his sequestration, and the trustee proposed to sell it as part of the sequestrated estates.

Mrs Scott and her husband, and another daughter of Mrs Gouk, thereupon brought an action in the Sheriff Court at Stonehaven against the trustee, to have the sale interdicted on the ground that the furniture belonged to the female pursuers under the settlement of their mother (who had died in 1885).

The pursuers pleaded;—(1) The female pursuers being the true owners of the furniture and other effects as condescended on, are entitled to obtain interdict against the defender selling the same.

The defender averred "that the pretended purchase on the part of Mrs Gouk was a simulate transaction between her and her son-in-law, with the view of giving the pursuer Mrs Scott and her husband a preferable claim to the furniture in question, to the prejudice of his creditors, who had refused to acquiesce in the private arrangement referred to. The said furniture was never sold or taken out of the bankrupt's possession, and he was never divested thereof until the defender was appointed trustee for behoof of his creditors, to whom it now belongs as part of the sequestrated estate."

The defender pleaded;—(2) The pretended sale having been entered into by the bankrupt when in insolvent circumstances with his mother-in-law, who was a conjunct and confident person with him, without a just price being paid, and with a view to defraud his just and lawful prior creditors, is null and void, and of no avail at common law. (3) Mrs Gouk being a conjunct and confident person with the bankrupt, the presumption is that the alleged purchase was entered into without a true, just, or necessary cause, and without a just price being paid, and with a

view to defraud his just and lawful prior creditors; it is therefore null and void, and of no effect. (4) The furniture in question not having been sold, and having remained in the undisturbed possession and occupation of the bankrupt, and immixed with his effects at the date of sequestration, the female pursuers have no right or title to the same, and their claim ought to be repelled. No. 85.  
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Scott's Trustees.

A proof was allowed. The Court having come to the conclusion on the evidence that the transaction in 1885 between Scott and Mrs Gouk was a real transaction, and the debt of £100 a real debt, it is unnecessary to go into the details of the proof.

On 16th August 1888 the Sheriff-substitute (Brown) pronounced this interlocutor:—"Finds that the pursuers have failed to prove that the household furniture and effects in question belong to them, or that they have any title to retain possession of them: Therefore recalls the interim interdict granted on the 25th day of November 1887; assolvies the defender from the conclusions of the action."

On appeal, the Sheriff (Guthrie Smith) adhered.

The pursuers appealed, and argued;—On the evidence there had been a *bona fide* sale. It was not *hujus loci* to inquire whether a sufficient voucher of the bankrupt's debt to Mrs Gouk was in existence at the time of the settlement of 1885. The claim had been recognised by the bankrupt. The possession of the bankrupt was continued, but on a contract of commodate. That was a "legitimate cause of possession."<sup>1</sup> The views of Lord Ivory and Lord Moncreiff, who dissented in *Anderson v. Buchanan*,<sup>2</sup> had been adopted in recent cases, and that case was no longer authoritative.<sup>3</sup> Mrs Gouk acquired a *jus in re* on the completion of the contract of sale, because the contract of commodate was entered into at the same time. To require that the goods should be carried out into the street and then replaced in the same premises was absurd. But if Mrs Gouk had not acquired a *jus in re*, the goods were goods sold but not delivered in the sense of the 1st section of the Mercantile Law Amendment Act.\* *Sim v. Grant*<sup>4</sup> was not in point. All that that case decided was that where the seller retained possession and a power of sale, the seller's creditors could attach the goods. That was a case which the Act did not touch. In *M'Bain's*<sup>5</sup> case Lord Blackburn did not put the case of a person being the creditor of another in an obligation for delivery of goods; he did not distinguish between *jus in re* and *jus ad rem*; he merely gave a particular illustration of the general principle of reputed

<sup>1</sup> Bell's Prin. sec. 1315; Bell's Com. (5th ed.) i. 250-1 (7th ed. i. 272).

<sup>2</sup> *Anderson v. Buchanan*, Dec. 22, 1848, 11 D. 270.

<sup>3</sup> *Marston v. Kerr's Trustees*, May 13, 1879, 6 R. 898; *Heritable Securities Investment Association v. Wingate*, July 8, 1880, 7 R. 1094; *Cropper v. Donaldson*, July 8, 1880, 7 R. 1108; *Duncanson v. Jefferies' Trustee*, March 4, 1881, 8 R. 563; *Robertson v. M'Intyre*, March 17, 1882, 9 R. 772.

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No. 85. MRS MARY GOUK OR SCOTT AND OTHERS, Pursuers (Appellants).—*Law.*  
 HENRY MONCREIFF HORSBRUGH (William Begg Scott's Trustee),  
 Defendant (Respondent).—*C. K. Mackenzie.*

Feb. 20, 1889.  
 Scott v.  
 Scott's Trustee.

*Sale retenta possessione—Reputed ownership—Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), sec. 1.*—Certain creditors of an insolvent agreed to accept a composition of 8s. per pound in full of their claims. A, the insolvent's mother-in-law, one of the creditors, took his furniture, as valued by an appraiser, in part payment of her composition. The furniture remained in his possession on a verbal agreement that his wife and he should have the use of it. Two years afterwards his estates were sequestrated under the Bankruptcy Act. In a question between A's representatives and the trustee in the sequestration held that under section 1 of the Mercantile Law Amendment Act, 1856, the former were entitled to delivery of the furniture, as having been sold to A but not delivered.

2D DIVISION.  
 Sheriff of  
 Aberdeen,  
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In 1885 William Begg Scott, finding himself in difficulties, offered to settle with his creditors on the footing of paying 8s. in the pound on his ordinary debts. Most of the creditors accepted this offer, and among others, Mrs Gouk, Scott's mother-in-law, who claimed a preference for £25 as the rent of his house, which belonged to her, and an ordinary ranking for a loan by her to him of £100. Scott admitted both claims which thus, on the footing of taking 8s. in the pound on the debt of £100, amounted together to £65. Scott's furniture had been valued at £50, 7s. 6d. by an appraiser, and Mrs Gouk agreed to take the furniture at that valuation in partial discharge of her claim for £65, and to take Scott's cheque for the balance of £14, 12s. 6d.

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Mrs Scott and her husband, and another daughter of Mrs Gouk, thereupon brought an action in the Sheriff Court at Stonehaven against the trustee, to have the sale interdicted on the ground that the furniture belonged to the female pursuers under the settlement of their mother (who had died in 1885).

The pursuers pleaded;—(1) The female pursuers being the true owners of the furniture and other effects as condescended on, are entitled to obtain interdict against the defender selling the same.

The defender averred "that the pretended purchase on the part of Mrs Gouk was a simulate transaction between her and her son-in-law, with the view of giving the pursuer Mrs Scott and her husband a preferable claim to the furniture in question, to the prejudice of his creditors, who had refused to acquiesce in the private arrangement referred to. The said furniture was never sold or taken out of the bankrupt's possession, and he was never divested thereof until the defender was appointed trustee for behoof of his creditors, to whom it now belongs as part of the sequestrated estate."

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The pursuers appealed, and argued;—On the evidence there had been a *bona fide* sale. It was not *hujus loci* to inquire whether a sufficient voucher of the bankrupt's debt to Mrs Gouk was in existence at the time of the settlement of 1885. The claim had been recognised by the bankrupt. The possession of the bankrupt was continued, but on a contract of commodate. That was a "legitimate cause of possession."<sup>1</sup> The views of Lord Ivory and Lord Moncreiff, who dissented in *Anderson v. Buchanan*,<sup>2</sup> had been adopted in recent cases, and that case was no longer authoritative.<sup>3</sup> Mrs Gouk acquired a *jus in re* on the completion of the contract of sale, because the contract of commodate was entered into at the same time. To require that the goods should be carried out into the street and then replaced in the same premises was absurd. But if Mrs Gouk had not acquired a *jus in re*, the goods were goods sold but not delivered in the sense of the 1st section of the Mercantile Law Amendment Act.\* *Sim v. Grant*<sup>4</sup> was not in point. All that that case decided was that where the seller retained possession and a power of sale, the seller's creditors could attach the goods. That was a case which the Act did not touch. In *M'Bain's*<sup>5</sup> case Lord Blackburn did not put the case of a person being the creditor of another in an obligation for delivery of goods; he did not distinguish between *jus in re* and *jus ad rem*; he merely gave a particular illustration of the general principle of reputed

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<sup>5</sup> *M'Bain v. Wallace*, July 27, 1881, 8 R. (H. L.) 106.

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ownership. The result would be the same as if there had been no sale, and the owner of the goods had put them into the hands of another.

Argued for the defender;—The *onus* was on the appellants to overcome the presumption of property arising from the bankrupt's possession. The Act of 1621 distinctly laid that *onus* on them. There was no clear evidence of a sale. The circumstances as to the bankrupt's indebtedness to his mother-in-law were suspicious. But if there had been a sale, it was a sale *retenta possessione*, and the buyer could never have a *jus in re*, and therefore could never part with the goods on a contract of commodate. The Mercantile Law Amendment Act did not apply. The case fell under the principle of *Sim v. Grant*. The circumstances of the possession were inconsistent with the existence even of a *jus ad rem*. That principle had been recognised by Lord Blackburn in *M'Bain's* case.

LORD YOUNG.—(After considering the evidence)—In 1885 Mrs Gouk honestly purchased the furniture for £50, 7s. 6d., being the value put upon it by a professional appraiser. She proceeded just as if her claim had been paid in money, and she had then gone and bought the furniture with it. She no doubt does not take delivery of it, that not being her purpose, which was that it should remain with her daughter and son-in-law, and be used by them, and she carried out that intention by allowing it to remain in the possession of the seller. I give no opinion as to the legal effect of a party getting the furniture in his own house in which he is residing purchased for him by a friend, it may be, and retaining possession of it as it stood. It may be a question whether such a transaction is or is not a *nudum pactum*. We have some decisions upon that, curious enough, because in our law a *pactum* may remain *nudum* upon which a price has been paid, although in Roman law a *nudum pactum* meant a mere stipulation and nothing more, ceasing to be *nudum* whenever arles had been given, because something having followed upon it, it had become clothed. Our decisions run on the other line of rails, or did, and it may be a long time yet before a different view of the law prevails. I give no opinion, then, upon the purchase of furniture in a man's own house for his own benefit, because there is no ceremonial of delivery. But here we have a specimen of a very different class of cases—a specimen of the very class provided for by the Mercantile Law Amendment Act. The Act says,—“From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same.” Here an honest buyer, who had paid the price but had allowed the goods to remain in the custody of the seller, wishes to have delivery, and the trustee of the seller wishes to prevent delivery. I think what the trustee wishes cannot be done. All Mrs Gouk did was open and above board, and no false credit was given to the bankrupt because of his possession of the furniture. I therefore think that she or her representatives are entitled to demand delivery now.

LORD RUTHERFURD CLARK, LORD LEE, and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—“Find in fact that the furniture in question was purchased by the late Mrs Gouk from

William Begg Scott at a price ascertained by a competent person, No. 85.  
and that the price was duly paid by her: Find in law that the  
pursuers, as in her right, are entitled to delivery of the furniture: Feb. 20, 1889.  
Recall the judgments of the Sheriff and Sheriff-substitute appealed Scott v.  
against: Grant interdict as craved: Find the pursuers entitled to the Scott's Trust-  
expenses in the inferior Court and in this Court." tee.

ALEXANDER CAMPBELL, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

HENRY MONCREIFF HORSBRUGH (William Begg Scott's Trustee), First No. 86.  
Party.—*C. K. Mackenzie.*

MRS MARY GOUK OR SCOTT AND SPOUSE, Third Parties.—*Law.*

*Husband and Wife—Jus mariti—Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), sec. 3.—Held that the jus mariti and right of administration of a husband are not excluded from the income of heritable estate, the fee of which has vested in his wife prior to the passing of the Married Women's Property Act, 1881.* Feb. 20, 1889.  
Scott's Trust-  
tee v. Scotts.

By his trust-disposition and settlement, dated 28th August 1874, David 2<sup>ND</sup> DIVISION.  
Gouk, merchant, Montrose, left his whole estates, heritable and moveable, Sheriff of  
to his wife in liferent and to his two daughters jointly in fee, with entry Aberdeen,  
to his said disponees, in liferent and fee respectively, immediately after and Banff.  
his death. 1.

The truster died on 10th September 1875 survived by his wife and daughters.

Mary Gouk, one of the daughters, was married to William Begg Scott on 23d May 1876.

Mrs Gouk, the widow, died on 17th December 1885.

On 19th May 1887 William Begg Scott's estates were sequestrated under the Bankruptcy Acts, and H. M. Horsbrugh, C.A., was appointed trustee.

The trustee having claimed one-half of the rents of Mr Gouk's heritable estate which had accrued since the sequestration, and were to accrue during the continuance of Mr and Mrs Scott's joint lives, as falling to Mr Scott *jure mariti*,\* this special case was presented, in which (besides other questions between other parties not necessary to be referred to here) this question was submitted for the opinion and judgment of the Court:—"3. Is the first party entitled to payment of one-half of the rents of the heritable estate of the late David Gouk accrued and to accrue since the date of the sequestration of the estates of the said William Begg Scott, and during the continuance of the joint lives of the said William Begg Scott and Mary Gouk or Scott?"

The trustee, the first party to the case, maintained the affirmative of this question. Mrs Scott and her husband, for her and for his own interest, the third parties, maintained the negative.

Argued for the first party;—The right which had vested in Mrs Scott prior to the passing of the Act was a right to the *corpus* of the heritable

\* The Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), which introduces a general exclusion of the *jus mariti* and right of administration in the case of all marriages entered into after its date, by sec. 3 enacts,—“In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act.”

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Feb. 20, 1889.  
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estate subject to her mother's liferent, and that gave her husband the right to draw the rents, if they were payable, and as soon as they became payable. The question would have been the same had there been no liferent. The husband could at common law have assigned the rents though not yet accrued, and they might have been adjudged for his debts. They were a life estate vested in him from the time of the marriage.

Argued for the third parties;—It was not disputed that the first party was entitled to the capital of the personal estate bequeathed by Mr Gouk to his daughter, because she took a vested interest at his death, but the same line of reasoning disentitled him from taking the rents of the heritable estate which accrued after the date of the sequestration. He could only take whatever right was in the bankrupt; and at common law the bankrupt was only entitled to such of the rents of his wife's heritable estate as had previously vested in her.<sup>1</sup> It was only when the term of payment had come that rents became moveable estate, and it was only as moveable estate that it passed to the husband at common law. Rents payable *in futuro* therefore were in the sense of the statute moveable estate, to which the wife acquired right after the date of the passing of the Act.

LORD JUSTICE-CLERK.—The question here is as to the interpretation of section 3, subsection 2, of the Married Women's Property Act, 1881, and the question arises in this way. The late Mrs Gouk had the liferent interest in certain heritable property left by her husband, who died in 1875. Her daughter Mrs Scott had the fee. Mrs Gouk enjoyed the liferent until her death in 1885, but in 1881 the Married Women's Property Act was passed, and the question is, how far that Act has affected the rights of Mrs Scott, who had right to the fee of the estate before the passing of the Act, but received no rents until the death of her mother in 1885. The words of the Act are—"In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act." The only difficulty arising here is as to the meaning of the words "and income thereof," and as to how far these words apply to the present case. If there had been no intervening liferent, there is no doubt that from 1875 to 1881 the daughter would have been in receipt of the rents derived from the heritable estate, and her husband, under the law then in existence, would have been entitled to receive those rents, which would have been liable to all the contingencies to which his own estate was liable. The question is, whether the passing of the Act deprived him of that right, and whether after 1881 the wife obtained that income free from his *jus mariti* and right of administration. Suppose Mrs Gouk had died just before the last term when the rents fell due before the passing of the Act, the husband's rights would not have been excluded as regards the rents falling due at that term. Would his rights be excluded at the next term by the Act having passed between the two terms? I am of opinion that they would not.

I think the exclusion of a husband's *jus mariti* and right of administration does not apply to any estate the fee of which is acquired before the passing of

<sup>1</sup> Fraser on Husband and Wife, i. 694-5.

the Act, or to the income thereof. I think that the position of estates acquired before the passing of the Act, and the husband's right to the income of these estates, are not altered by the Act, and that we must answer the question submitted to us accordingly.

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LORD YOUNG.—I am of the same opinion. By the law of Scotland before the Act of 1881 a husband had right to the administration of his wife's heritable estate, and to the income thereof. He had these two rights over her heritable estate, while her moveable estate passed to him absolutely. Now, the wife of the husband in this case who is bankrupt became entitled to the fee of heritable estate in 1875, which, however, yielded no income to her, as it was burdened with a liferent to her mother. But the fee was hers, and her husband was entitled to administer the estate in her interest as fiar, and as soon as it began to yield income to her he became entitled to draw that income or possess the estate himself. He could enter into possession if there were no leases, and if there were he could draw the rents. That is to say, he could do so irrespective of the Act. Now, the idea that the Act stops all that does not commend itself to me. The husband might have possessed the estate or enjoyed the income thereof for thirty years, yet the contention is that on the passing of the Act his right ceased. I am unable so to hold. The idea of the statute to my mind is this—"You, who have married a wife with heritable estate, shall not be affected by this Act. Your right is a right to administer the estate and to draw the income, and that which has existed heretofore is not to be affected by the Act. After the passing of the Act you must regard any heritable estate coming to your wife as a windfall upon which you had no right to calculate, and which you must take under the law then existing." I cannot read these words in the Act "and income thereof" as meaning each year's rent as a separate subject. I think that the estate and the income thereof are joined together as one subject.

LORD RUTHERFURD CLARK.—I am of the same opinion.

LORD LEE.—I had some difficulty about this question, but on the whole I have come to the same conclusion as your Lordships. The exclusion of the *jus mariti* applies to all moveable estate acquired by a wife after the passing of the Act, but the question is, are the rents of heritable estate excluded as moveable estate falling to a wife after the passing of this Act? No doubt the clause admits of being read as applying to the income of heritable estate which comes to a wife after the passing of the Act, and not to the income of heritable estate which fell to her before the passing of the Act, and on the whole I agree with your Lordships that it should so be read.

THE COURT answered the third question in the affirmative.

TODD, MURRAY, & JAMIESON, W.S.—ALEXANDER CAMPBELL, S.S.C.—Agents.

MRS ANN MERCER OR GAVIN AND SPOUSE, Pursuers.—*J. G. Smith—  
M'Lennan.*

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ARROL & COMPANY AND OTHERS, Defenders.—*J. C. Thomson—  
J. A. Reid.*

Feb. 22, 1889.  
Gavin v.  
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*Reparation—Road—Unfenced path near public road—Contributory negligence.*—The contractors for a new line of railway erected a hut for the housing of their workmen in a field which they had purchased. The previously exist-

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ing direct access to the site of the hut and an adjoining cottage from a neighbouring town having been permanently interrupted by a new railway cutting made by the contractors, the only remaining access was by a footpath round three sides of the field. In place of this circuitous road, the workmen, message boys, and others, had within the knowledge of the contractors formed a beaten track leading off this road by the edge of the cutting direct to the hut. Where the track left the public path a paling forming part of a fence erected to guard the cutting had been turned round by the workman in charge so as to admit of easier access to the cut. A member of the public who had been on business at the hut and was returning from it on a dark night fell over the cutting and was severely injured. In an action of damages against the contractors, on the ground that there was a duty upon them to have had the cutting fenced and protected, the jury found for the pursuer. On a motion for a new trial the Court (*Int.* Lord Wellwood) refused to disturb the verdict, holding upon the evidence that there was a duty on the defenders to see that the path was not dangerous, and that a plea of contributory negligence had not been substantiated.

1st Division.  
Ld. Wellwood.  
B.

THE FORTH BRIDGE RAILWAY COMPANY were in course of constructing a line of railway from Inverkeithing to North Queensferry. At Inverkeithing part of the line passed eastwards through a cutting thirty feet deep and a tunnel under a public footpath (sometimes called the Shore Brae Road), which crossed the line at right angles. This public footpath leading from Hope Street, a street parallel to the railway, on the north to the shore on the south, formed the eastern boundary of a field occupied by the railway contractors on the south side of the cutting. About 130 feet west from the public footpath on the southern edge of the cutting stood Brae Cottage, which formerly had direct access to Hope Street by a path in front parallel to the above-mentioned public footpath, but this access was cut off by the railway. Behind Brae Cottage a wooden house called Brae Hut was erected for the accommodation of their employees by the railway contractors. Brae Cottage, with the ground on which it and Brae Hut stood, and also the ground between them and the public footpath, had been acquired by the Forth Bridge Railway Company for the purposes of the railway, and had been placed by the railway company at the disposal of Messrs Arrol & Company, their principal contractors, for the purposes of their contract. Messrs Arrol had erected Brae Hut, which was given by them or by their subcontractor, John Williams, as a residence to William Buxton, a foreman ganger in their service, and Buxton paid rent for it to Messrs Arrol. After October 1887 Buxton resided at Brae Hut with his wife and family, and had several other railway workers as lodgers with him there.

In consequence of the direct access from Brae Cottage to Inverkeithing on the north being cut off, the only available access was by a footpath leading south for 110 feet, and then turning eastwards 130 feet, when it joined the public footpath at a point 180 feet south of the tunnel. There was a gate upon the private footpath about 60 feet west from the point where it joined the public footpath, which was sometimes kept locked. It was thus necessary to go round three sides of the plot of ground on which the houses stood in order to cross the railway at the tunnel, a distance in all of about 140 yards. From the time however of Buxton's occupation of the hut a short cut had come into use diverging westwards immediately to the south of the place where the public footpath crossed the tunnel, and running along the south side of the railway cutting and close to its edge, until it reached the hut through a slap in a wall which it crossed.

On 23d February 1888 Mrs Gavin, a sick nurse, was summoned from Inverkeithing to attend Buxton's wife at the hut, and went there on that occasion and thereafter twice daily until 3d March, by the short cut leading from the public path above described.

On the evening of the 3d March, which was dark and stormy, she left the hut about eight o'clock on her return to Inverkeithing, but after proceeding a short way, and when close to the public path, she lost the track and fell over the cutting on to the railway below, and was severely injured. No. 87.  
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She thereafter brought an action of damages for the injuries thereby sustained against Messrs Arrol and the individual partners of the firm, and also against Williams, the subcontractor.

She averred;—(Cond. 8) "The said accident to the female pursuer occurred through the fault or negligence of the defenders, or of those for whom they are responsible. It was caused by the unprotected and dangerous state of the branch footpath above described. The said footpath, notwithstanding its close proximity to the railway cutting, was entirely unfenced, and was left at night without any light to indicate its course. It was the duty of the defenders, Arrol & Company, the principal contractors, in erecting said Brae Hut, and assigning it as a residence for the said William Buxton, to secure that the access thereto was safe and convenient and sufficiently fenced and protected, and to prevent the use of an unsafe access. They entirely failed to provide a safe and convenient access to said hut. . . . The defenders . . . in full knowledge that the branch path above described constituted the ordinary and only available access to Brae Hut, and that it was unfenced and unprotected, and in a condition dangerous to the lives of the lieges having legitimate occasion to visit Brae Hut, permitted it to be formed and maintained in use as the access thereto without any attempt to render it free from danger. Since the accident to the pursuer, the entrance to said branch path from the public footpath has been closed up, and a new access formed to Brae Hut in a different direction."

The defenders denied these averments, and explained that as the pursuer had chosen of her own accord to go across private waste ground, and not by the proper and safe access round the field, she was not entitled to damages.

The issue as against each of the two defenders was,—Whether the pursuer "fell into an unfenced and unlighted railway cutting at or near the town of Inverkeithing," and sustained injuries, through the fault of the defenders? The defenders were not separately represented, and made common cause at the trial.

The jury returned a verdict for the pursuer, and assessed the damages at £100.\*

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\* From the evidence led in the case it appeared that where the public footpath crossed the railway tunnel there was a paling fencing it on the west, and that that paling had been turned in along the short cut to the hut for about eight feet, so as to admit of easier access to it. The short cut was described as being "a beaten-down path upon rough ground," and was about five feet wide. The pursuer deponed that on every occasion on which she had gone to the house she had taken the short cut, and there was evidence that it was used by all who went there, e.g., by the doctor, the washerwoman, tradespeople, and others. It was admitted by Buxton, who was a witness for the defenders, that coals for the use of those occupying the hut were brought in wheelbarrows along the path in question, and that it was for that purpose that he had shifted the paling; that he had been found fault with for so doing by Mr Gray, Messrs Arrol's manager, but that it was not put back. Shortly before the accident a crane had been erected close to the entrance to the path, and after that it was impossible to pass between the crane and the cutting. There was evidence that the pursuer had been warned to avoid the crane, and that she had taken the wrong side of it, having attempted to pass between it and the cutting.

Mr Gray, Messrs Arrol's manager, a witness for the defenders, deponed,—“I



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The defenders moved for and obtained a rule on the pursuer to shew cause why there should not be a new trial, on the ground that the verdict was contrary to evidence.

Argued for the pursuer in shewing cause;—The fault proved here arose from what might be called a structural defect, as the path where the accident occurred was made, or at least permitted to be made, by the defenders, in order to supply the deficiency caused by the interruption and removal of the old road owing to the making of the cutting. The case was *a fortiori* of that of *M'Feat*.<sup>1</sup> It was not necessary for the pursuer to establish that the path was the only road to the workmen's hut. If it had come to be recognised as a usual road, which upon the evidence was amply proved, that was enough. There was no ground for saying that the pursuer was a trespasser when she made use of the path, nor was she in the sense in which the term had been used by the English Courts, a "licensee." She had been invited by Buxton to use the path in question, or at least she had used it and he did not object, and she was therefore entitled to require that it should be in a reasonably safe condition.<sup>2</sup> Neither was there contributory negligence on her part. It could not be said that she had walked into a known and obvious danger. She knew that the path was being constantly used, and was quite entitled to rely on its being safe for that purpose.

Argued for the defenders;—The question was whether there was an obligation on the defenders to fence the side of the cutting along which the path ran? It was settled that if a person came upon private ground and used it as a trespasser, he was not entitled to recover damages in the event of injury. If he had permission to make use of private ground *et*

know the Shore Brae Road, which crosses the mouth of the tunnel. There is a dyke supporting the field, which almost dies away just as it comes up to near the scene of this accident. A wooden fence begins there, which I caused to be erected. When the cutting got up to that point, we erected the fence to protect the footpath, and to keep the public from getting on to the ground. The mouth of the tunnel is just below the Shore Brae Road. It is supposed to be as close to the edge of the footpath as it can be made, and we fenced it close to the edge of the footpath. We brought the fence down to the end of the dyke. That would be in the end of 1887 or beginning of 1888, when the cutting got up to a point where it would be dangerous to leave it open. Even after the fence was erected it was possible for people to get over the low part of the dyke and into the field if they chose. Buxton removed a piece of the fence opposite where the accident took place to get in coals for his own use. I quarrelled him for it, and told him that if anything went wrong I would hold him responsible, and I wanted it put back, but it was not put back. That was months before the accident, at least weeks. Even before the fence was removed sightseers used to cross and come upon the ground. In fact, it was a trouble at times to find them there, and I have ordered them off more than once when I have had occasion to be about, as it was dangerous for people to be there when we were firing shots. By that time it had become practically waste ground. I never saw a formed footpath there. None was ever constructed by us, or by anybody that I know. I believe the people at the cottage frequently took this short cut. . . ."

It appeared that on the night of the accident the pursuer had asked a Mrs Kyle, who was in the hut, "to shew her on the road a bit," and that Mrs Kyle had gone about half way along the path, and then turned, and that after she left the pursuer she heard her cry, and then found she had fallen into the cutting.

<sup>1</sup> *M'Feat v. Rankin's Trustees*, June 17, 1879, 6 R. 1043; *cf.* also *Brady v. Parker*, June 7, 1887, 14 R. 783.

<sup>2</sup> *Holmes v. North-Eastern Railway Company*, May 1869, L. R., 4 Exch. 254.

*gratia* and as a "licensee," the proprietor of the ground was bound to take care that there was no trap or concealed danger on the ground which might lead to his injury. But that was not the present case. Again the proprietor of private ground in the neighbourhood of a public road who let the ground to others, and gave them leave to make roads was bound to take care that any quarry abutting on the roads was properly protected and fenced.<sup>1</sup> That had been held in the case of *M'Feat*,<sup>2</sup> but that was a decision which might require to be reconsidered by the Court. Besides it was not in point here, for there the road on which the accident took place was the only means of communication available, and an unfenced quarry was allowed to remain in its immediate neighbourhood. Further, the liability which the Court seemed to have recognised in that case was a liability *ex dominio* and not *ex delicto*. In some of the cases there appeared to be a recognition of a doctrine to the effect that if there was an invitation to use private ground, there was a further duty to have it protected. The present case could not be brought within that category, for any invitation that there was to the pursuer to use the ground proceeded from Buxton, and could not bind the defenders. Further, if the pursuer chose to take a short cut on a dark night, where there was a regular road, even although it might be longer, the defenders could not be made liable, for that amounted to contributory negligence on her part.

At advising,—

LORD PRESIDENT.—The scene of the accident, which forms the subject of this action, was a line of railway which the Forth Bridge Railway Company are constructing between Inverkeithing and North Queensferry and the two parties who are called as defenders are Messrs Arrol & Company, the principal contractors, and Mr John Williams, the subcontractor under them, for the new line. Two issues were taken, one applicable to each of the defenders, but we were given to understand that the two made common cause, and accordingly the question which we have now to determine is whether the jury were justified in returning a verdict against the defenders.

The question is a somewhat delicate one. The place where the accident occurred was alongside an unfenced railway cutting, and there is no doubt that the place where the pursuer was walking, when she met with the accident, was used as a footpath. It was not a footpath which had been constructed for the purpose of being used, but it was one which those engaged in the making of the railway cutting, and others who had reason to go to the hut to which I shall presently refer, had made by actual use along the edge of a field through which the cutting was being formed. What we have to decide is whether the defenders were under a duty to fence that pathway so brought into use by the persons to whom I have referred. Accordingly this is hardly a motion to set aside a verdict on the ground of its being contrary to evidence. The point rather is whether the evidence discloses an obligation on the part of the defenders to fence the path on which the pursuer met with her accident.

The history of the matter is that there is a house upon the south side of the railway cutting called Brae Cottage. Before the cutting was made, there were

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<sup>1</sup> *Hounsall v. Smyth*, Feb. 1, 1860, 29 L. J., C. P. 203; *Bolch v. Smith*, Jan. 30, 1862, 31 L. J. Exch. 201; *Ross v. Keith*, Nov. 9, 1888, 16 R. 86; *Forbes v. Aberdeen Harbour Commissioners*, Jan. 24, 1888, 15 R. 323; *Addison on Torts*, 567.

<sup>2</sup> 6 R. 1043.

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two accesses to this house, one from the north, connecting it with Inverkeithing and running in a straight line from Brae Cottage to Hope Street, and another from the south. The access from the north has been destroyed by the operations of the railway company, and the opening up of the cutting. The interposition of the cutting prevented the road from the north from being any longer available. In that state of matters Messrs Arrol, the contractors, or their representative, built a wooden hut immediately to the south of Brae Cottage for the purpose of accommodating their workmen. The nominal tenant of that hut was a man named Buxton. He took in as lodgers the navvies who were under his charge. But these were not the only persons who required access to the hut. Those who brought the food supplies, and those who had occasion to visit the inmates of the hut, and their wives and children, had to be provided with an access. There was undoubtedly the access from the south, but it was by a roundabout route, and it was only natural that a short cut should be invented and set up, and it was upon that short cut that the pursuer met with the injury complained of. A straight line of public footpath led from the town of Inverkeithing to the seashore, and somewhat to the east of the hut to which I have referred it crossed over a tunnel of the new railway. There was a communication from this public footpath to the hut by the footpath which I have already described as having been formed by the use made of it by the workmen and their friends. The defenders say that they did not make this footway, and that there was no duty on them to make it; that there was an existing access to the hut, which was perfectly well established and well known, and that no one had a right to go to the hut except by that access. But, upon the other hand, there is no doubt that they saw that this path was coming into use, and that everyone went by it in preference to the roundabout way from the south. There is an indication of this in the evidence of Gray, the defenders' foreman, for he noticed that the paling which protected the public footpath over the tunnel on its west side had been interfered with, and turned round so as to enable the inhabitants of the hut to approach it more easily, and also, it appears, to admit of their coals being wheeled in; and so soon as he had observed this he remonstrated with Buxton, but, unfortunately, he did not sufficiently insist upon his remonstrance. He was conscious that the fence ought to have been put right, and that this had not been done. I think that these circumstances are sufficient to infer a duty on the part of the defenders to make the path safe not merely for the workmen, who may be supposed to have been able to take care of themselves, but also for other purposes. It was impossible for the workmen to occupy the hut without other people coming there also, and the needs of those other people had also to be attended to. This unfortunate pursuer, for instance, was frequently at the hut for the very legitimate purpose of attending the wife of the ganger. Accordingly, I am of opinion that there was an obligation upon the defenders to fence this pathway so as to prevent the risk of accident.

But there is a further consideration, which does not seem to have been urged at the trial, viz., whether there was not contributory negligence on the part of the pursuer. There is a plea to that effect, but the statement in support of it is not very strong. It is stated in the 6th answer to the condescendence that "the pursuer went alone, and, instead of going by the proper access, chose to walk across the foressaid private waste ground," i.e., the footpath in question. Again, in the 7th answer,—“Explained that on said occasion she again chose of her own accord to go across said private waste ground, and not to go by the proper

and safe access." It does not appear to me that these statements afford a relevant ground for the plea of contributory negligence. If this path was used by the employees of the defenders and by all who had occasion to visit the hut, and if that fact was seen by and known to the defenders and they took no steps to prevent it, it is not for them to say that the pursuer "chose of her own accord to go across private waste ground." Can it be said that she walked into an obvious and known danger? She had fair ground for thinking that she was doing what others did. She received particular directions to keep upon the one side of a crane which was being erected close to the path, and if she had done so she would probably have escaped. She took the wrong side of the crane, very unfortunately both for herself and for the defenders, but that fact is not, in my opinion, sufficient to justify a plea of contributory negligence.

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Feb. 22, 1889.  
Gavin v.  
Arrol & Co.

**LORD MURK.**—I agree with your Lordship that there was a duty on the defenders to have a fairly safe path to the hut which they had built for the use of their workmen, the old footpath having been put an end to.

Upon the question of contributory negligence I have more difficulty. My doubt is not due to the consideration that the allegation upon record does not amount to an allegation of contributory negligence. But the pursuer's own statement is, that she was accompanied half-way up the road by another woman whom she asked to go along with her, as she seems to have been afraid to go by herself. I should myself have hesitated to say that there was no contributory negligence on the part of the pursuer, but the question was one eminently for a jury, and as they have taken a different view, I do not think the verdict should be disturbed upon that ground.

**LORD ADAM.**—Before the formation of the new railway there was only one house in the neighbourhood of this cutting, viz., Brae Cottage. There were two accesses to it—one from the north leading from Hope Street straight down to it, and another which led by a circuitous route, turning first south, and then north again, before it reached the cottage. In August 1887 the contractors took possession of the field in which the cottage was situated, and built a hut in it for the accommodation of their workmen. Buxton became tenant of it, and took in lodgers. "Sometimes," he says, "there is a considerable community of us." There would therefore be a good deal of traffic to the hut in consequence. The railway cutting was commenced in September. About the end of October the road from the north which formed the direct access to the hut was interrupted, and a new access came to be formed by the constant passage of the workmen, message boys, and others across the field from the other road to the hut. This was a short cut to prevent the necessity of going round three sides of the field. As the railway cutting which shut off the access from the north progressed, a fence was erected along the Seabrae Road, running from north to south, fencing it off from the cutting, and which was originally prolonged across the entrance to the new path, but about the end of December or beginning of January the end of this fence, to the extent of seven or eight feet, was removed and turned round along the cutting so as to leave the access to the new path again open. The use of the new path had gone on until at the time when the accident in question occurred, a distinct, definite, and well-worn track had been formed, and was being used to the knowledge of the defenders by many persons having legitimate business at Buxton's house.

**No. 87.** The question is whether or not, that being the origin or genesis of the footpath, there was an obligation upon the contractors to look after and be responsible for the safety of those using the road. They knew of its existence—they were daily on the ground—they permitted it to go on—and the footpath passed close by the unfenced cutting, which was some thirty feet deep. There was, I think, an implied invitation to passengers to use it; and in these circumstances I think there was a duty upon the defenders either to stop the use of the road, or to see that it was properly protected against the chance of accident. Accordingly I concur.

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I also agree in thinking that there was no contributory negligence such as would disentitle the pursuer to recover damages. The question is a jury one, and I do not think there is any ground for disturbing their verdict.

**LORD WELLWOOD.**—I agree in the result to which your Lordships have come, but not exactly on the same grounds.

I confess that I should not myself have taken the view which the jury did, although I say so with diffidence after hearing the opinions which have now been expressed by your Lordships. I thought at the trial, and I think still, that the pursuer has not succeeded in establishing that there was an obligation upon the defenders to fence the pathway in question. The proper and legitimate access to the hut was undoubtedly the circuitous road which led round to it by the shore; and the footpath which formed the short cut was not, as alleged on record, originally formed or sanctioned as an access by the defenders. Now, although it appears to me that if the footpath had been used for a considerable time, there might have been a duty on the part of the defenders to protect it, I think that the use which has been proved here was not sufficient to impose such an obligation upon them.

On the other hand, there are, I think, certain elements in the case sufficient to support the verdict. In the first place, there is evidence to shew that the footpath was used to some extent as an access to Brae Hut. In the second place, there is little, if any, evidence of the use of the circuitous route to the hut as an access to and from Hope Street, although, as I have said, it was the legitimate route. In the third place, there is evidence that after a fence had been put across the entrance to the footpath, it was removed by Buxton in the knowledge of the defenders, and not replaced. I think the jury were of opinion that there was thus a kind of recognition of the footpath by the defenders, and an invitation by them to people like the pursuer to use it. Accordingly I think that the verdict which was brought in cannot be held to be contrary to evidence.

In regard to the question of contributory negligence, I think there was not sufficient evidence to disentitle the pursuer on that ground to recover damages.

THE COURT discharged the rule.

P. H. CAMERON, S.S.C.—REID & GUILD, W.S.—Agents.

JOHN THOMSON AND OTHERS (David Jugurtha Thomson's Trustees),  
First Parties.—*G. W. Burnet.*

No. 88.

MRS JESSIE CALLENDER OR THOMSON AND OTHERS, Second Parties.—  
*Jameson.*

Feb. 22, 1889.  
Thomson's  
Trustees v.  
Thomson.

*Trust—Investment.*—*Held* that authority given by a testator to his trustees to continue investments made by him did not authorise them, on the reconstruction of an undertaking by the winding-up of an old company and the formation of a new one, to take up shares in the new company in lieu of shares belonging to the testator in the old one.

DAVID JUGURTHA THOMSON, merchant in Edinburgh, died on 16th March 2d Division. 1871, leaving a trust-disposition and settlement dated 3d December 1868. M.

By this deed Mr Thomson disposed his whole estate, heritable and moveable, including shares in trading and other companies, to the trustees therein named, with the powers and for the purposes therein expressed, and, *inter alia*, authorised them "to continue or not, as they may think advisable, such investments of my means and estate as I may have made during my lifetime of whatever kind or denomination, and that without incurring any responsibility for so doing, but (though without prejudice to the general discretionary powers hereby conferred) I recommend my trustees not to change any of the said investments unless circumstances may, in their opinion, render it expedient for them to do so." The trustees were further empowered to lend the trust funds upon heritable security, or upon security of debentures of incorporated companies, or on the security of the Government funds, or of shares in chartered or incorporated companies in Great Britain, and they were empowered to invest the trust-estate, or any part thereof, in the Government funds, in the purchase of heritable property, feu-duties, ground-annuals, or other heritages, or of the guaranteed or preference or debenture stock of railway or other incorporated companies in which the liability of each shareholder was limited, or to retain the same in bank in Great Britain. General power was also conferred upon them to alter and renew the securities from time to time, as they might consider expedient.

The estate left by the truster included certain £100 shares of the North British Rubber Company, Limited, a company registered under the Limited Liability Act, 1856 (19 and 20 Vict. c. 47), on 30th March 1857. The trustees continued to hold these shares. The investment proved a very remunerative one, the dividends on the ordinary selling price of the stock averaging about eight per cent.

On 28th March 1888, at a general meeting of the company, a scheme for the reconstruction of the company was submitted. The reconstruction scheme involved the winding-up of the old company and the incorporation of a new company under the existing Companies Acts.

The general object of the reconstruction sufficiently appears from the following extract from a circular issued by the directors of the old company to their shareholders:—

"The directors finding a necessity for more capital, and giving the matter very careful consideration, finally came to the conclusion, with a view to conserve as much as possible the interests of all the shareholders, that the capital presently needed could be most favourably acquired by the issue of preference shares. But, on consulting the articles and the statutes, and the decisions interpreting them, it was found that they had no power to issue preference stock.

"The first Limited Liability Act was passed on 14th July 1856, and one of the first companies to take advantage of it, while it may be said to have been in an experimental stage, was the North British Rubber Com-

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pany. Their memorandum and articles, which were dated 26th September 1856, and were registered on 30th March 1857, referred to and adopted table B of the Act 1856, making some slight changes where the circumstances of the company required it. Table B was the stereotyped form of articles which the framers of the Act 1856 thought sufficient for the regulation of companies in those days. Both in regard to the regulations for the conduct of the business which the Legislature then thought sufficient, and in regard to the objects for which the company was established, the existing memorandum and articles of this company may be regarded as meagre; and although, up to the present time, their business affairs have been conducted under these articles practically without a single hitch, the fact of their being meagre, and that the company may require at any moment further powers than what these articles give, has, along with other considerations, led the directors to propose to the company that there shall be a re-registration of the company under the same name, and with objects and powers of a much wider scope than either the first statute or the original articles contemplated."

The proposal was approved of by the shareholders of the old company at an extraordinary general meeting thereof on 30th June 1888, and resolutions to wind up the old company and otherwise to carry out the scheme were duly passed and confirmed.

On 9th August 1888 the new company was registered under a new memorandum and relative articles of association, and on 3d September 1888 the liquidator of the old company intimated to the trustees that, under the powers of section 161 of the Companies Act, 1862, which were specially conferred on him, he had accepted on their behalf certain shares in the new company in lieu of the shares held by them in the old company.

A question having arisen as to the power of the trustees to take up these shares this special case was presented, the trustees being the first parties, and Mrs Thomson and others—beneficiaries representing all the different interests under the trust—being the second parties.

The case, after setting forth the foregoing facts, stated that the first parties believed that the shares in the new company formed as safe and good an investment for the trust funds as the shares of the old company, but they maintained that they were not entitled, looking to the terms of the testator's settlement, to invest the trust funds therein. The second parties maintained that the shares of the new company offered to the trustees being of a greater nominal value, as well as of at least an equal actual value, as the shares in the old company originally held by the testator and thereafter by his trustees, formed an investment for the trust funds authorised by him by his trust-disposition and settlement; and further, that looking to the powers generally and specially conferred upon the trustees by the trust-disposition and settlement, and the testator's recommendation therein expressed not to change any of his investments unless circumstances rendered it expedient, the trustees were not in the circumstances entitled to realise the shares offered to them in the new company, but were bound or, at all events, entitled to accept and hold them as a proper investment of the trust funds. Both parties were agreed that by the reconstitution of the company there had been no material change of the assets or liabilities of the company as it existed prior to reconstitution, and that the registration under the later Companies Acts would probably prove of advantage to the shareholders.

The questions submitted were,—“(1) Are the parties of the first part bound to sell the shares in the new company now offered to them in exchange for those formerly held by them in the old company? Or (2)

Are they entitled in the circumstances stated to retain the same as a proper investment of the trust funds ? " No. 88.

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**LORD JUSTICE-CLERK.**—However desirable it may be that these trustees should become members of this company, there is no authority in the trust-deed enabling them to do so. The testator having perfect confidence in the investments which he himself has made recommends his trustees not to change any of them unless they see fit, but that is a totally different thing from authorising them to become members of a new company, with new capital, and under new conditions. The company in which the shares were held is in liquidation. It has been put an end to. Probably the new company will consist largely of the same members as the old one, and no doubt it may be highly successful. In this age of competition large extensions are sometimes of immense advantage to companies, but that does not make this company the less a new one, of which the trustees have no power to become members.

**LORD YOUNG** and **LORD LEE** concurred.

**LORD RUTHERFURD CLARK** was absent on Circuit.

THE COURT answered the first question in the affirmative and the second question in the negative.

**FODD, SIMPSON, & MARWICK, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.**

**JAMES DICKSON AND OTHERS** (Peter Dickson's Trustees), Petitioners.— No. 89.  
*Balfour—A. Mitchell.*

Feb. 23, 1889.  
Dickson's  
Trustees.

*Trust—Investment—Consigned money—Lands Clauses Consolidation Act, 1845 (8 and 9 Vict. cap. 19), secs. 67, 68, 79.*—Lands held by testamentary trustees under a declaration that they should have no power to sell them during the lifetime of testator's children were taken by a railway company under compulsory powers and the price consigned in bank, "subject to the control and disposition of the Court of Session, to the intent that the same shall be applied, under the authority of the said Court, to some one or more of the purposes specified in the Lands Clauses Consolidation (Scotland) Act, 1845, relative to parties under disability." The Court on the petition of the trustees, while the truster's children were alive, *authorised* the bank to pay over the consigned money to the trustees to be invested by them in accordance with their powers under their trust-deed, without requiring them to apply it to some one or more of the purposes specified in the Act.

**PETER DICKSON**, Isa Villa, Bridge of Allan, died on 31st January 1875, leaving a trust-disposition and settlement, under which he, *inter alia*, expressly declared that his trustees should not have the power during the lifetime of his children to sell any part of his heritable estate. 2<sup>ND</sup> DIVISION.  
Junior Lord  
Ordinary.  
M.

On 10th August 1888 the North British Railway, under compulsory powers, took a portion of the heritable property belonging to the trust, situated in the Gallowgate of Glasgow, the price thereof being fixed by valuation at £2700.

The trustees being unable, in consequence of the declaration above quoted, to give an effectual conveyance to the subjects sold (two of the truster's children being alive), the North British Railway Company consigned the price in the British Linen Company Bank, the consignment bearing that the sum had been consigned "subject to the control and disposition of the Court of Session, to the intent that the same shall be applied, under the authority of the said Court, to some one or more of



No. 89. the purposes specified in the Lands Clauses Consolidation (Scotland) Act, 1845, relative to parties under disability."

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The trustees being desirous of uplifting the consigned money and investing it in Glasgow Corporation Stock, presented a petition, bearing to be in terms of the 67th and 79th sections of the Lands Clauses Consolidation Act of 1845, in which they prayed the Court "to grant warrant to authorise and ordain the said British Linen Company to make payment to the petitioners of the said sum of £2700, with all interest accrued thereon, and to authorise and empower the petitioners to invest the said principal sum in the purchase of stock of the Corporation of Glasgow, or otherwise as your Lordships may direct; and further, to find the said North British Railway Company liable in the expenses of this application and of carrying through the investment of the said money."

On 8th February 1889 the Junior Lord Ordinary (Wellwood) pronounced this interlocutor:—"Allows the petition to be amended at the bar to the effect of bringing it under the 68th section of the Lands Clauses Consolidation (Scotland) Act, 1845, and of section 3 of the Trusts (Scotland) Act, 1884, and by inserting in the prayer of the petition, after the word 'Glasgow,' the words 'either as a permanent, or as an interim investment'; and the petition having been so amended, on the motion of the petitioner, in respect of the importance of the question raised, reports the matter to the Second Division of the Court."\*

\* "NOTE.—In this petition, as originally presented, the petitioners, who are testamentary trustees of the late Peter Dickson, crave the authority of the Court to invest in the purchase of stock of the Corporation of Glasgow, a sum of about £2700 which has been received by them as the price of part of the heritable estate belonging to the trust, which was taken compulsorily by the North British Railway Company. The said sum was consigned in the British Linen Company's Bank on 10th November 1888, 'subject to the control and disposition of the Court of Session, to the intent that the same shall be applied, under the authority of the said Court, to some one or more of the purposes specified in the Lands Clauses Consolidation (Scotland) Act, 1845, relating to parties under disability.'

"The said purposes as contained in the 67th section of the Act 8 and 9 Vict. cap. 19 (the only section besides the 79th founded on by the petitioners), are as follows:—'Such monies shall be applied, under the authority of the Court of Session, to some one or more of the following purposes (that is to say),—In the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith on the same heirs, or for the same trusts or purposes, or affecting succeeding heirs of entail in any such lands, whether imposed and constituted by the entailor, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament: In the purchase of other lands to be conveyed, limited, and settled upon the same heirs and the like trusts and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled; or if such monies shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, or in removing or replacing such buildings, or substituting others in their stead, in such manner as the said Court shall direct; or in payment to any party becoming absolutely entitled to such money.'

"On its being pointed out to the petitioners by the man of business to whom the petition was remitted, that the section above quoted does not authorise the investment of consigned money in the purchase of stocks issued by municipal corporations, they explained that they relied upon the Trusts (Scotland) Amendment Act, 1884, as extending the purposes to which such trust monies might be applied. In particular they referred to section 3 of that Act (47 and 48 Vict. cap. 63), which provides that 'Trustees under any trust may, unless specially

THE COURT delivered no opinions, and pronounced the following No. 89.  
interlocutor:—"On the report by the Honourable Lord Well-  
wood, remit to his Lordship with instructions to grant warrant Feb. 23, 1889.  
to authorise and ordain the British Linen Company Bank to make Dickson's Trustees.  
payment to the petitioners of the sum of £2700 mentioned  
in the petition, with all interest accrued thereon, the said sum to be  
invested by the petitioners in accordance with their powers under  
the trust-deed: And further, to find the North British Railway  
Company liable in the expenses of this application, and of carrying  
through the investment of the said money."

F. J. MARTIN, W.S., Agent.

SIR ARCHIBALD DOUGLAS STEWART, Bart., Petitioner.—*Asher—Dundas.* No. 90.  
JOHN STEWART KENNEDY, Respondent.—*D.-F. Mackintosh—C. S. Dickson.*  
Feb. 26, 1888.  
*Stewart v. Kennedy.*

*Appeal to House of Lords—Leave to appeal—Interlocutory judgment—Possibility of second appeal.*—Circumstances in which the Court refused a petition for leave to appeal to the House of Lords against an interlocutor which did not exhaust the whole conclusions of the action.

(*VIDE Kennedy v. Stewart, ante, p. 421.*)

Sir Archibald Douglas Stewart, Bart., presented this application for

1ST DIVISION.  
C.

prohibited by the constitution or terms of the trust, invest the trust funds (a) in the purchase of, *inter alia* (subsection 6), stocks or annuities issued by any municipal corporation in Great Britain, which annuities, or the interest or dividend upon which stock are secured upon rates or taxes levied by such municipal corporation under the authority of any Act of Parliament.'

"The petitioners have now amended their petition to the effect of founding upon the Trusts Act of 1884, and also—alternatively to the 67th section—upon section 68 of the Lands Clauses Act, which provides for the interim investment of consigned money, in the following terms:—(sec. 68) 'Until the money can be so applied'—that is in terms of sec. 67,—'it shall be retained in bank at interest, or shall be laid out and invested in the public funds or in heritable securities.'

"It will be seen from the provisions of sections 67 and 68 of the Lands Clauses Act above quoted, that neither of these sections authorises the investment now desired by the petitioners, and the question now raised is whether the Trusts Act of 1884 can be read into the 67th and 68th sections of the Lands Clauses Act to the effect of extending the purposes to which consigned money may be applied under both or either of these sections. It appears to me that the Trusts Act of 1884 does not affect section 67 of the Lands Clauses Act because the specific object of that section is to secure the application of the purchase price of land sold compulsorily to the disburdening, purchase, or improvement of lands and heritages, for the benefit of the heirs in heritage, who would have been entitled to the lands taken.

"As regards section 68, however, it may be argued with some force that the object of that clause was simply to secure the safe interim investment of consigned money in one of the ways then recognised as legal for trust funds:—That the interim investments therein specified were, at the date of the Act, practically the only trust investments sanctioned, and that as the selection of trust investments has been extended by the Act of 1884, it is reasonable that the provisions of the latter Act should be held to apply to the interim investment of consigned money under the Lands Clauses Act.

"As the question is one of general importance, and as I think it is probable that such applications will become numerous if this application is granted, I report the matter for the consideration and decision of the Court."

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leave to appeal to the House of Lords against the interlocutors of the Lord Ordinary of 21st December 1888, and of the First Division of 8th February 1889, in the action against him at the instance of John Stewart Kennedy, reported *ante*, p. 421, the conclusions of which had not been exhausted by these interlocutors.

He urged that an appeal should be allowed at this stage, before the other matters were disposed of. The first question was what was the meaning of the document on which Mr Kennedy founded. And in the event of the House of Lords taking the same view of the document as the Court of Session did, Sir Archibald proposed to bring a reduction on the ground of circumvention, error, and fraud.

The respondent contended that the case should be allowed to go on to final judgment before it was appealed. If an appeal were allowed at the present stage, the case would be hung up for a year. Besides, in the event of the House of Lords affirming the judgment of the Court of Session, there might be further appeals to that House, *e.g.*, on the question of the heir's compensation. A multiplication of appeals was very undesirable.

LORD PRESIDENT.—The case in which this application has been presented is an action for enforcement of a contract of sale contained in missive letters, the subject being the estate of Murtly, and the pursuer concluding for specific implement, and alternatively for damages. The defender resisted the action upon two grounds, the first being founded upon a construction of the personal contract of sale, and the second being that it was not a case in which specific implement was the appropriate remedy. We repelled both pleas, and appointed the pursuer to lodge in process the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer, in fulfilment of the contract of sale constituted by the missives of sale. The draft disposition so appointed to be prepared has been lodged, and accordingly the case is now in such a position that the disposition may be adjusted. But there is a great deal to follow upon that, because when the deed has been executed, it will be necessary to apply to the Court to have the sale confirmed under the Entail Amendment Act of 1882. There may then arise questions of very great importance, particularly as regards the manner in which the compensation to the next heir will fall to be adjusted, and its amount. There is therefore a good deal to be done before specific implement can be given.

In a question of this kind the Court is bound to consider the interests of both parties, and in the exercise of its discretion to say where the balance lies. It has been suggested that the whole merits of the case are substantially exhausted. But I can hardly assent to that. No doubt the case has been finally decided up to this point, that the defender is bound by the missives to give specific implement of the contract therein contained. But there may be an appeal hereafter to the House of Lords in regard to other questions, and accordingly we must take into consideration the disadvantage to both parties if there should be more than one appeal. Mr Asher says that there is no ground for an appeal at a later stage. I cannot agree with him. There may be a very fair ground for appeal in the future, and besides the pursuer is quite entitled to suggest in a case like this that an appeal may be taken with the object of delay. There is therefore no protection or assurance against the prospect of there being more than one appeal. That is a very serious consideration.

The alternative of granting or refusing leave to appeal generally depends on

a variety of considerations affecting the case in point. And it has been a common thing to present an application for leave to appeal against a judgment sustaining a plea of relevancy, the object being to avoid the expense which would attend an inquiry by proof or by jury trial, if it should be held by the House of Lords that there was no relevant case. We have not seen many of these cases lately, but I can recall two of them in which petitions for leave to appeal to the House of Lords were refused, and in both there was ultimately a verdict for the defender. That seems to be a very good practical justification of the refusal of the application. I do not say that they are precisely applicable, but I cannot help thinking that the likelihood of there being more than one appeal is a sufficient reason for refusing this petition.

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LORD ADAM.—There is a good deal of contentious matter still to be disposed of in this case. Your Lordship has said that there may quite well be a *bona fide* appeal at a future stage, and a case in point in which that course was taken was that of General Macdonald in the Dunalastair disentail, which was appealed to the House of Lords on the very question of the amount of compensation to be paid to the next heir. I do not think it is at all desirable that there should be a possibility of two appeals, and I think the respondent has a legitimate interest that the case shall be disposed of here before an appeal is taken. I accordingly concur with your Lordship.

LORD LEE concurred.

LORD MURE and LORD SHAND were absent.

THE COURT refused leave to appeal.

DUNDAS & WILSON, C.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

THE DALMELLINGTON IRON COMPANY AND OTHERS, Pursuers (Respondents). No. 91.

—*Asher—C. S. Dickson.*

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders  
(Reclaimers).—*Balfour—C. J. Guthrie.*

Feb. 26, 1889.  
Dalmellington  
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So. Western  
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*Payment—Condictio indebiti—Error—Knowledge.*—Where a person makes a payment in the knowledge that the sum paid is not due, he is presumed to have waived all objection, and to have admitted the debt. In order, however, to bar his right to repetition of the payment it must be established that the knowledge that the sum was not due either was, or should have been, present to his mind at the time of payment.

An iron company and a railway company entered into an agreement by which the railway company, *inter alia*, undertook "not to carry traffic for any other party at lower proportionate rates than those charged to the iron company, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line." The iron company regularly paid for fifteen years the rates charged by the railway company on their traffic. In an action by the iron company against the railway company, founded on this clause, for repetition of certain sums which they averred they had been overcharged, in respect that lower rates had been charged to two other traders, the railway company pleaded that the pursuers were barred from repetition in respect that they had paid the alleged overcharges in the knowledge (possessed by their manager, who was one of their partners, and their secretary) that the two traders were being charged lower rates. *Held*, after a proof, that the pursuers were entitled to repetition in respect (1) that though their manager and their secretary had had some information of the rates charged to the other traders this information was not in fact present to their minds at the time of payment, and was not of such a character that it ought to have

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been present; and (2) that the defenders must be held to have known that they were violating their own agreement.

*Carrier—Railway—Agreement—Construction.*—A railway company entered into an agreement with an iron company to carry upon their railway system the whole mineral and other traffic which the iron company might send, of the description and at rates and charges specified in the third article of the agreement. In that article the traffic was divided into two classes, of which class A included "pig-iron, coke, hewing stone, bricks, and tiles," and class B included "rubble stone, iron ore, coal," &c. The railway company further undertook not to carry traffic for any other trader at lower proportionate rates than those charged to the iron company, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line.

*Held*, on a construction of this agreement, (1) that it imposed an obligation on the railway company not to carry traffic, inwards or outwards, for any other traders at lower proportionate rates per ton per mile than those charged to the iron company, irrespective of the terminus from or to which the traffic was carried; (2) that in the case of lower rates being charged to other traders, e.g. for pig-iron, the iron company was entitled to a reduction only on pig-iron, and not on the other specific kinds of traffic comprised in the general class to which pig-iron belonged.

2D DIVISION.  
Lord Trayner.  
M.

On 30th March 1868 the Glasgow and South-Western Railway Company as first parties, and the Dalmellington Iron Company and the individual partners thereof as second parties, entered into an agreement whereby the second parties bound themselves that the whole mineral and other traffic of the description specified in the third article thereof, which they might have occasion to send along the first parties' railways to or from their works or mineral fields, should be sent and be conveyed by the railway company over their railway system, and that the second parties should pay in respect of the conveyance of such traffic the rates and charges therein specified. The third article of the agreement provided—"The mineral and other traffic referred to in article second shall be held to embrace all traffic falling under the descriptions following, excepting therefrom all traffic to or from the port and harbour of Troon:—Class A,—pig-iron, coke, hewing stone, bricks, and tiles. Class B,—rubble stone, calcined or raw ironstone, iron ore, coal sent to or by the second party . . . shale, lime, limestone, sand, and fire-clay."

The fourth article set forth the rate per ton per mile to be charged under the agreement, all the articles classed in class A being charged at one rate, all the articles in class B being charged at another rate.

The agreement came into operation on 1st January 1868, and was to continue for ten years, but by a supplementary agreement, dated 15th February 1873, which was to come into force from and after the 31st August 1872, the time during which the original agreement was to continue in force was extended to October 1890. The fifth article of this supplementary agreement provided,—“The first party undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line; Troon traffic . . . alone excepted from this condition.”

On 16th June 1887 James Murray and others, the surviving partners of the original Dalmellington Iron Company, and the Dalmellington Iron Company, Limited, which had taken the place of the original company, raised this action against the Glasgow and South-Western Railway Company, on the ground generally that the defenders had carried, in violation of the above agreement, traffic for other persons and firms at rates lower than those charged to the pursuers, and concluding for repetition of the amount alleged to have been so paid by them in excess.

The pursuers, after setting forth the agreement, and the rates stipulated therein, averred—(Cond. 7) “These rates were duly paid by the pursuers in the erroneous belief that they were the same proportionate rates as were demanded from other parties and traders on the system for traffic as enumerated and defined under tables A and B, and relying on the defenders fairly and honestly fulfilling their part of the said agreement, and without the pursuers knowing the fact that there were more favoured traders in the matter of mineral traffic rates.”

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In conds. 8 and 9 the pursuers averred that in 1884 they discovered for the first time that the defenders had entered into an agreement, dated 3d and 13th April 1866, with the Earl of Eglinton, under which coal traffic was conveyed by them to Ardrossan from Hurlford, a distance of twenty miles, for 1s. 7d. per ton, while the rate according to the pursuers' agreement was 1s. 11d., and also that under it the defenders carried pig-iron from the Portland Iron Works, Hurlford, to Ardrossan for 1s. 8d., while the rate according to the pursuers' agreement would have been 2s. 1d.

In conds. 11 and 12 the pursuers further averred that they had ascertained in June 1886 that the defenders had been in use for many years past to grant special reductions to the Lanemark Coal Company, under an agreement entered into with the latter in 1874, in terms of which they had for the period from 25th August 1874 to 17th August 1885 carried coals from Lanemark Collieries, a distance of thirty-one miles, to and from Troon, at the rate of 1s. 9d. per ton, and to Ayr, a distance of twenty-four miles, at the rate of 1s. 7d. per ton, while the rates, according to the pursuers' agreement with them, should have been for these distances—2s. 6d. to Troon, and 2s. 2d. to Ayr.

The conclusions of the summons were for payment of the four following sums in name of overcharges—(1) £2767, 14s. 4d. as the difference between the amount the pursuers had paid under schedule B of their agreement from 31st August 1872 to 31st December 1874 and what they should have paid had they been charged during that period at the Eglinton rate from Hurlford to Ardrossan; (2) £16,356, 6s. 9d. as the difference between what they had paid under the same schedule from 31st December 1874 to 25th February 1885,\* and what they should have paid during that period if charged at the Lanemark Coal Company's rate on their coal carried from Lanemark to Ayr; (3) £2784, 2s. 2d. as the difference between what they had paid under the same schedule from 25th February 1885 to 31st October 1886 and what they should have paid during that period if they had been charged at the Lanemark rate; (4) £14,837, 15s. 9d. as the difference between payments made between 31st August 1872 and 31st December 1886 under schedule A for pig-iron and what they should have paid had they been charged at the Eglinton rate for coal and pig-iron between Hurlford and Ardrossan.

The defenders averred;—(Ans. 7) “The rates demanded from and paid by other traders were well known to the pursuers and the deceased John Hunter, who was, during the period up to his death on 18th January 1886, the manager or managing partner of the pursuers' company.”

As regarded the sum first concluded for, the defenders further averred;—“Explained that the pursuers are claiming a reduced rate on articles which are not embraced within the table of rates charged under the agreement with Lord Eglinton, which agreement provided for a reduction on the rates for coal traffic only. Explained that the said sum of £2767, 14s. 4d. bears to be made up on the footing of the pursuers being

\* The new company was incorporated under the Companies Act on 25th February 1885.

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entitled to a deduction from their rates to all places whatever proportionate to the amount by which the rate of 1s. 7d. charged for traffic from Hurlford to Ardrossan, being twenty miles, falls short of the scheduled rate under pursuers' agreement for that distance. Of said sum of £2767, 14s. 4d. only £6, 1s. 9d. bears to be in respect of traffic carried from the pursuers' works. Further, only £37, 5s. 1d. bears to be in respect of traffic between the pursuers' works and Ardrossan, the balance—£2728, 9s. 3d.—bearing to be in respect of traffic between their works and other places to which the rates charged against them are as low as those charged against any other traders. Only £711, 10s. 2d. of said sum of £2767, 14s. 4d. bears to be in respect of coal traffic."

The answers in regard to the other sums concluded for were, *mutatis mutandis*, substantially to the same effect.

The pursuers pleaded;—(1) Under the several agreements mentioned the pursuers were entitled to have their whole traffic specified in said Classes A and B carried during the period in question at the lowest rates either to Lord Eglinton or the Lanemark Coal Company for any of the goods or materials mentioned in the said classes respectively. (2) The pursuers having been overcharged by the defenders, are entitled to repetition of the sums so overcharged.

The defenders pleaded;—(1) The pursuers' statements are irrelevant. (2) *Mora* and acquiescence. (3) The payments in question having been made by the pursuers voluntarily in full knowledge of the whole facts now alleged, so far as material, they are not entitled to demand repetition of the said sums. (4) The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor. (5) On a sound construction of the agreements, the defenders are not indebted to the pursuers, and are entitled to be assolized. (6) In any event, the pursuers are only entitled to a reduced rate on articles carried under Lord Eglinton's agreement, or for the Lanemark Coal Company at a lower rate than that charged against the pursuers. (7) In any event, the pursuers are only entitled to a reduction on their rates for coal traffic to Ayr, and pig-iron and other traffic to Ardrossan; *et separatim*, they are not entitled to have their rates to any places reduced below those charges to the same place against those traders on a comparison with whose rates to other places the pursuers' claim for reduction is based.

A proof was allowed. The evidence was mainly directed to the question whether the pursuers had paid the overcharges complained of in the knowledge that other traders were being charged at less rates.

In regard to the overcharges based on the Eglinton agreement, as both the Lord Ordinary and the Court held that neither the pursuers nor Mr Hunter were aware of the terms of that agreement, it is unnecessary to go into the details of the evidence on that point.

The evidence regarding the pursuers' knowledge of the Lanemark rates depended entirely on the knowledge (if any) possessed by Mr Hunter, the pursuers' manager, and Mr Gavin, their clerk. Mr Hunter became manager in 1846, his duties being, according to Mr J. H. Houldsworth, one of the pursuers, "to take the practical management of the iron-works in all its details. He was not then authorised in any way to enter into agreements of a large or important character for the company. If there was any question of entering into a lease or traffic agreement he was instructed to go to the partners of the company."\* In 1859 he became

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\* Mr Gavin gave this evidence regarding Mr Hunter's position:—"The checking clerk went over the [railway traffic] accounts and checked them, and if there was nothing unusual he initialed them and passed them to Mr Hunter,

a partner of the Lanemark Company, but he took little, if any, charge of its affairs in consequence of the pursuers requiring him to give his whole time to the management of their company. In 1868, when the original agreement between the pursuers and the defenders was entered into, he was still only manager of the pursuers' company, but in 1872 he became one of its partners, and continued so to be until his death in 1884. He, along with Mr Barr, the pursuers' law-agent, acted as their representative in negotiating the supplementary agreement of 1872.\* Mr Gavin came to know of the Lanemark agreement in 1882 in consequence of his having asked the defenders to quote special rates for the conveyance of certain coal which the pursuers had bought from the Lanemark Company. It further appeared that the pursuers had repeatedly asked the defenders to reduce their rates owing to the exigencies of trade.

On 14th March 1888 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Repels the first, second, third, and fifth pleas in law for the defenders: Finds that under the agreement of 1868, and supplementary agreement of 1872, between the parties, the pursuers were and are entitled to have the traffic sent by them to the defenders conveyed along the defenders' railway system at the same rates per ton per mile as are charged by the defenders to other traders for the same kind of traffic, and are now entitled to repetition of any rates or charges paid by them to the defenders in excess of rates charged by the defenders for the same kind of traffic to other traders: *Quoad ultra* continues the cause."†

the manager, for signature. . . . If there was any difficulty about any of the rates the clerk would apply to me. Mr Hunter did not go into the details of the accounts; he just signed them when they were presented to him initialed by the clerk. . . . Mr Hunter did not interfere much about the work of the office. His duty was to exercise a supervision over the whole works. He was practically manager at the works. Cross.—He could see the rates charged if he chose to look at the accounts."

\* On 30th May 1876 Mr Hunter sent this letter to Mr Barr:—"My dear Sir,—Has the agreement between the G. & S.-W. Ry. Coy. and the Dalmellington Iron Co., to which you refer in your letter to me of the 6th December 1872, ever been executed? If it has not, no time should be lost in getting it completed," &c.

† "OPINION.—. . . The parties have argued before me three questions involved in the defences, and on these questions I have been asked to give judgment in the meantime, because if decided in favour of the defenders, the pursuers' claim would be excluded in whole or in part, while if decided in favour of the pursuers, they would be entitled to decree for such sum as an accounting would shew to be due to them. These three questions are—(1) Did the pursuers pay the charges now complained of as overcharges, in the knowledge that others were being charged less than they were for their traffic? (2) Does that knowledge, if it existed, or such as it was, bar the pursuers from insisting in their present claim? and (3) On a construction of the agreements before referred to, what parts of the pursuers' claim, if any, can be maintained, and what parts are excluded?

"1. On the first question proof has been submitted by both parties, partly parole, and partly documentary, the result of which will now be considered. It is not proved that any of the partners of the pursuers' company (as then constituted) knew of the lower rates which were being charged to other traders, except perhaps Mr Hunter. Indeed, on this part of the case it is not maintained by the defenders—it certainly is not established—that there was knowledge on the part of anyone connected with the pursuers regarding the lower rates conceded to other traders, except on the part of Mr Hunter, and Mr Barr, the law-agent of the Dalmellington Company. The defenders, however, maintain that any knowledge which Mr Hunter had must be regarded as knowledge

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The defenders reclaimed, and argued ;—The first point was the construction of the equality clause of the agreement. The rate there men-

on the part of the pursuers, because of Mr Hunter's position in the pursuers' firm. This makes it necessary to consider what that position was. Mr Hunter was from 1846 the manager of the pursuers' company, his duties being 'to take the practical management of the iron-works in all its details. He was not then authorised in any way to enter into agreements of a large or important character for the company. If there was any question of entering into a lease or traffic agreement, he was instructed to go to the partners of the company.' Mr Hunter, in 1874, became a partner of the pursuers' company to a small extent—'a thirty-first share'—but he continued still to take the practical management of the works. That being Mr Hunter's position the next question is the state of Mr Hunter's knowledge, and that so far as the case has been presented to me concerns the rates at which the defenders were carrying traffic under (1) Lord Eglinton's agreement ; and (2) under agreement or arrangement with the Lanemark Company. I shall take these in their order." (His Lordship then proceeded to review the evidence bearing on Mr Hunter's knowledge of the Eglinton agreement, coming to the conclusion that he had no such knowledge.)

"I come now to consider the proof bearing upon the question, whether the pursuers knew of rates being charged to the Lanemark Company which were less than those charged to the pursuers. The pursuers, I think, did not know of these rates, unless it be held that knowledge on the part of Mr Hunter, or Mr Gavin (the pursuers' clerk), is knowledge by the pursuers. In 1859 Mr Hunter (then manager, as I have already said, for the pursuers) became a partner of the Lanemark Company, in which he held a very substantial interest until his death. He was therefore quite aware in 1868 and 1872 of the rates paid by the Lanemark Company to the defenders for the traffic carried by them for that company.

"When the agreement of 1868 was entered into, Mr Hunter was not a party to it ; he was then the pursuers' manager at the works—nothing more. He had no authority to make traffic agreements or enter into any important contract as representing the pursuers. In these circumstances I am of opinion that the knowledge which Mr Hunter had in 1868 and which came to him as a partner of the Lanemark Company, cannot be imputed to the pursuers, because Mr Hunter was at that time also the pursuers' servant. Matters, however, stood in a different position in 1874. Mr Hunter was then a partner of the pursuers' company, and was apparently put forward by the pursuers as their representative in negotiating on their behalf along with Mr Barr, their law-agent, the agreement of 1872. This appears from the correspondence and from the memorandum of the meeting held on 6th February 1872 with the chairman and directors of the defenders' company, in which Mr Hunter is described (by Mr Barr) as appearing 'for the Dalmellington.' No other partner of the pursuers' company appears at that time to have taken part in the negotiations. Accordingly, I am of opinion that in 1872, when the supplementary agreement was negotiated and concluded, the pursuers, through their partner Mr Hunter, must be regarded as being in the knowledge that the charges made by the defenders for the Lanemark Company's traffic were less than those charged for similar traffic to the pursuers. I need say nothing about Mr Gavin's knowledge. What he learned on the subject now under consideration was only learned in 1882, and went no further than to Mr Hunter ; and if Mr Hunter's knowledge of the Lanemark rates was the pursuers' knowledge in 1872, what Mr Gavin learned in 1882 neither made that knowledge more nor less.

"2. This leads me to the second question submitted at present for decision, viz., What is the effect of the pursuers' knowledge ; does it bar the present claim ? At the most, the pursuers' knowledge of the Lanemark rates could only bar the present claim in so far as it consists of charges made by the defenders in excess of the Lanemark rates. But in my opinion it has not even this effect. Whatever knowledge the pursuers had about the Lanemark Company, or any other trader's rates, the defenders had at least as much knowledge. In this

tioned was a special rate. The Lord Ordinary was of opinion that the pursuers obtained all the benefit which the clause was intended to give

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state of matters the parties entered into an agreement, which is free from all ambiguity. They agreed that from and after 31st August 1872 the defenders should not carry traffic for any other party at lower proportionate rates than those charged to the pursuers, i.e., the rates charged to the pursuers under the original agreement, and the defenders undertook to place the pursuers on the same footing as that enjoyed by the most favoured traders on the line—Troon traffic 'alone excepted from this condition.' Nothing could be more explicit. Nobody using the defenders' line was to have any advantage over the pursuers in the matter of rates: the pursuers were to be put on an equal footing with the most favoured traders. Assuming now that both parties to this agreement knew that the Lanemark Company, or any other trader, was, at the date of the agreement, in a better or more favoured position as regards rates than the pursuers, what was the purpose and effect of that agreement? Simply to abolish the inequality by putting the pursuers on a footing with the most favoured. I do not know whether the parties had any particular rates or agreement in view at the time this agreement was made, but if they had, then it was their knowledge of the existing inequality which probably led to the agreement being expressed as it was: if they had not, then it was to prevent any inequality for the future that they stipulated. Whatever knowledge either or both of the parties had before the agreement was concluded cannot affect or overrule the agreement actually made. Nor can the defenders be heard to say that the Lanemark Company's rates, or the Lord Eglinton agreement rates, were in view of the parties, and were intended to be treated as exceptions. Troon traffic alone was excepted from the agreement.

"3. One or two questions have been raised on the construction of the fifth article of the agreement of 1872.

"(a) The defenders say that 'traffic' means only outward traffic. I see no ground for this limitation. I think traffic means all traffic—outward or inward.

"(b) The defenders farther say that if the pursuers are not charged more than other traders for the same kind of traffic to the same port or terminus they are then placed on the footing of the most favoured trader, and can ask nothing more. I do not adopt this view. Suppose that one trader sends goods to Ardrossan alone, that being his market, and that the pursuers never send anything to Ardrossan, having there no market, is the Ardrossan trader to have his goods sent to Ardrossan at 1s. 6d. per mile for twenty miles, and the pursuers to be charged 2s. per mile for twenty miles in another direction? That would neither be placing the pursuers on the footing of the most favoured trader, nor observing the other branch of the defenders' obligation, 'not to carry traffic for any other party at lower proportionate rates than those charged to' the pursuers, for lower proportionate rates means lower rates per ton per mile irrespective of the direction in which the traffic is carried.

"(c) The pursuers maintain that if the defenders have carried for another trader any traffic at lower rates than those charged to the pursuers, they are entitled to have carried at the lower rate, not only the same kind of traffic, but the whole articles comprised in the class to which the particular traffic belongs. Thus, by the pursuers' agreement with the defenders, the defenders are bound to carry under class A 'pig-iron, coke, hewing stone, bricks, and tiles,' at 1½d. per ton per mile for any distance over six and not beyond sixteen miles. Suppose that the defenders have carried for another trader bricks for fifteen miles at 1d. per ton per mile, in that case the pursuers maintain that they are entitled to have pig-iron carried for the same distance at the same rate, not because the defenders have carried pig-iron on these terms for anyone, but because the defenders having carried bricks at that rate, and bricks being one of the articles in class A of the pursuers' agreement the whole of class A must be put on the same footing and carried at the same rate. In short, the pursuers maintain that class A is a *unum quid*, and that if they are entitled on any ground to have one of the articles enumerated in that class carried at lower than agreement rates,

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them if they were charged the same rate per ton per mile as that which was charged to the most favoured traders on the same kind of traffic. If this reasoning was correct it led to the construction that they were only entitled to reduction where they could shew that the defenders had been giving preference for traffic to the same or analogous destinations, and in the same direction. The pursuers sent only to Ardrossan, and had no concern with alleged preferences given to the other traders who sent their traffic to Carlisle and Glasgow. There could be no question of reduction in the case of traffic involving no competition. The next question was whether the alleged overcharges were paid by the pursuers in the knowledge that other traders were being charged less for their traffic. First, with reference to the Lanemark agreement. It was quite clear that Mr Hunter, the manager of the pursuers' company, knew of it throughout the whole time. In 1859 he became a partner in the Lanemark Company, in which he held a substantial interest till his death in 1886. He was therefore quite aware in 1868 and 1872 of the rates paid by the Lanemark Company. In 1872 he became a partner in the pursuers' firm, and was put forward as the *alter ego* of the company in the negotiations along with Mr Barr, the pursuers' law-agent. The correspondence and memorandum of meeting with the defenders of 6th February 1872 shewed this. Hunter was described as appearing "for Dalmellington." He was clearly the acting and responsible manager. He signed the railway accounts, and was thus cognisant of all the rates paid. Throughout his correspondence with the railway company he dealt with them as having power to adjust and get new rates. The Lord Ordinary was of opinion that knowledge on his part was proved in 1872. It was also beyond question that Mr Gavin knew also in 1882. It must be taken then as clearly proved that both Hunter and Gavin knew of the Lanemark rate. That being so, the pursuers had, in respect of this knowledge, intentionally abandoned their advantage under the equality clause of the 1872 agreement. Second, with reference to Lord Eglinton's agreement, the evidence, though not so absolutely clear, was equally convincing. In this state of the facts, what was the law applicable? It was settled, according to the law of Scotland and the law of England, on a review of the cases cited by the pursuers, that: (1) if a payment were made in full knowledge of the facts, the Court would not give the remedy of repetition to the person who had made such payment; (2) that while the mere existence of the means of knowledge would not absolutely disentitle the person who has made payment from recovering, yet if it appeared that he had so acted as to waive all inquiry his right of repetition would be barred; (3) the Court would also consider the element whether it was unconscionable for the person paid to retain the money, and unconscionable for the person who had paid to demand it back again. The recent case of *Evershed*<sup>1</sup> was *a fortiori* of the present. The proof then having disclosed a case of waiver by the pursuers of their right to recover the alleged overcharges, as well as of payment by them in the full knowledge that they were paying more than was paid by Lord Eglinton

the whole class must be carried at the rate thus reduced. I do not so read the agreement. The classification of different kinds of traffic saved repetition, but does not seem to me to have had any other intention or purpose. It was easier to say that pig-iron, coke, bricks, &c. shall be carried at 1½d. per ton than to say pig-iron 1½d. per ton, coke 1½d. per ton, and so on. In my opinion the pursuers get all the benefit which the clause was intended to give, or does give, if they are charged the same rates per ton per mile as is charged on the same kind of traffic to the most favoured trader."

<sup>1</sup> *Evershed v. London and North-Western Railway Company*, Feb. 1877. L. R., 2 Q. B. Div. 254, and July 5, 1878, L. R., 3 App. Cas. 1029.

and the Lanemark Coal Company, their right to recover could not be maintained. No. 91.

Argued for the pursuers;—(1) The Lord Ordinary's construction of the agreement was sound, subject to the modification that the pursuers were entitled to have class A dealt with as a whole, so that where ironstone was carried at a lower rate for others the pursuers were entitled to have a correspondingly low coal rate, because they were in the same class. (2) On the question of knowledge, with reference to the Lanemark rate, it was important to observe that until 1878 the pursuers dealt solely in iron, while the Lanemark rate was a coal rate. It was also important that they had no knowledge which the defenders did not possess, and the latter had a duty to see that their accounts were properly charged under the equality clause. Hunter, though a partner of the Lanemark company, paid no detailed attention to its affairs, as his whole time was required for the pursuers' business. He had no authority to enter into agreements. It was evident too that he was constantly pressing to get reduced rates for the pursuers' traffic, not as matter of right, but owing to the exigencies of trade. It was inconceivable that if the pursuers had known of the Lanemark agreement they should not have insisted on a reduction when the equality clause was inserted into the 1872 agreement. It was true that Gavin had a certain amount of information in 1882 about it; but he obtained this information in order to satisfy himself about a special transaction which was never carried out. When the transaction came to nothing the information would very naturally go out of his mind. The proof as to Hunter's knowledge of Lord Eglinton's agreement also failed. In this state of facts how stood the law? The old doctrine of *condictio indebiti* was that an unavoidable error in fact or in law was sufficient to found an action to recover payment made in such error.<sup>1</sup> There was no distinction recognised between the two classes of error.<sup>2</sup> It was quite true that Lord Brougham had as regards error in law laid it down in two cases,<sup>3</sup> that by the law of Scotland payment made under such an error could not be recovered. There was, however, good reason to doubt whether the rule so laid down could be accepted as sound.<sup>4</sup> The Court had expressed hesitation in accepting these cases as absolutely settling the law, although it was admitted that in very few cases would *ignorantia juris* found a *condictio*. In *Dickson v. Halbert*,<sup>5</sup> where these general doubts were expressed, the Court held that error in point of law afforded a ground for reducing a discharge granted *sine causa* in ignorance of the granter's legal rights. In England Lord Brougham's dictum had been rejected.<sup>6</sup> At the present time the law seemed to be practically settled that *condictio indebiti* will always lie where the party paying has not paid knowingly and voluntarily intending to waive all objection.<sup>7</sup> Further, the pursuers were not barred from their right to recover by lapse of time

<sup>1</sup> 3 Ersk. 354; Stair, 179; Bell's Prins. 534.

<sup>2</sup> Carrick v. Carse, Aug. 5, 1778, M. 2931.

<sup>3</sup> Wilson v. Sinclair, Dec. 7, 1830, 4 W. & S. 398-409, and 3 Scot. Jur. 123; *Dixons v. Monkland Coal Company*, Sept. 17, 1831, 5 W. & S. 445-452.

<sup>4</sup> Kerr on Fraud, 474.

<sup>5</sup> *Dickson v. Halbert*, Feb. 17, 1854, 16 D. 586, 26 Scot. Jur. 266.

<sup>6</sup> *Kelly v. Solare*, 1841, 9 Mees. & Wel. 54; *Townsend v. Crosby*, 1860, 8 C. B. (N. S.) 477; *Dixon v. Brown*, April 13, 1886, L. R., 32 Ch. Div. 597.

<sup>7</sup> *Baird's Trustees v. Baird & Co.*, July 10, 1877, 4 R. 1005; *Durrant v. Ecclesiastical Commissioners for England and Wales*, Nov. 16, 1880, L. R., 6 Q. B. D. 234; *Balfour v. Smith & Logan*, Feb. 9, 1877, 4 R. 454, per Lord Shand, 462; *Lancashire and Yorkshire Railway Co., v. Godlow*, 1875, L. R., 11 L., 517, Lord Chelmsford, 527.

No. 91. since they made the payment.<sup>1</sup> The case of *Evershed*<sup>2</sup> did not apply, because there was there the amplest and fullest knowledge on the part of the agent who had charge of the traffic. On the whole matter, then, the proof disclosed facts sufficient in law to found a *condictio*, and the overcharges fell to be repaid to the pursuers.

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At advising,—

LORD RUTHERFURD CLARK.—This is an action for the recovery of overcharges. It is founded on an agreement entered into between the pursuers and defenders in 1868, and a supplementary agreement dated in December 1872 and February 1873. The latter agreement by the 5th article thereof provides as follows:—“The first party undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line, Troon traffic, unless arranged for as above, alone excepted from this condition.” On the construction and effect of that agreement I adopt the judgment of the Lord Ordinary. I have nothing to add to the views which his Lordship has expressed in his note.

The rates with which the pursuers compare the rates charged to them are—1st, Hurlford to Ardrossan for ironstone; and 2d, Lanemark to Ayr for coal. These were charged to the Eglinton Iron Company and the Lanemark Company respectively, and were lower than the rates charged to the pursuers.

The defenders aver that the pursuers knew the rates which were charged to these companies, and that they paid the rates charged to them in the full knowledge of the overcharge. They plead that the pursuers are thereby barred from recovering the overcharge.

The persons to whom this knowledge of the overcharge is attributed are Mr Hunter and Mr Gavin. Mr Hunter was during the period libelled the manager of the pursuers' company, and became in 1872 a small shareholder. Mr Gavin was at one time a clerk, and afterwards the secretary of the pursuers. It is not alleged that any of the other partners or officials were aware of the overcharge.

In considering this question it is to be observed that the parties are not in the same position. The defenders knew, or must be held to have known, that they were overcharging the pursuers. They knew the agreement, and of course they knew the rates which they were charging to other traders, and consequently knew, or must be held to have known, that they were violating the agreement. They say that they put upon it a construction other than that which has been adopted by the Court, and that the rate which was allowed to the Lanemark Company was a special rate, which under the agreement they were not bound to allow to the pursuers. But I must hold that they were wrong. Nor do I see any plausible ground on which they can maintain the construction which they put on the agreement. To my mind there was no justification for their charging higher rates to the pursuers for ironstone than they charged to the Eglinton Iron Company. Nor can I see how any special rate could be excepted from the operation of the agreement. For the agreement is expressed in very absolute terms, and applies to all traffic carried for any trader, with the single exception of

<sup>1</sup> *Earl of Beauchamp v. Winie*, 1873, L. R., 6 E. and Ir. App. 223; *Cooper v. Phibbs*, 1867, L. R., 6 E. and Ir. App. 149; *Durrant v. Ecclesiastical Commissioners for England and Wales*, *supra*.

<sup>2</sup> *Evershed v. London and North-Western Railway Company*, Feb. 1877, L. R., 2 Q. B. Div. 254, and July 5, 1878, L. R., 3 App. Cas. 1029.

Troon traffic, and though the pursuers choose to call the Lanemark rate a special No. 91.  
rate, it was nothing more than a charge for carrying coals from Lanemark to Ayr.

Again, there is nothing in the case to suggest that the pursuers intended to submit to what they knew to be an overcharge. It is inconceivable that they should. Further, their correspondence, which was conducted almost exclusively by Mr Hunter, shews that there was a continuous effort on their part to get the rates reduced. But they made no claim for a reduction under the equality clause. It does not seem to have occurred to their mind that the circumstances admitted of an appeal to it. Their application was based on the necessities of their trade, and writing on 29th August 1883 Mr Hunter goes so far as to say that "unless we get some reduction on the carriage of our pig-iron and minerals to and from these works they must be stopped." Such a course of action and such expressions seem entirely inconsistent with the notion that the pursuers knew of the overcharge and voluntarily submitted to it.

The defenders, however, undertake to prove that Mr Hunter knew of the rates allowed to the Eglinton Iron Company and Lanemark Company, and it is necessary that I should shortly notice the evidence in regard to each of them, though I am relieved from the necessity of going into this matter at any length from the detailed examination which the Lord Ordinary has made of it.

The rate allowed to the Eglinton Iron Company, called the Hurlford rate, was fixed by an agreement between that company and the defenders in 1865. One important consideration is, that that rate was fixed some years before the agreement between the pursuers and defenders. If the pursuers or Mr Hunter, who took a leading part in negotiating the agreement, had known of the Hurlford rate in 1868, it may be doubtful if they would have accepted the rates fixed by the agreement in that year. But when in 1872 they got the benefit of an equality clause, they would either have insisted on a reduction of the existing rates, or made a claim under that clause. It cannot be imputed to them that they desired to pay more than they could help. If they knew of the Hurlford rate at the time when they settled the equality clause, they must have known that they had an immediate right to a reduction.

It is the case of the defenders that Mr Hunter came to know of the Hurlford rate when the agreement of 1868 was settled. They say that the Eglinton Iron Company's agreement, or the terms of it, was communicated to Mr Hunter. There is evidence to the effect that at later discussions the arrangements of the defenders with Lord Eglinton and the Eglinton Iron Company were fully explained to Mr Hunter and Mr Barr, who represented the pursuers. But I am unable to hold that there is any sufficient proof of Mr Hunter's knowledge, because it seems to me to be certain that if the knowledge which is imputed to him had really existed he could not have acted as he did, but would at once have insisted on the right of his company to a reduction, which it is conceded on both sides he never did. On this question of fact I agree with the Lord Ordinary, and I need not go into more detail.

With regard to the Lanemark rate, I think that it is proved that it was at one time known to Mr Hunter. Mr Hunter was a partner of the Lanemark Company, though he took very little, if any, charge of its affairs, in consequence of the pursuers insisting that he should give his whole time to the management of their company. It further appears that the Lanemark rate became known to Mr Gavin, the pursuers' secretary, though in connection with a particular transaction which was not carried out. And when I am on the subject of Mr Hunter's

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No. 91. knowledge, I may notice that it is not clear that he ever knew whether the agreement of 1872 was signed or not if we are to judge by the terms of the letter to Barr dated 30th May 1876.

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One matter more requires to be stated, viz., that until 1878 the pursuers dealt almost entirely in iron. Till that date the amount of coal carried for them was inconsiderable, and the coal rate was not of much importance to them.

It is in these circumstances that the defenders contend that the pursuers are barred from recovering the overcharges for which they sue. As I think that the pursuers did not know of the Hurlford rate, the case of the defenders so far fails. But as Mr Hunter and Mr Gavin had some knowledge of the Lanemark rate, I have to consider how that knowledge may affect the pursuers.

There is high authority for the proposition that a payment made in the knowledge that it is not due cannot be recovered. It seems to depend on the principle that such a payment imports a waiver of all objections, and an admission that the debt is justly due. When there is a question whether money is due, and when it is paid in the knowledge of the facts on which that question depends, it may be reasonably inferred that all objections are waived, and that the debt is admitted. To hold that a payment so made cannot be recovered is nothing more than to hold that the voluntary waiver and admission cannot be afterwards called into question, or, in other words, that a person who has paid a debt which he has admitted to be due will not be allowed to go back on his admission. I can see no other principle on which the rule of law can depend.

I do not think that we can apply this rule of law unless we are satisfied that the presumption on which it is founded is, or, at least, may be, in accordance with the fact, nor, in my judgment, can this condition exist unless it be the case that at the time when the payment was made the knowledge of the overcharge was present to the mind of the person who made the payment. If it was not he could not intend to waive any right or make any admission. It may be sufficient if the knowledge should have been present to his mind, on the ground that he cannot be allowed to say that he did not know what he ought to have known. But unless it was present, or should have been present, it would, I think, be unjust to apply the rule, and particularly in this case, when I think it to be certain that neither the pursuers nor any of their officials ever intended to waive any right or submit to any overcharge.

Assuming that the pursuers are to be identified with Mr Hunter and Mr Gavin it is, in my opinion, plain that when the rates charged by the defenders were paid they never thought that there was any overcharge. Such a thing never entered into their minds.

As I have already said, Mr Hunter was constantly urging the defenders to concede a reduction of rates. He may have known of the Lanemark rate, in the sense that it had at some time or other been brought under his notice, but it seems to have escaped his recollection. That he should have knowingly submitted to the overcharge which the defenders made is out of the question, unless he was defrauding the pursuers for the benefit of the Lanemark Company, a charge which has not been made against him. Nor is it remarkable that the Lanemark rate might have dropped from his memory, because his whole attention was given to the pursuers' affairs, and because at the time when the rate was fixed, and for a long time afterwards, coal traffic was of little importance to the pursuers. The position of Mr Gavin need hardly be considered. His knowledge was confined to a particular transaction, which was not carried out,

and, besides, it does not appear that the payment of the rates fell within his department. **No. 91.**

Nor can it, I think, be said that the pursuers—including Mr Hunter—ought to have been aware of the overcharge when the rates were paid. Assuming such knowledge as may be fairly imputed to Mr Hunter, I think that his oversight was excusable, and that the defenders cannot retain the moneys which they have received in excess of what was justly due to them on the plea that the pursuers were in default. The defenders were the real defaulters. There was no excuse for them making the overcharge, and, in my opinion, they must repay the amount of it.

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LORD YOUNG, LORD LEE, and the LORD JUSTICE-CLERK concurred.

THE COURT refused the reclaiming note, and remitted the cause to the Lord Ordinary to proceed.

WEBSTER, WILL, & RITCHIE, S.S.C.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

YEATS'S TRUSTEES (Bellfield Colliery Company), Pursuers (Respondents). **No. 92.**  
—Asher—Low.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders  
(Appellants).—Balfour—C. J. Guthrie.

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*Railway—Rates—Undue preference—“Same portion of the line of railway”*—*Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 83.*—The 83d section of the Railways Clauses Consolidation (Scotland) Act, 1845, gives certain powers to a railway company to alter or vary such tolls as it is by its special Act entitled to charge, “provided that all such tolls be at all times charged equally to all persons, and after the same rate . . . in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances. . . .”

A railway company charged a certain rate per mile, every incomplete mile being reckoned a mile. The sidings of two collieries joined the main line of the railway within the twelfth mile from Troon, but one was 415 yards nearer Troon than the other. *Held* that in determining, in the sense of the above section, the portion of the railway used by the collieries respectively, the incomplete mile was to be considered as a whole mile in each case.

The Bellfield Colliery siding joined the down line of the railway to Troon. The Wellington Colliery siding joined the up line of the railway at a point 415 yards nearer Troon than the Bellfield siding. Wellington Colliery traffic for Troon was carried back by the railway company to cross-over points in the immediate vicinity of the Bellfield siding. Wellington traffic was, however, invariably, and Bellfield traffic usually, carried to a siding beyond Hurlford Station, in the immediate vicinity, and there marshalled for despatch to Troon. Both collieries were within the same mile from Troon. The railway company charged a certain rate per mile, and every part of a mile was accounted a whole mile.

In an action at the instance of the Bellfield Colliery proprietors against the railway company on the ground of undue preference in the rates charged for the Wellington traffic, the defenders contended that their contract was to carry the traffic of each colliery to Troon from the respective points where it reached their railway, and that, inasmuch as the pursuers' siding joined the railway 415 yards further from Troon than the Wellington siding, their traffic was not carried “over the same portion of the line of railway.” *Held* that the traffic of the two collieries was carried “over the same portion” of the railway.

*Opinion* that the traffic of both collieries must be viewed as carried to Troon from Hurlford Station, and therefore that it passed “over the same portion” of railway.



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2D DIVISION.  
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I.

BELLFIELD COLLIERY AND WELLINGTON PIT, PORTLAND COLLIERY, were situated on different sides of the Glasgow and South-Western Railway in the immediate vicinity of Hurlford Station. Bellfield Colliery possessed a siding which connected with the railway company's down line to Troon exactly at Hurlford Station. Wellington Colliery on the other side of the line was connected with the up line from Troon by a siding which was 415 yards distant from Hurlford Station, and so much nearer Troon than the siding of the Bellfield Colliery. As, however, Wellington Colliery joined the up line, traffic from that colliery for Troon had to be carried back to cross-over points a few yards on the other side of Hurlford Station, where it was marshalled. Traffic from Bellfield Colliery was sometimes carried on to Troon from the colliery siding on the down line, but it was usually carried back past Hurlford Station and made up for Troon at the same siding where the Wellington traffic was marshalled. Both collieries were within the same mile—that is to say, more than eleven miles and less than twelve miles—from Troon.

In September 1886 the trustees of the deceased Robert Yeats, who carried on the Bellfield Colliery, raised the present action in the Sheriff Court at Kilmarnock against the railway company for the sum of £190, 0s. 3d. (which was subsequently restricted to £178), as the amount of alleged overcharge by the defenders for the carriage of coals in violation of the Railways Clauses Consolidation (Scotland) Act, 1845, sec. 83.\*

The pursuers averred;—"The coals and dross from the pursuers' pit and from the said Wellington pit are of the same description, and are conveyed and propelled by like carriages and engines, and pass only over the same portion of the defenders' line of railway—to wit, from Hurlford Station to Troon Harbour—under the same circumstances. The pursuers are therefore entitled to be charged equally with the said Wellington pit, and after the same rate per ton per mile.

"The defenders, however, have been charging the pursuers, between the 25th day of August 1884 and the 17th day of August 1885, the rate of 1s. 3d. per ton for the conveyance of coal and dross from Hurlford Station to Troon Harbour, which is 4½d. per ton more than the rate they charged the Wellington Colliery."†

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\* The Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 83, enacts—"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties, it shall be lawful therefore for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time, to alter or vary the tolls by the special Act authorised to be taken either upon the whole or upon any particular portions of the railway as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

† The pursuers, on record and before the Sheriff-substitute, also founded on an agreement entered into in 1875, which was the foundation of the action of, and is quoted in *Mackinnon v. Glasgow and South-Western Railway*, July 15, 1885, 12 R. 1309, aff. June 26, 1886, 13 R. (H. L.) 89; but as they acquiesced in the

The pursuers pleaded, *inter alia* ;—(4) The defenders having charged the pursuers a higher rate than they had agreed to charge another coalmaster for the carriage of goods of the same description, conveyed and propelled by like carriages and engines, and passing only over the same portion of defenders' line of railway under the same circumstances, have violated the Railways Clauses Consolidation (Scotland) Act, 1845, sec. 83, and are bound to repay to the pursuers the amount of the overcharge.

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The defenders pleaded ;—(5<sup>a</sup>) No violation of the Railways Clauses Consolidation Act, 1845, sec. 83, having been committed by the defenders, the action, so far as founded thereon, is untenable.

A proof was allowed. The evidence disclosed the custom and practice in marshalling of traffic from the respective pits as explained above. It also appeared that according to the rates at which the defenders charged the pursuers fractions of tons were to be considered as whole tons, and fractions of miles as whole miles.

On 29th June 1887 the Sheriff-substitute (Hall) pronounced this interlocutor :—“ Finds that the pursuers' author Robert Yeats was not as an individual a party to the agreement, No. 5 of process, and that the pursuers have no title to sue under that agreement: Finds that Wellington Pit, Portland Colliery, presently carried on by William Mackinnon, C.A., as trustee for behoof of the creditors of Allan Gilmour, a party to the said agreement, and the pursuers' Bellfield Colliery, both adjoin the main line of the defenders' railway in the immediate vicinity of Hurlford Station: Finds that the junction of Bellfield Colliery siding with the said main line is at Hurlford Station: Finds that the junction of Wellington pit siding with the said main line is 415 yards further on the way to Troon, but on the up line from which, in order to be conveyed to Troon, its traffic must be transferred to the down line: Finds that the nearest point at which this can be done is the through crossing at Hurlford Station: Finds that Wellington pit and Bellfield Colliery have hitherto been treated by the defenders as equidistant from Troon, the distance in each case being charged for as twelve miles, and the rate for the carriage of coal and dross being 1s. 3d. per ton: Finds that in its transmission to Troon the traffic from both collieries has its *terminus a quo* at Hurlford Station, and passes over only the same portion of the defenders' line of railway: Finds that in virtue of the above-mentioned agreement, and in respect of the rates charged by the defenders to traders who are not parties to the said agreement, it has been decided \* that the defenders came under an obligation to carry coal and dross from Wellington pit to Troon during the period from 25th August 1884 to 17th August 1885, at a reduction of 4½d. on the said rate of 1s. 3d. per ton: Finds that between the said dates the pursuers paid to the defenders the said rate of 1s. 3d. per ton for the carriage of 9538 tons 2 cwt. of coal and dross from Bellfield Colliery to Troon, conform to the receipts or discharged accounts, Nos. 25 to 67 of process: Finds in law (1) that the case falls under section 83 of the Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33); (2) that in conformity therewith the pursuers are entitled to the same reduction as that to which the proprietors of Wellington pit have been found entitled on the rate paid by them to the defenders for the carriage of their coal and dross from Bellfield Colliery to Troon during the said period: Therefore repels the defences, and decerns against the defenders in terms of the prayer of the petition: Finds them liable in expenses.” &c.

The defenders appealed to the Court of Session, and argued ;—Their Sheriff-substitute's judgment holding that they had no title to sue on that agreement, it is unnecessary to set it forth.

\* That is to say in the case of *Mackinnon, supra*, note.

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contract with the Wellington Coal Company must be kept in view in considering whether the 83d section of the statute applied. They had contracted to take the coal from the Wellington siding to Troon. The siding was 415 yards nearer Troon than the Bellfield siding, and so the Bellfield coal was not carried "over the same portion of the line of railway." The fact that the traffic had to be drawn back to the cross-over points did not affect the question. It was merely a convenience for the defenders. Delivery was not taken at Hurlford Station, but at the Wellington siding. The Sheriff-substitute proceeded on the view that the difference in length between the two pieces of line was too small to make a substantial difference of circumstances. But it had been decided that a large difference of distance was unnecessary if the traffic was sent to the same place.<sup>1</sup> Besides transit "over the same portion" was absolutely necessary.<sup>2</sup>

Argued for the pursuers;—The defenders admitted that they had to draw the traffic back from Wellington siding to Hurlford before sending it to Troon, and so implied that the Wellington traffic started from the same terminus as the Bellfield traffic. It was not reasonable construction to argue that a few yards made all the difference as to traffic being "over the same portion" of the line. Probably no two traders could reach the railway company's line at equidistant points from the place of destination. The short distance between Wellington siding and Hurlford was not charged for. In *Murray's* case the goods of both traders passed over the same portion of the line, but one trader was at a distance of four miles along the line from the other. The *Denaby* case shewed even greater disparities. For rating purposes the mile was the unit. All traders within the same mile were for rating taken in at the same point. They were therefore within the same portion of the railway, and for the purposes of the 83d section of the statute their goods were carried over the "same portion." The construction proposed by the defenders would make the statute inoperative.

At advising,—

LORD RUTHERFURD CLARK.—In this action the pursuers founded on an agreement with the defenders. The Sheriff held that they were not entitled to sue upon it. The pursuers acquiesced in that judgment, for the argument which was addressed to us was based entirely on the 83d section of the Railway Clauses Act.

The pursuers and the Portland Colliery send coal by the defenders' railway to Troon. The pursuers complain that the defenders have charged lower rates to the Portland Colliery than they have charged to them. The defenders admit the difference of rates, but they maintain that the traffic of the pursuers and the traffic of the Portland Colliery are not carried "over the same portion of the line of railway," and therefore that they have not violated the provisions of the Act.

The coals of the pursuers are raised at the Bellfield pit, which is connected by a siding with the down line, along which the traffic to Troon is carried. The coals of the Portland Colliery are raised at the Wellington pit, which is on the other side of the railway. The point at which they are brought by a siding to

<sup>1</sup> *Finnie v. Glasgow and South-Western Railway Co.*, March 10, 1853, 15 D. 523, per Lord Fullerton, p. 531.

<sup>2</sup> *Murray v. Glasgow and South-Western Railway Co.*, March 29, 1883, 11 R. 205; *Denaby Main Colliery Co. v. Manchester and Sheffield and Lincolnshire Railway Co.*, 1885, L. R., 2 App. Cas. 97; *Evershed v. The London and North-Western Railway Co.*, Feb. 1877, 2 Q. B. Div. 254, and 3 Q. B. Div. 135, aff. July 1878, 3 App. Cas. 1029.

the railway is about 400 yards nearer Troon than the Bellfield siding, but inas-  
 much as the former siding joins the up line, they must, in order to get to the  
 down line, be drawn back to a cross-over which is a few yards further from  
 Troon than the Bellfield siding. In point of fact the coals from the Wellington  
 pit were invariably, and the coals from the Bellfield pit were usually, taken to a  
 place on the further side of the Hurlford Station, where the trains were  
 marshalled, and after this was done they were despatched from the Hurlford  
 Station to Troon.

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The Bellfield pit and the Wellington pit are both situated within the same  
 mile from Troon—that is to say, they are both more than eleven miles and less  
 than twelve miles from that place.

The defenders contend that the question arising under the 83d section must  
 be determined by reference to the point at which the traffic actually reached  
 their line. They maintain that their contract was to carry it from that point to  
 Troon, and that inasmuch as the pursuers' coals reached the railway at a point  
 some 400 yards further from Troon than the point at which the coals from the  
 Wellington pit reached the railway, they were not carried "over the same  
 portion of the line of railway." They admit that as matters now stand, and as  
 they stood during the period to which the action relates, the Wellington coal  
 could not get on the down line without being drawn back to the cross-over  
 which I have mentioned. They further admit that in fact both sets of traffic  
 were usually marshalled on the further side of the Hurlford Station, and  
 despatched from that station. But they say that all this was for their own con-  
 venience only, and that in a question with the pursuers and the Portland  
 Colliery the coals of each company are to be held as having been carried to  
 Troon from the point at which they respectively reached the railway.

If this argument be sound there is great difficulty in seeing how any coal  
 company could benefit by the provision of the Act. It is hardly conceivable  
 that any two pits should be so situated as that the coals raised therefrom should  
 reach the railway at points precisely equidistant from the place of destination.  
 The argument implies that in order to be within the statute the traffic must be  
 carried over exactly the same portion of the railway, and the defenders did not  
 hesitate to contend that if the traffic were despatched from different parts of the  
 same station to the same destination the statute would not apply. I cannot  
 adopt an argument which would deprive the statute of all its power, and which  
 is supported neither by reason nor authority.

The pursuers urged that the traffic in question was to be regarded as having  
 been carried between Hurlford Station and Troon, and therefore that it was  
 carried over the same portion of the railway. It is true that it was not received  
 at Hurlford Station. As I have said, the Wellington pit coal was invariably  
 despatched from that station, and though in some cases the Bellfield coal was  
 carried on to Troon from the siding at which it reached the railway, it was usual  
 so to marshal it that it was despatched from Hurlford Station. Consequently  
 if the Wellington coal be considered as despatched from Hurlford it passed over  
 the same distance as the pursuers' coal, or in some cases over a longer distance.  
 This is a reasonable view, for it cannot be doubted that the two classes of coal  
 were, in the fair sense of the phrase, traffic between Hurlford and Troon.

There is, however, another argument which was advanced by the pursuers,  
 which in my opinion furnishes a safer ground of judgment. The coal from each  
 pit reached the railway within the same mile from Troon, and apart from any

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favour shewn to the one over the other the charge for carriage would be the same. For the defenders charge a certain rate per mile, and every additional part of a mile counts as a mile. The 83d section of the Railway Clauses Act is intended to provide for equality of charge. It enacts that all tolls shall be charged equally to all persons, and after the same rate for all goods of the same description passing over the same portion of the line. As every part of a mile may be charged for as a mile, I think that I may hold that every mile and every part of it is, within the meaning of the section, one and the same portion of the railway whether the traffic passes over a larger or a smaller part of it. In short, each mile is to be considered as a unit in determining the portion of the railway over which the traffic passes just as it is considered as a unit in fixing the charges which the railway company are entitled to make. Such a construction, which I think does no violence to the language of the statute, is consistent with its purpose, and preserves its efficiency. I prefer it to that maintained by the defenders, which in my opinion would make the statute a dead letter in regard to traffic of the kind with which we are here concerned. In this view both classes of coal were carried over the same portion of the railway, and therefore the complaint of the pursuers is well founded.

LORD YOUNG, LORD LEE, and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced the following interlocutor:—"Find in fact and in law in terms of the findings of the Sheriff-substitute contained in his interlocutor of 29th June 1887, which are held as herein repeated: Therefore dismiss the appeal, and affirm the said interlocutor, except in so far as the sum concluded for in the petition and decerned for is erroneously stated to be £190, 0s. 3d. instead of £178, 16s. 9d., and to that extent and effect alter the said interlocutor: Of new repel the defences, and ordain the defenders to make payment to the pursuers of the said sum of £178, 16s. 9d., with interest thereon at the rate of five per cent per annum, from the 1st day of September 1885 till paid: Find the pursuers entitled to expenses in the inferior Courts and in this Court."

GORDON, PRINGLE, DALLAS, & Co., W.S.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

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donald v.  
Campbell.

LORD MACDONALD, Pursuer (Respondent).—*D.-F. Mackintosh—G. R. Gillespie.*

SAMUEL CAMPBELL, Defender (Appellant).—*R. V. Campbell—Ure.*

*Lease—Use of subjects—Restriction against sale of spirits—Consent of landlord—Acquiescence.*—A building lease granted in 1876 for ninety-nine years contained a provision that the tenant "shall not sell or retail spirits upon the premises without the express consent of the proprietor or his factor for the time being," the proprietor or his factor "being the sole judge of all such matters." In 1876 the landlord consented to an application by the tenant for a grocer's licence which was granted for that year, and renewed without objection for seven years afterwards. The alterations made by the tenant to adapt his premises for the sale of spirits were very slight. In 1884 the landlord objected to the renewal of the licence, and subsequently he brought an interdict against the continued sale of spirits by the tenant. In answer, the defender pleaded (1) that the pursuer had once for all discharged the prohibition in the lease; and (2) that he was barred by acquiescence for seven years from insisting in the action.

*Held*, after a proof, (1) that the landlord had neither expressly nor by acquiescence discharged the conditions in the lease, and (2) that he was entitled to recall his consent if the defender's actings justified his doing so, and that the

defender's conduct of his business had been shewn to be such as to entitle the pursuer to interdict. No. 93.

By building lease dated 2d October 1875 and 2d March 1876, Lord Macdonald let to Samuel Campbell for ninety-nine years a certain piece of ground at Broadford, Skye, amounting to 2436 square yards, under the following among other conditions:—"And it is hereby expressly provided and declared that it shall not be lawful to nor in the power of the said Samuel Campbell or his foresaids to have or keep any matter or thing upon the said piece of ground which may prove injurious to the amenity of the locality, or may be deemed a nuisance, or create annoyance or disturbance to the neighbouring tenants or proprietors, and particularly that they shall not sell or retail spirits upon the premises without the express consent of the proprietor or his factor for the time being, the said Lord Macdonald, or the heirs of entail in possession of the said lands and estate, or the factor for the time, being the sole judge of all such matters."

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Sheriff of Inverness-shire.  
M.

On 25th October 1876 Mr Macdonald of Tormore, who was factor for Lord Macdonald from 1872 to 1879, wrote the following letter to the Justices, who attended at the Licensing Court held at Portree:—"Dear Sir,—As it is likely you will be one of the acting J.P.'s the day the Court is held at Portree for considering the applications for licences, I will be obliged if you will support the application of Mr Samuel Campbell, merchant, Broadford, for a grocer's licence to sell malt liquors, the same being approved of by the proprietor.—Yours truly, D. MACDONALD." On 31st October following Campbell obtained a grocer's licence from the Justices, which was renewed at the Licensing Court each year thereafter without objection until 1884. In April of that year a licence was refused, and on 21st May following Messrs John Clerk Brodie & Sons, W.S., Lord Macdonald's agents, wrote to Mr Campbell intimating the withdrawal of any permission which he had given to sell spirits.\* Campbell renewed his application at the two next half-yearly Licensing Courts, but it was refused on both occasions.

Campbell having continued the sale of spirits under a "wholesale licence," obtained direct from the Excise without a certificate from the Justice of Peace Court, Lord Macdonald, in September 1885, brought an action in the Sheriff Court of Inverness-shire to have him interdicted from selling or retailing spirits on his premises.

He averred that the refusal by the Justices to renew the licence in 1884 was due to complaints which had been made against its continuance, and that in April 1885 he had further communicated to the Justice of Peace Clerk at Portree his objection to the granting of the licence on the ground that it was unnecessary, and would be injurious to the public interest in the district.

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\* That letter was:—" . . . We understand that, by permission of Lord Macdonald's former factor, you have for some time been selling and retailing spirits within the premises erected by you on the ground held from his Lordship under the above-mentioned lease. Lord Macdonald has recently had the matter under consideration, and he is of opinion, on public grounds, that a continuance of the permission granted to you to sell and retail spirits is unnecessary for the requirements of the district, besides being hurtful to the inhabitants, most of whom are his Lordship's tenants. We are therefore instructed to intimate to you that any permission granted to you under your lease to sell and retail spirits is now withdrawn, and we have to request that you will write us acknowledging receipt of this letter, and undertaking to discontinue the traffic in spirits within the premises erected on the ground leased to you by Lord Macdonald within a month from this date.—Your obedt. servts. JOHN C. BRODIE & SONS."

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The defender, in answer, *inter alia*, averred that in consequence of his getting the pursuer's consent to his getting a licence, he had expended a large sum in new buildings and otherwise.

The pursuer pleaded;—(1) It being provided by the defender's lease that he shall not sell or retail spirits upon the premises let without the express consent of the pursuer, and the defender not having such consent, the defender is not entitled to sell or retail spirits on the said premises.

The defender pleaded, *inter alia*;—(3) The pursuer is barred by *mora* and acquiescence from insisting in the present action. (4) The prohibition founded on by the pursuer being in the circumstances vexatious, and contrary to public policy, is not enforceable. (5) The prohibition founded on having been discharged by the pursuer's factor, and *rei interventus* having followed on the said discharge, the pursuer is not now entitled to revive and enforce the prohibition, and the interim interdict already granted ought to be recalled, and the action dismissed, with expenses.

After proof,\* the Sheriff-substitute (Blair), on 10th April 1888, pronounced this interlocutor (after certain findings in fact):—"Finds in point of law that the pursuer, by assent and acquiescence in the defender's use of the premises in question for the sale of exciseable liquors from the 31st October 1876 to 15th April 1884, must be held to have discharged the prohibition founded on, and to have lost the right to enforce it: Therefore to that extent and effect sustains the third and fifth pleas in law for the defender, . . . and assoilzies the defender from the conclusions of the petition, and decerns."

On appeal the Sheriff (Ivory), on 19th May 1888, recalled the Sheriff-substitute's interlocutor, and found:—" (3) That the defender has failed to prove that the pursuer has discharged the said prohibition, or that he has, by acquiescence or otherwise, lost his right to enforce it; (4) that at the date when the present process of interdict was raised, and for some time previously, the defender was selling spirits upon the said premises, which were erected on the said piece of ground, not only without the consent of the proprietor or his factor, but in opposition to their frequent remonstrances: Finds in law that the defender is not entitled to sell or retail spirits on the said premises without the express consent of the pursuer or his factor, and that the pursuer is entitled to interdict as craved: Therefore repels the defences, grants interdict in terms of the prayer of the petition, and decerns."

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\* It appeared from the proof that Campbell, the defender, carried on a large business in Broadford as a grocer and meal merchant and general dealer, and that he had extended his premises since 1876, but that any expenditure he had incurred had not been on account of his whisky business, except to the extent of about £30 or £40 for a new shed or lean-to in which he stored the whisky: that there was a hotel in the immediate neighbourhood of the shop, also belonging to the pursuer, the tenant of which had appeared and objected at the Licensing Court in 1884 that the defender did not require a licence, and that there were complaints against it in the neighbourhood. The fiscal had also complained on that occasion of irregularities about the premises, and the Rev. Donald Mackinnon, D.D., of Strath, and Lauchlan Nicholson, shopkeeper to the defender, deposed to seeing people drinking upon the premises. Petitions had also been presented both in 1884 and 1886 by residents in the parish of Strath against the licence being granted, the first signed by 341 and the second by 664 persons.

On the other hand a petition, signed by 901 persons, had been presented in favour of the licence, and it was also pointed out for the defence that the Clerk to the Justices, Mr Alexander Macdonald, had also been Lord Macdonald's factor from 1878 to 1887.

The defender appealed to the Court of Session.<sup>1</sup>

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**LORD PRESIDENT.**—The question before us relates, firstly, to the construction of a clause in the lease between the pursuer and defender, and secondly, to the construction and effect of the consent given by the landlord to dispense with the conditions in that clause.

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As regards the clause in the lease, the prohibition is so far distinctly enough expressed that the tenant "shall not sell or retail spirits upon the premises without the express consent of the proprietor or his factor for the time being, the said Lord Macdonald, or the heirs of entail in possession of the said lands and estate, or the factor for the time, being the sole judge of all such matters." There is no doubt that without a consent such as is here specified it would not be lawful for the tenant to sell spirits on the premises under any form of licence. But at the same time it was not unlawful under the lease, nor against its spirit and purpose, that whisky and other malt liquors should be sold if the requisite consent were given. In this case there was a verbal consent given by Lord Macdonald's factor, but there is not much doubt about the precise amount and character of the consent. The factor says that in the exercise of the powers vested in him he did consent that the tenant should have a grocer's licence, and in fulfilment of that undertaking he wrote what may be called a circular letter to the Justices, asking them to support the tenant's application. The licence was granted in 1876, and was renewed for six or seven years without any objection being taken by the landlord, and without the consent which he had given being withdrawn. Accordingly there was on the landlord's part an implied consent—and a very distinctly implied consent—that the tenant should sell spirits as a licensed grocer. But the landlord has now changed his mind, and the question is whether he may now put a stop to their sale, or whether the consent which he gave is irrevocable to this extent, that so long as the defender remains tenant he shall be entitled to have a grocer's licence from year to year.

There is no doubt that cases might arise out of such clauses as that with which we are here dealing which would give a considerable amount of permanency to such an arrangement as is implied in the giving of the landlord's consent. If the landlord were to give such consent on the footing that the tenant should start a public-house, and the tenant were to erect such a house and to invest capital in it, such circumstances would give a more permanent character to the arrangement, and would imply a different kind of consent from what was implied in the present case. Here very little alteration upon the premises was required in order to enable the tenant to engraft upon the premises sufficient additional accommodation for the carrying on of the new business. He erected a cellar in which he might store sugar and whisky—and this was all that was necessary, and all the change on the building that was brought about in consequence of the licence.

The question is how far is the landlord's consent revocable, and upon what

<sup>1</sup> *Cases cited.*—Earl of Zetland v. Hislop, March 18, 1881, 8 R. 675, revd. June 12, 1882, 9 R. (H. L.) 40, Lord Watson, p. 52; Skene v. Maberley, March 2, 1822, 1 S. 369; Young, Ross, & Co. v. Ramsay, March 11, 1824, 2 S. 793, affd. 1 W. & S. 560; Cairncross & Others v. Meek, May 28, 1858, 20 D. 995, 30 Scot. Jur. 611, affd. Aug. 9, 1860, 3 Macq. 827; Cowan, &c., v. Lord Kinnaid, Dec. 15, 1865, 4 Macph. 236; Ewing v. Campbell, Nov. 23, 1877, 5 R. 230.



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conditions may it be revoked. I need hardly say that during the year for which the tenant obtained the licence with the landlord's consent, it would have been out of the question for the landlord to withdraw it. But does the consent bind the landlord to more than this, that for the year for which it was granted it shall run its ordinary course? I entertain a very strong impression that the landlord would not be entitled capriciously, or through enmity or ill-will or malice, to put an end to the consent for the purpose of injuring his tenant. That would be such an exercise of the landlord's power as the Court would not readily sustain. But in the present case, looking to the terms of the clause in the lease, I think there was an intention to reserve to the landlord a power to recall the consent if and when a change of circumstances should justify such a recall. The landlord or his factor was to be "the sole judge," which means that he was to be the sole judge not only whether the consent should be granted, but also whether it should be continued or recalled. Reading the clause in that sense, and the consent which was given in a corresponding sense, the landlord would, I think, be justified in withdrawing his consent if circumstances should occur to make an alteration upon the conditions of the case.

It is somewhat remarkable that no such change of circumstances is set forth upon record. But upon fuller consideration I have rather come to think that the question is whether, in point of fact, the landlord intimated to the tenant that circumstances had occurred which justified the withdrawal of the consent. I think communications were made to the defender sufficient to make him aware that such circumstances had occurred, and that there was in point of fact such a state of matters as entitled the landlord to put an end to the sale of spirits on the premises. The evidence of Dr Mackinnon and of Nicholson, the defender's shopman, leaves very little doubt that, with or without the knowledge of the defender, the leave to sell drink on the premises had been abused. I do not believe that the defender encouraged this. I think he was acting in good faith throughout, but that with all his endeavours he has not succeeded in making a proper use of his licence. That being so, the question is whether it was not the landlord's duty towards the neighbourhood to put an end to the consent which he had given to the licence. I think it was the landlord's duty in the circumstances which have occurred, and that there was nothing to prevent his withdrawing that consent upon reasonable cause shewn. I am therefore for affirming the judgment of the Sheriff.

LORD ADAM.—I think the decision of this case turns upon the construction of the clause which has been founded upon in the lease. It appears to me that the object and intention of that clause was that Lord Macdonald should retain the control of the sale of spirits by his tenant. I agree with the Dean of Faculty in the construction which he has put upon this clause, that the selling of spirits is a continuous act, and that the landlord's consent fell to be obtained from time to time if the sale was to be continued.

The consent which the landlord gave in 1876 was not an express consent to sell or retail spirits. It was rather a consent to an application by the tenant to the Justices for a grocer's licence, and was therefore confined to a sale in that way and manner. The consent was therefore given with reference to what I think was the proper construction of the clause in the lease, and the tenant ought to have known that that consent might be recalled at any time, consistent with the consent given. For I think neither party understood nor intended that

the condition in the lease should be to any extent discharged by the consent which was given. No. 93.

The next question is one which has been suggested by your Lordship, viz., whether the consent once given can be capriciously recalled. It is not necessary to offer an opinion upon that point in this case, but for my part I think the landlord is under the lease the sole judge of the matter. If the tenant were to allege that the landlord had recalled his consent *in mala fide*, it might be different, but otherwise I do not think the landlord is bound to assign any reason for withdrawing it. I think he had reasons in this case, looking to the evidence, and it does not matter whether what took place was done with the knowledge of the tenant or not. The fact that there was something done which Lord Macdonald had reason to disapprove of is enough to justify him in withdrawing his consent.

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I further think there is no question in the case of acquiescence by the landlord in anything done contrary to the obligation in the lease. What was done was done by consent of the landlord under the lease. I concur in thinking that if there were things done by the tenant which were inconsistent with the view that consent was given under the lease, that would have raised a different question, such as was dealt with in *Lord Zetland's* case, viz., whether something was done by the tenant and acquiesced in by the landlord against the terms of the lease. All the change which was made by the tenant upon his premises did not come to much, and was referable to the consent given under the lease, and not to any implied acquiescence in anything adverse to the lease.

LORD LEE.—I concur in the opinion of your Lordship. I think that according to the true meaning of the clause in the lease, consent once given to a particular tenant could not be withdrawn arbitrarily and without cause. But the evidence shews no consent excepting to the extent of allowing the tenant to apply for and obtain a grocer's licence, and no acquiescence excepting in the sale of spirits under such a licence. Such consent could not be withdrawn during the year. But when the licence was refused by the Justices on 15th April 1884, I think that this created a change of circumstances which entitled the landlord to reconsider the matter, and that enough has been proved to support his withdrawal of consent.

LORD MURE and LORD SHAND were absent.

THE COURT repeated the findings in the Sheriff's interlocutor, refused the appeal, and adhered to the interlocutor appealed against.

DUNDAS & WILSON, C.S.—WYLIE & ROBERTSON, W.S.—Agents.

GEORGE AULDJO JAMIESON AND ANOTHER (Lord Glasgow's Trustees),  
Pursuers (Reclaimers).—*D.-F. Mackintosh—Low.*  
JOHN CLARK, Defender (Respondent).—*Balfour—Ure.*

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Lord Glasgow's Trustees v. Clark.

JOHN CLARK, Pursuer (Respondent).—*Balfour—Ure.*  
GEORGE AULDJO JAMIESON AND ANOTHER (Lord Glasgow's Trustees),  
Defenders (Reclaimers).—*D.-F. Mackintosh—Low.*

*Sale—Assignment of rents—Legal and conventional terms—Seller and Purchaser.*—The seller of certain heritage, consisting of two farms, assigned to the purchaser the rents "due and payable from and after the term of entry," which was Martinmas 1886. In a question as to the right to the farm rents payable

**No. 94.** at Whitsunday 1887 for the crop and year 1886, *held* (reversing judgment of Lord Trayner, Ordinary) that the proportion applicable to the possession prior to Martinmas 1886 belonged to the seller, and that applicable to the possession subsequent thereto to the purchaser.

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*Sale—Assignment of rents—Shooting rents.*—Where certain heritable subjects were sold during the subsistence of a shooting lease, *held* (reversing judgment of Lord Trayner, Ordinary) that the shooting tenant's rent fell to be apportioned between the seller and purchaser according as the right of shooting was exercised before or after the purchaser's term of entry to the subjects.

1st DIVISION.  
Lord Trayner.  
C.

ON 24th August 1886 Messrs George A. Jamieson and Frederick Pitman, Lord Glasgow's trustees, exposed for sale by public roup the lands of Thirdpart and others belonging to his Lordship, in terms of articles and conditions of roup, which provided, *inter alia*:—"Tertio, The entry of the purchaser to the said lands and others shall be at the term of Martinmas 1886, and the purchaser shall have right to the rents to become due for the possession from and after that term, the expositors having right to the rents due for the possession prior to that term, notwithstanding the dates at which the same may be conventionally payable."

The subjects, which consisted of two farms which were let under leases at rents of £290 and £160 per annum respectively, were bought by Mr John Clark for £12,500. The term of entry was Martinmas 1886, and the clause of assignment of rents in the disposition to Mr Clark was as follows:—"And we, as trustees foresaid, with consent foresaid, assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry."

The rents were payable at Whitsunday and Martinmas. At Whitsunday 1887 the rents for the half year ending at Martinmas 1886, viz., for the one farm, £122, 10s., and for the other, £72, 10s., less abatements allowed by Lord Glasgow, were paid by the tenants to Mr Clark.

Lord Glasgow's trustees now sued Mr Clark for the £195, with interest from Whitsunday 1887, averring that the defender had no right to the rents, which were for the possession of the farms prior to his term of entry.

The pursuers pleaded;—(2) The rents of the said farms due and paid at Whitsunday 1887 being for possession of the said farms prior to the date of the defender's entry, he has no right thereto.

The defender pleaded;—(1) The rents in question having become due and payable subsequent to the term of the defender's entry, he was entitled to uplift the same. (2) In respect that by the terms of the conveyance in his favour the said rents belonged to the defender, he is entitled to absolvitor with expenses.

The Lord Ordinary (Trayner), on 4th July 1888, assoilzied the defender.\*

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\* "OPINION.—The defender bought the lands of Thirdpart from the pursuers, and he is now infeft therein. By the disposition in favour of the defender the term of entry was declared to be Martinmas 1886, and the clause assigning the rents was expressed thus:—"And we, as trustees foresaid, . . . assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry."

"The rents uplifted by the defender, which the pursuers seek by this action to recover from him, were due and payable after Martinmas 1886, and therefore, *prima facie*, were assigned to the defender by the conveyance in his favour. But the pursuers maintain that the said rents nevertheless belong to them, because, by the articles of roup under which the defender purchased, it was stipulated that the purchaser should have right to the rents to become due for the possession from and after the term of entry; and the rents in question,

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In a second action between the same parties Mr Clark claimed payment from the trustees of a sum of £100, being the rent of the shootings of the above subjects, which were let from 1st August 1886 to 31st March 1887. The rent had been paid to the defenders on 21st February 1887. Feb. 27, 1889.  
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The defenders stated in answer ;—"The said rent falls to be apportioned between the pursuer and the defenders, the latter being entitled to the proportion effeiring to the period from 1st August to 11th November 1886, and the former being entitled to the remainder of the said rent. The defenders have all along intimated their willingness to settle with the pursuer on these terms, but he has refused to do so, and claims the whole rent." They pleaded ;—(1) The pursuer is only entitled to the portion of the said rents due for the possession of the said lands from and after the term of Martinmas 1886. (2) In terms of the contract between the parties and the provisions of the Apportionment Act, 1870 (33 and 34 Vict. c. 35), the said rents fall to be apportioned between the pursuer and the defenders, and the latter are entitled to the proportion thereof effeiring to the period from 1st August to 11th November 1886.

It was stated that the shooting was a mixed one, partly moorland and partly low country.

The Lord Ordinary (Trayner), on 4th July 1888, decerned against the defenders in terms of the conclusions of the summons.\*

Lord Glasgow's trustees reclaimed in both actions.

Argued for Lord Glasgow's trustees ;—*In the first case.*—The case turned upon the construction of the words "due and payable from and after the said term of entry," contained in the disposition. The rents here in question were no doubt conventionally payable after the term of entry, but they were due for a possession which was prior thereto. They therefore belonged to the seller. This interpretation was fortified by the terms of the articles of roup, and if the form provided in the Statute of 1868 (Act 31 and 32 Vict. cap. 101), sec. 8, had been used, it would have had the same meaning. The use of that form was optional, and the fact that it had not been used was not an argument in favour of the view

although due and payable after Martinmas 1886, were for the possession prior to that date.

"If the rights of parties were to be held as fixed by the articles of roup, I should find for the pursuers. But I am of opinion that the rights of parties are to be determined by the terms of the disposition granted by the pursuers to the defender, that being the ultimate expression of their contract, which cannot be modified or altered by previous writings, negotiations, or conditions of sale.

"Further, by the Statute 31 and 32 Vict. cap. 101, section 8, it is provided that an assignation of rents, in the form there given, shall, 'unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry.' The pursuers, therefore, by using the statutory form, 'we assign the rents,' would have limited the defender's right to that which was expressed in the articles of roup. Instead of doing so, however, the pursuers 'specially qualified' the assignation of rents by adding 'due and payable from and after the said term of entry.' I must suppose that this qualification was intended to have some meaning and effect, otherwise it would not have been expressed ; and the only meaning I can give to the qualification is its natural and ordinary meaning as contended for by the defender."

\* "OPINION.—The rents in question, which were for shootings over a portion of the lands of Thirdpart, were due and payable at 31st March 1887. I think they belonged to the pursuer, being assigned to him by the conveyance granted in his favour by the defenders. I refer to the opinion expressed by me to-day in deciding the case *Lord Glasgow's Trustees v. Clark*.

"The Apportionment Act referred to by the defenders has no bearing upon this case, which is one of contract."

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that a construction different from what the words of the form bore was to be put upon the language of the deed. There was a series of authorities in support of the view contended for.<sup>1</sup>

*In the second case.*—There was no legal term at which shooting rents were payable, particularly in a case like this of a mixed shooting. The right to the rent depended upon the occupation solely, and not upon the enjoyment of the fruits, as in an agricultural lease. The Apportionment Act of 1870 (33 and 34 Vict. cap. 35) applied to a case of this kind.<sup>2</sup>

Argued for Mr Clark ;—*In the first case.*—There must have been some good reason for the use of the terms in the disposition, and the Lord Ordinary had taken the correct view. Otherwise the statutory words, "we assign the rents" would have been employed. The contrast between the terms of the disposition and of the articles of roup supported this contention.

*In the second case.*—The shooting rent was not due till 31st March 1887, and so clearly fell to Mr Clark under the terms of the disposition.

LORD PRESIDENT.—I am sorry that I cannot agree with the Lord Ordinary in this case. The law, or I should rather say the law and practice of Scotland, regulating the rights of seller and purchaser in the rents of the subjects sold is quite uniform, and supposing there is no assignation of the rents and no special provision upon the subject of what portion of the rents is to belong to the seller and what to the purchaser, the purchaser becomes entitled to the rents of the estate for the possession that follows his term of entry, and the rents for the possession prior to that term belong to the seller.

No doubt these rules may be varied by paction, and it is contended that they are altered here by the terms of the assignation of rents contained in the disposition. But it appears to me that the construction of that clause depends upon the use of terms which have a precise and definite meaning assigned to them by a series of authorities. There is no need to go back to the provisions of the articles of roup, which are to the effect that "the entry of the purchaser to the said lands and others shall be at the term of Martinmas 1886, and the purchaser shall have right to the rents to become due for the possession from and after that term," i.e., the term of entry. That provision simply gives expression to what is the common law upon the subject. It is said that the clause of assignation of rents in the disposition is not only different in words, but that it entirely abrogates the common law rights of the parties, and gives them a special meaning in this case. The words are, "We . . . assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry." I conceive that these words are identical in meaning with the words in the articles of roup, and accordingly I do not need to say whether it is competent to refer to the articles or not. The words "rents due" mean rents becoming due according to the legal terms.

The case of *Penman & Campbell* (6 S. 940) is so applicable to the facts of the present case that I think it is impossible to distinguish it. It was followed by a series of cases to the effect that rents become due according to the legal terms

<sup>1</sup> *Penman & Campbell v. Ker*, June 10, 1828, 6 S. 940 ; *Stevenson v. Maccreiff*, Feb. 12, 1845, 7 D. 418, 17 Scot. Jur. 205 ; *Sinclair v. Sinclair*, Dec. 1847, 10 D. 190, 20 Scot. Jur. 49 ; *Shand's Trustees v. Mackie*, Feb. 15, 1850, D. 739 ; *Lady Murray's Trustees v. Jardine*, May 31, 1865, 3 Macph. 845, Scot. Jur. 433.

<sup>2</sup> *Maxwell's Trustees v. Scott*, Nov. 5, 1873, 1 R. 122.

although they may be only payable according to the conventional terms. I think the result here plainly is that the rents for the possession prior to the term of entry belong to the seller, and those for the possession subsequent thereto to the purchaser.

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It is said that an intention to alter the ordinary rule and to introduce a novelty is to be gathered from the fact that the short form of assignation of rents clause given in the Act of 1868 has not been adopted in the disposition. I do not quite follow that argument. Conveyancers are not bound to follow the language of the statute. They are only bound to use words to express their meaning, and it cannot matter that they have thrown aside the statutory forms.

As regards the other case, it depends upon a different principle. The shooting rent was payable under the agreement for a possession which lasted from the 1st August 1886 to 31st March 1887. The right conferred by the agreement upon the so-called lessees is a right to enter upon and use the subjects named for the purpose of sport. There is no annual profit from the subjects derived from that use in any proper sense of the term, as is the case in an agricultural lease. The return from shootings cannot be regarded in the light of a crop, nor can it on the other hand be assimilated to the profits of a mining lease. It is simply the exercise of a personal franchise for a definite period. It is a possession which is to be measured by time only. That being so, it appears to me that when the rents are assigned what is meant is that the purchaser shall have right to the rent in so far as it is derived from the possession subsequent to the term of entry, and the seller in so far as effairs to the period antecedent to the term of entry. In this case the game lessees had possession from 1st August 1886 to 31st March 1887. Up to Martinmas 1886 the shooting rent is due to the seller of the estate, after that date the shooting tenants held of the purchaser, and the rent for that period falls to be paid to him. That is the solution of the whole question, and on these grounds I differ from the Lord Ordinary. I think the rent falls to be divided accordingly to the period of possession which has been enjoyed under the seller and purchaser respectively.

LORD ADAM.—In regard to the first of these two cases, the only thing which we have to consider is the assignation of rents clause. I do not propose to look at the terms of the articles of roup, or of the Act of 1868. I think we ought not to look at the articles of roup, for the plain reason that if their terms were different from the terms of the clause in the disposition, it must be presumed that the clause in the disposition was meant to be different, and if they were the same, there is no need to look at them. I agree with your Lordship that the words, "the rents due and payable from and after the said term of entry," have in the law of Scotland a fixed and definite meaning. They are the rents due for the possession, and they are payable for the possession had according as it is before or after the term of entry of the purchaser. The rents claimed here are rents due for the possession prior to the purchaser's entry.

In the second case, I also concur with your Lordship. A shooting lease is not to be likened to the lease of an agricultural subject. In the case of shootings, the crop so to speak is reaped from day to day, and in the case of such a subject the rents fall to be apportioned according to the time of the possession.

LORD LEE concurred.

LORD MURE and LORD SHAND were absent.

In the first action the Court recalled the Lord Ordinary's inter-

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locutor, repelled the defences, and decerned in terms of the conclusions of the summons.

In the second action the Court pronounced this interlocutor:—"Recall the Lord Ordinary's interlocutor: Sustain the first plea in law for the defenders, and in respect thereof decern against the defenders for payment to the pursuers of the sum of £57, 12s. 3d. with interest thereon at the rate of five per centum per annum from 21st February 1887 till payment: *Quoad ultra* assolvie the defenders, and decern."

J. & F. ANDERSON, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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Feb. 27, 1889.  
Begg v. Begg.

Mrs RACHEL ISABELLA LOCKHART OR MENZIES OR BEGG, Pursuer  
(Reclaiming).—*Gloag—G. W. Burnet.*

CHARLES BEGG, Defender (Respondent).—*Balfour—Jameson.*

*Husband and Wife—Divorce for adultery—Reduction—Perjury—Subornation of perjury—Relevancy.*—A wife against whom decree of divorce on the ground of adultery had been pronounced raised an action of reduction of the decree on the ground that the material evidence against her was perjured, and that it had been obtained by subornation of perjury on the part of a detective employed by her husband for that purpose. The Court allowed a proof before answer of the allegations of subornation of perjury, and thereafter, the pursuer having failed to establish these, held that the averments of perjury were irrelevant, and dismissed the action.

*Observations (per Lord Young)* on subornation of perjury as a ground for reducing a decree of divorce.

1ST DIVISION.  
Lord Fraser.  
I.

(SEE *Begg v. Begg*, Feb. 25, 1887, 14 R. 497.)

In 1886, Charles Begg, bachelor of medicine, residing at Hankow in China, brought an action of divorce for adultery against his wife Mrs Rachel Isabella Lockhart or Menzies or Begg.

On 10th November 1886, the Lord Ordinary (Fraser) pronounced decree of divorce, and on a reclaiming note to the Second Division of the Court, their Lordships, on 25th February 1887, affirmed his interlocutor.

On 15th December 1887, the defender raised an action for reduction of the decree on the following grounds, stated in article 15 of her condescendence;—"The pursuer did not commit adultery, and is not guilty of any of the charges made against her in the said action; she was not at that time able to contradict the said witnesses, or to prove that their evidence was false. She has since learned, and now avers and offers to prove, that the evidence of the said witnesses [mentioned in the Lord Ordinary's note] in all essential particulars, and so far as material to the said charge, and forming a ground of judgment against the pursuer, is entirely false, and was emitted by the said witnesses, wilfully and corruptly, in the knowledge that it was false, on the suggestion or at the instigation of a private detective named Alexander Macdonald, who was employed by the defender to concoct and procure evidence against the pursuer."

The substance of the averments on which she relied appear *infra* in the opinion of the Lord Ordinary (Fraser), who on 30th June 1888 found the pursuer's averments irrelevant, and dismissed the action.\*

\* "OPINION.—The object of the present action is to reduce a decree *in fact* pronounced in the Court of Session, on the ground that the witnesses were perjured, and were suborned.

"To aver that the witnesses in a cause were perjured is not sufficient in an action of reduction. In almost every case that is tried there is conflicting evidence. Much of it is undoubtedly false, and it is for the Judge or the jury to

The pursuer reclaimed.

The cause was continued to allow her to amend her averments of subornation of perjury with the view of making them more specific.

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find out on which side the truth lies. Therefore, an allegation that the successful party obtained a verdict or decree in consequence of perjured evidence is irrelevant as a ground of reduction. But the pursuer goes further than an allegation of perjury, and states that the evidence given against her was suborned by a person acting on the defender's behalf, and she maintains that her averments on this head ought to be allowed to be proved. There can be no doubt that subornation of perjury is a ground of reduction, even of a decree *in foro* of the Court of Session. In the case of *Lockyer v. Ferryman* (28th June 1876, 3 Ret. 896) the Lord Justice-Clerk stated the law as follows:—‘I entertain no doubt that an allegation, relevantly made, that a decree was obtained by the successful party having induced or bribed the witnesses to depone falsely, is, like any other fraud, sufficient to rescind or subvert a decree so obtained. If a man obtains a decree by bribing the Judge, or by personating the creditor in a debt, the judgment so obtained must yield to a proof of the facts.’ And in the case of *Forster v. Grigor or Forster* (21st January 1871, 9 Macph. 448) Lord Cowan expressed himself as follows:—‘There is an essential distinction between an allegation of subornation of perjury and one merely of perjury. If subornation of perjury by the party successful in the action were here alleged, the conduct of the party would be fraudulent; and inasmuch as a party cannot benefit by his own fault or fraud, that would form a relevant ground of reduction of a decree alleged to have been obtained by such means.’ In both of these cases the allegations upon which the decrees were sought to be set aside were found to be irrelevant or insufficient; and the question now comes to be, whether there is to be found in the present record any relevant statement, such as is necessary to support a charge of the commission of a crime.—(1 Hume, 381.)

“The pursuer's allegations consist of an attack upon the credibility of five witnesses who were examined against her. In the first place, she avers that Christina Ramsay Fairbairn gave false evidence when she said that she had seen the pursuer kiss the man with whom she is said to have committed adultery, and that she had seen other familiarities between the parties; and it is averred that such evidence ‘formed a material part of the evidence adduced by her’ (Christina Fairbairn) ‘in said action.’ The advising by the Judges in the Inner-House has not been reported, and the Lord Ordinary has no means of knowing what view they took of this girl's evidence; but, in so far as regards his own opinion, it was so little material that he discarded it altogether, not because he did not think the girl a credible witness, but because it was a point in the case which was capable of corroboration, and was not corroborated, and also because the witness and the pursuer parted upon unfriendly terms. The pursuer next attacks the witness, Elizabeth Fairbairn, and avers that she spoke falsely when she said that she had been a witness of familiarities between the pursuer and the man. The truth or falsehood of her evidence was a matter for the Court to judge of; and the pursuer, knowing this, makes the averment that the two girls gave this false evidence ‘on the suggestion or at the instigation of a private detective named Alexander Macdonald, who was employed by the defender to concoct and procure evidence against the pursuer’; and it is said that he enforced these suggestions by ‘various threats against them, alleging that he would “jail” them if they did not say that the particulars he mentioned were true, and urged them, at all events, to say that they heard those particulars stated.’ Now, the precise meaning of this threat is not very obvious, and, if the threat was issued, it seems to have been very senseless. How persons could have been induced to swear falsely by a threat to ‘jail’ them (meaning, it is supposed, to put them in prison) if they did not swear falsely, is really very difficult to comprehend, when an appeal to their parents, the neighbours, and the police was quite open. There is here a want, as there was in the case of *Lockyer v. Ferryman* and in the case of *Forster v. Grigor or Forster*, of any specification of the suggestions which the private



**No. 95.** The pursuer lodged amendments, of which it is only necessary to say that she stated the particulars in which she alleged the evidence to be false and perjured, and averred that in each particular it was procured by subornation of perjury on the part of the defender or of his agent Alexander Macdonald, a private detective, acting on his instruction, and who, she averred, was employed by the defender to get up the case against her.

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Argued for the pursuer;—By her amended averments she had gone further than merely making allegations that the evidence of certain witnesses was false. She had alleged that Macdonald, as agent for the pursuer in the original action, had gone to the two Fairbairns, and two other witnesses, and obtained false evidence from them by subornation of perjury. There was no decision in the law of Scotland on the question whether allegations of perjury alone were a relevant ground of reduction of a decree. The dicta, however, in the cases of *Forster*<sup>1</sup> and *Lockyer*<sup>2</sup> shewed that a distinction was recognised between such a case, and a case like the present, where there were specific allegations made of subornation of perjury amounting to fraud on the part of the successful party in the action. These averments at all events fell to be admitted to probation.

Argued for the defender;—There were no relevant averments to remit to probation. The evidence of the witness Christina Fairbairn was not material, the Lord Ordinary and the Inner-House having both disregarded it, and besides, at the previous trial, an unsuccessful attempt had been made to shew that her evidence was false. As regarded Elizabeth Fairbairn there was sufficient evidence to warrant the decree apart from her evidence. The test of reducing a decree was the materiality of the evidence said to be false. A new trial, especially in consistorial causes, was not to be granted where the alleged culpability might have been discovered by ordinary diligence before the trial.<sup>3</sup>

**LORD YOUNG.**—I was not one of the Judges who heard the original action of divorce, and I am therefore not at all intimate with the facts of it. But I have regarded this action of reduction of the decree obtained in that action as raising questions of the very highest importance, and as involving questions of very great difficulty.

The decree of divorce was pronounced in the Outer-House in 1886, and in the Inner-House in February 1887, and this action of reduction was brought in the end of 1887, substantially—and in so far as I mean to notice it at all—on the ground that material evidence on which the decree proceeded was false and perjured, and that some of it, at all events, was not only false and perjured, but was procured by the pursuer's agent by the commission of the crime of subornation of perjury.

detective made, or the time or place when he made them; and, without such specification, the averments are irrelevant. . . .

"Lastly, in regard to this matter of subornation, the pursuer charges Frederick Reid and his wife, Mrs Reid, as giving false evidence, which is just a reiteration of what was formerly maintained by her after her proof was led, and then comes this general averment,—'The pursuer further believes and avers that the said detective also visited these witnesses, and, profiting by their animosity to the pursuer, induced them to give the said evidence against her.'"

<sup>1</sup> *Forster v. Grigor or Forster*, Jan. 21, 1871, 9 Macph. 445, per Lord Cowan, 448.

<sup>2</sup> *Lockyer v. Ferryman, &c.*, June 28, 1876, 3 R. 882, per Lord Justice-Clerk, 896.

<sup>3</sup> *Macfarlane's Practice in Jury Trial*, p. 271.

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I am not prepared to give at this moment any opinion upon the question whether a decree of divorce or any other decree might be set aside upon the ground that it proceeded on evidence which was false and perjured. I do not require to consider it. We are told that there is no judgment on the point, although there are *obiter dicta* to the effect that a reduction would not be entertained. I desire to reserve my opinion on that altogether. But it is another question, though involving some of the same considerations, and a more extended question, whether, if the party against whom the decree was pronounced avers that the perjured evidence on which it proceeded was procured by subornation of perjury by the opposite party or his agent, that is not a relevant ground of reduction. It may not be relevant merely that the decree proceeded upon false evidence, and may be none the less relevant if it was procured by the party who obtained the decree. It does not seem to be considered doubtful that in a case of the kind the decree could not stand.

I am not disposed to consider at present the averments of false and perjured evidence, beyond its relation to the witnesses alleged to have been suborned by the pursuer's agent. I do not think it necessary to give any opinion now as to the relevancy of the averments of subornation, or the sufficiency of these averments if proved, to entitle the pursuer to the remedy she asks. I do, however, think that they are such that it is expedient in the interests of both parties, and altogether justifiable on the part of the Court, that we should order an inquiry so as to see how the facts stand before answer upon the legal questions. I say nothing about the materiality of the evidence of the two girls Fairbairn, except that as regards the evidence of one of them the Court proceeded on it more or less in the action of divorce. It is averred that the husband's case with regard to his wife having been put into the hands of Macdonald, he deliberately set about procuring false evidence, and got these two girls, partly by offers of bribes and partly by threats, to consent to give evidence which it is averred was altogether false. I do not go into the details any further than to say that it is averred in the proposed amendments that they gave evidence to the effect that Mrs Begg and the co-defender acted in an unbecoming manner, and in a manner which indicated some immoral relations between them. All the evidence of the Fairbairns is on that, and was confined to matters tending to prove exhibitions of familiarity of a character favouring the view of the pursuer that they were leading an immoral life together. Now, as I have said, the averment here is that they have since confessed that all this evidence was false, and was given by them in the knowledge that it was false, and further, that they were suborned to give it by bribes offered and threats made by Macdonald. I said more than once during the debate that probably the evidence on the matters of fact would present a simpler issue than the legal question on which we heard argument. We were assured by the defender that there was no foundation for these statements, and that they were quite untrue. If that is so, it is not likely that the Court will be imposed on in regard to the two young girls, the only question being whether their story was false and was induced by Macdonald acting in the manner alleged. It should be a shorter story than is presented for consideration by the legal questions in the case, which are, as I have said, attended with great difficulty about setting aside the decree of divorce. If there should be a failure to establish this story of perjury and subornation—as I hope there will be—there is an end of the matter. If, however, the pursuer should succeed in establishing it, we shall have to encoun-

No. 95. ter the legal questions, but we shall know all about the details of the case. If the pursuer did nothing amiss, if Macdonald was merely over-zealous, and there is an absence of crime, there is an end of the matter. If, however, crime is proved, a very serious case will be raised, and we shall have to consider it with reference to the whole details. I abstain from stating my opinion as to whether we should refuse to try the case again, if the proceedings are shewn to be so tainted as the pursuer alleges. I am of opinion, then, on the whole matter that we should allow the pursuer a proof before answer of her averments with respect to the subornation of the Fairbairns.

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LORD RUTHERFURD CLARK.—I also agree that we should allow a proof before answer, but nothing more at present. I would in the meantime rather refrain from making any observations on the matter.

LORD LEE and the LORD JUSTICE-CLERK concurred.

ON 15th November 1888 the Court pronounced this interlocutor:—

“ Having heard counsel for the parties on the reclaiming note for the pursuer against Lord Fraser’s interlocutor of 30th June 1888, recall the said interlocutor *in hoc statu*; allow the pursuer to amend the record, and the defender to answer the amendments, and, in order thereto, open up the record; and the amendments and answers having been made, of new close the record as amended: Before further answer, and reserving all questions of expenses, allow the pursuer a proof of her averments with regard to the subornation of Elizabeth Fairbairn and Christina Ramsay Fairbairn: Appoint the same to proceed before Lord Rutherford Clark, at such time or place as his Lordship shall fix; and grant diligence at the instance of the pursuer against witnesses and havers.”

Proof was led before Lord Rutherford Clark, but as the Court were of opinion that the pursuer’s allegations had not been substantiated, it is unnecessary to consider it.

The LORD JUSTICE-CLERK, after reviewing the evidence, was of opinion that the pursuer had completely failed to establish her allegations of subornation of perjury.

LORD YOUNG.—I concur, and I do not propose to make any observations on the evidence which has been led. Important questions have, however, been raised and argued, and as we must dispose of the whole case, I think it right to refer to them. The grounds upon which in this action the defender has sought to reduce the decree pronounced against her in the original action are that that decree was obtained by means of wilfully false and perjured evidence procured by an agent for the pursuer, who knew it to be false. The Lord Ordinary was of opinion that the record was irrelevant, that it did not set forth grounds relevant to set aside the decree which is impugned. He therefore dismissed the action, and it is upon a reclaiming note against his interlocutor that the case is now before us.

The case was fully argued in November last, with this result, that we allowed the record to be amended so as to make the allegations of wilful perjury and subornation more specific. We did not decide that the amendments made the record relevant, but we thought it fitting to allow a proof before answer. We heard argument not only on the relevancy of a reduction of a decree of divorce,

or of any other decree, on the head of perjured evidence procured by subornation, but also on the head of wilful and corrupt perjury by itself, and without such subornation. The proof before answer which we allowed has been taken, and we now have, as I have said, to decide the whole case. Being of opinion with your Lordship that the allegations of subornation have not been substantiated, we have now to consider and determine the question previously argued, but not then decided, whether, with these out of the case, there is a relevant record. I am of opinion with the Lord Ordinary, whose judgment is really under review, although we recalled it *in hoc statu* to admit the proof, that the decree is well founded.

I think it would require very exceptional circumstances to admit a reduction of a decree on the ground that perjury had been committed in the trial. It is constantly a matter of discussion in jury trials and in trials on evidence before a Judge, whether certain evidence is true or false, or, without suggesting perjury, whether it is reliable. Perjury is sometimes, though rarely by discreet counsel, imputed in perfect good faith, and a jury or the Court not taking the same view may refuse to act upon it. I have no idea that in such a case the judgment which follows could be relevantly impugned on the ground of perjury. It is no doubt dreadful to think that in pronouncing judgment in a very important matter injustice may be done induced by perjury. It is also a dreadful thing to contemplate injustice being done by an error in law on the part of the Judge. But in this world such things happen, I suppose, more frequently owing to an erroneous decree upon an error in law on the part of the Judge than owing to false evidence. If they do happen we have to take into consideration the impossibility of carrying on the business of Courts of justice by trying and re-trying cases on such grounds as error in law or error in fact. Upon the head of legal error, if that error has been induced by fraud, which it conceivably might be, then there might be a reduction, or if an error in point of fact has been induced by fraud, of which subornation of perjury is a typical instance, that may be a ground for reducing the decree which proceeded upon it. It was therefore in that view that we before answer allowed a proof of the fraud which was alleged to have been practised upon the Court.

It is not necessary to express an opinion upon the matter, but I may say that in my opinion, if it had been proved that fraud had been practised upon the Court by a person even in the subordinate position of a detective inducing witnesses to say what was false, we should have set aside the decree obtained thereby. That, however, having failed, nothing remains here, and the result is that the judgment of the Lord Ordinary, which, as I have said, was recalled *in hoc statu* to allow the pursuer to lead her evidence of subornation, ought to be adhered to.

LORD RUTHERFURD CLARK.—I agree.

LORD LEE was absent.

THE COURT pronounced this interlocutor :—" Having resumed consideration of the cause, with the proof adduced under their interlocutor of 15th November last, find the averments of the pursuer irrelevant : Dismiss the action : Find the defender entitled to expenses."

ROBERT STEWART, S.S.C.—STUART & STUART, W.S.—Agents.

No. 95.

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No. 96.

LOCHORE AND CAPLEDRAE CANNEL COAL COMPANY AND OTHERS,  
Petitioners.—*Cooper.*

Mar. 2, 1889.  
Lochore and  
Capledrae  
Cannel Coal  
Co.

*Company—Liquidation—Powers of provisional liquidator—Companies Act, 1862 (25 and 26 Vict. cap. 89), secs. 95, 96, and 97.*—Circumstances in which the Court appointed an official liquidator in the winding-up of a company, and gave him the powers conferred by the 95th, 96th, and 97th sections of the Companies Act, 1862, with special power to borrow money on the security of the assets of the company.

1st Division.  
M.

THE LOCHORE AND CAPLEDRAE CANNEL COAL COMPANY was registered on 29th June 1872 under the Companies Acts, 1862 to 1867, its objects being to carry on certain mining undertakings in Fife. Its capital of £110,000, divided into 11,000 shares of £10 each, which was subsequently increased by an additional issue of 2000 shares, having been exhausted, and the company being considerably in debt, it was resolved, at a meeting of the company held on 8th February 1889, that the directors should take steps to place the company in liquidation in order to dispose of it as a going concern, either to a reconstituted company or otherwise.

The company, the Union Bank, who were creditors, and Mr J. D. Lawrie, who was a shareholder of the company, presented a petition under the Companies Acts, 1862, praying that the Court should order the company to be wound up, that Mr Richard Brown, C.A., should be appointed provisional liquidator, with power to exercise the duties specified in sections 95, 96, and 97 of the Companies Act, 1862, without the sanction of the Court; that the provisional liquidator should be authorised to borrow a sum of £2500 for the purpose of carrying on the business of the company, and protecting its interests; and on resuming consideration of the petition, with or without answers, to appoint Mr Brown official liquidator, with the foresaid powers.<sup>1</sup>

The petitioners averred;—"There is no prospect of the company being successful with the money resources at its command. If a sale be effected of the property and undertaking of the company, there will be a considerable surplus of assets to be divided among the shareholders, and the petitioner Mr Lawrie will be entitled, as a shareholder, to a substantial portion of such surplus.

"It is expedient, in the interests of the creditors and shareholders of the company, that the undertaking of the company be disposed of as a going concern, and that in the meantime the business of the company be carried on with a view to the beneficial winding-up of the company. It is also necessary that the liquidator be authorised to borrow money to the extent of £2500 to enable the business to be carried on, and to meet the payments required to protect the company's rights in Benarty Colliery."

On 12th February 1889 the Lord Ordinary on the Bills in vacation (Fraser) ordered intimation and advertisement, and appointed Mr Brown provisional liquidator, with the powers asked, and on 2d March following the First Division pronounced this interlocutor:—

"HAVING resumed consideration of the petition and proceedings, order that the Lochore and Capledrae Cannel Coal Company be wound up by the Court under the provisions of the Companies Acts, 1862 to 1886: Nominate and appoint Richard Brown, chartered accountant in Edinburgh, to be official liquidator of the said company, with all the powers conferred by the 95th, 96th, and

<sup>1</sup> *Authorities.*—Palmer's Company Precedents (4th edn.) 707, Form 596; Buckley on the Companies Acts (5th edn.), 261.

97th sections of the Companies Act of 1862, but declaring that No. 96.  
the power of the official liquidator to borrow money on the secu-  
rity of the assets of the company shall be and is hereby restricted Mar. 2, 1889.  
to an amount not exceeding the sum of £2500, the said Richard Lochore and  
Brown always finding caution for his intrusions and manage- Caplethrae  
ment in common form before extract, and decern: Farther, remit Cannel Coal  
the petition and proceedings to Lord Kinnear to proceed therein Co.  
in terms of the statutes."

DRUMMOND & REID, W.S., Agents.

JAMES EAGLESHAM & COMPANY, Pursuers (Appellants).—*Ure.*

No. 97.

ADAM DICKSON AND OTHERS, Defenders.

*Process—Petition against custodier of stolen property under Glasgow Police Act, 1866 (29 and 30 Vict. c. cclxxiii).—Multiplepinding.* Mar. 2, 1889.  
Eaglesham &  
Co. v. Dickson.

ON 1st December 1888 James Eaglesham & Company, manufacturers, Glasgow, presented a petition in the Sheriff Court of Lanarkshire at Glas-  
gow against Adam Dickson, Central Police Office, Glasgow, who was the 2D DIVISION.  
custodier, under the Glasgow Police Act, of property taken possession of Sheriff of  
in the public interest in criminal cases, and against certain pawnbrokers. Lanarkshire.  
The prayer of the petition was for delivery of a number of articles which I.  
they averred had been stolen from their premises by James Patrick while  
in their employment, and for the theft of which he was now undergoing  
a term of imprisonment.

On 20th December 1888 the Sheriff-substitute (Lees) dismissed the  
petition, and, "in respect no appearance has been entered by any person  
called as defender, finds no expenses due, and decerns."

On appeal the Sheriff (Berry), on 21st January 1889, adhered. The  
ground upon which the Sheriffs proceeded was that they were of opinion  
that the principal defender might be exposed to risk of future claims being  
made for the goods in his custody if in an action like the present decree  
was given against him for delivery to the pursuers; the usual and proper  
course where there were a number of possible claimants to the goods was  
to bring an action of multiplepinding.

The pursuers appealed.

THE COURT, holding that the Sheriffs were wrong, pronounced this  
interlocutor:—"Recall the interlocutors of the Sheriff and Sheriff-  
substitute appealed against, and remit the cause to the Sheriff,  
with instructions to grant the prayer of the petition."

DOVE & LOCKHART, S.S.C., Agents.

FRANCIS S. ALLAN (Surveyor of Taxes), Appellant.—*Sol.-Gen. Darling—* No. 98.  
*A. J. Young.*

WILLIAM MILLER, Respondent.—*R. V. Campbell—G. R. Gillespie.*

Mar. 6, 1889.  
Allan v.  
Miller.

*Revenue—Inhabited House Duty—Different tenements let to one tenant for  
cumulo rent—Verbal lease—Customs and Inland Revenue Act, 1878 (41 and 42  
Vict. c. 15), sec. 13, subsec. 1.—The Customs and Inland Revenue Act, 1878, sec.  
13, subsec. 1, provides, as to inhabited house duty, that "where any house  
being one property shall be divided into and let in different tenements, and any  
of such tenements are occupied solely for the purpose of any trade or business,"  
&c., the occupier of such tenement shall be relieved of the duty.*

*Held (following Smiles v. Crooke, 13 R. 730) that the exemption applied in  
a case where different tenements (one of which was used solely for business*

No. 98. purposes) were let to the same tenant from year to year under a verbal lease at a *cumulo* rent.

Mar. 6, 1889.

Allan v.

Miller.

Exchequer

Cause.

1st Division.

C.

At a meeting of Commissioners of Income-Tax for the Lower Ward of Lanarkshire, William Miller appealed against an assessment made upon him for the year 1887-88 of 12s. 6d., being the inhabited house duty at the rate of 6d. per pound on £25, the annual rent of a dwelling-house and shop occupied by him at 59 Main Street, Rutherglen.

The Commissioners sustained the appeal, and discharged the assessment.

On the motion of Francis S. Allan, Surveyor of Taxes, a case was stated for the consideration of the Court.

From the case it appeared that the premises let to Mr Miller consisted of a spirit shop, a dwelling-house, a bakehouse, and sheds. There was no written lease of the subjects, which were let simply from year to year at a *cumulo* rent of £35.

The parties were agreed that of that rent £10 was fairly applicable to the bakehouse and sheds, and that house duty was not exigible thereon.

The spirit shop and the dwelling-house had no internal communication with one another, and, taken separately, neither of them was of the value of £20 per annum.

The Surveyor of Taxes maintained that the subjects were not "divided into and let in different tenements," in the sense of the statute. The case was distinguishable from that of *Smiles v. Crooke*,<sup>1</sup> where the subjects were separately entered in the lease. Here there was no lease, and all that was known was that they were let to one man at a *cumulo* rent. The view of the Commissioners simply read the words "let in different tenements" out of the Act.

Counsel for Miller were not called on.

LORD PRESIDENT.—There is just one point on which it is possible to make any distinction between this case and that of *Smiles v. Crooke*, and the question is whether that distinction is material. In that case there was a written lease, and the different tenements were described as such in the lease. Here there is no lease, the subjects being merely let from year to year. But if in point of fact these tenements are so different as to answer the description in section 13 of the Act, then if there had been a lease they must have been separately described in it, or they would have been wrongly described. In that view, I do not think the distinction between the cases is in the slightest degree material, and therefore I think the decision in *Smiles v. Crooke* must be followed.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

THE COURT affirmed the decision of the Commissioners.

SOLICITOR OF INLAND REVENUE—WYLIE & ROBERTSON, W.S.—Agents.

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<sup>1</sup> *Smiles v. Crooke*, March 6, 1886, 13 R. 730.

JAMES WHYTE AND OTHERS (Dalglish's Trustees) Pursuers (Real Raisers). No. 99.

THOMAS CARRITT AND OTHERS (Bannerman's Executors) Defendants  
(Claimants).—*Murray*.

RALPH RADCLIFFE WHITEHEAD, Defender (Claimant).—*D.-F. Mackintosh*  
—*Wallace*.

Mar. 6, 1889.  
Dalglish's  
Trustees v.  
Bannerman's  
Executors.

MRS MARGARET DALGLISH OR WILSON AND OTHERS, Defendants  
(Claimants).

MARY LANG OR DALGLISH, Defender (Claimant).

*Succession—Fee and liferent—Fee with protected succession—Repugnancy—Vesting.*—A truster directed his trustees to divide his estate into shares in a certain manner, "said shares to be payable to my said children as soon as my estate shall be realised and converted into cash." In the event of the death of any of the children before receiving payment of their shares without leaving lawful issue, the share of such decesser was to be divided among the surviving children or their issue.

By a codicil he directed his trustees "to invest the shares of my means and estate falling to my daughters," "so soon as the same is realised and can be invested upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use alienably, and to the child or children of their bodies, if more than one, equally among them in fee"; declaring that such liferent provisions were to be purely alimentary, exclusive of the *jus mariti*, but with power to any of the daughters, by writing under her hand, to continue her liferent to her husband, and to apportion the fee among her children.

A daughter who had married died without issue, predeceased by her husband, and leaving a will. She had not received payment of her share. *Held* that the settlement and codicil taken together conferred upon each daughter a fee which vested *a morte testatoris*, subject only to a restriction in favour of her issue, in the event of her having such.

JAMES DALGLISH, manufacturer, Glasgow, died on 24th July 1849, leaving a trust-settlement dated 7th May 1847, with a codicil thereto dated 3d March 1848. By the settlement he conveyed his whole estate, heritable and moveable, to his son James Dalglish junior and others as trustees. He directed his trustees, *inter alia*, to make payment to his widow "of a free yearly jointure or annuity of £400."

By the third purpose of the settlement the truster directed his trustees, in the event of his daughter Isabella being alive and unmarried at the date of his death, to pay to her a legacy of £500 over and above her share of his means and estate; and by the fourth purpose he appointed his trustees "to divide the remainder and residue of my said means and estate into twenty-eight equal parts or shares, four of such parts or shares to be paid to each of my four daughters, and six parts or shares to each of my two sons; and on the death of my said spouse, in case she shall survive me, I direct my said trustees to divide the sum set apart for answering her annuity, and the proceeds of the house and furniture liferented by her, among all my children in the same proportions, said shares to be payable to my said children as soon as my estate shall be realised and converted into cash; which provision in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husbands they may presently have or may afterwards marry, and not subject to the debts or deeds of such husbands or the diligence of their creditors, and the same shall be under their entire control and disposal; and in the event of the death of any of my said children before receiving payment of their shares without leaving lawful issue, the share of such decesser shall be divided among my surviving children or their issue in the proportions foresaid;

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and in the event of the death of any of my said children leaving lawful issue, the share of such deceiver shall be paid to said issue equally share and share alike."

By the codicil the truster directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested, upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use alienably, and to the child or children of their bodies, if more than one, equally among them in fee; declaring that said liferent provisions shall be purely alimentary, exclusive of their husbands' *jus mariti*, not attachable for his or their debts, nor assignable by my said daughters. But providing and declaring that my said daughters or any of them may, if so disposed, by a writing under their hands, continue the liferent provision to their husbands during their respective lifetimes, burdened with the support of the children, and may divide and apportion the fee among their children in such proportions, and under such limitations and conditions as they think proper to impose." The truster was survived by his widow and by one son and four daughters.

The son, Robert James Dalglish, died in 1866 without issue.

The truster's widow died in 1876.

The youngest daughter, Jane, married a Mr Bannerman. She died without issue, and predeceased by her husband, on 22d January 1888. She left a settlement, by which she conveyed her whole estate to Thomas Carritt and others as her executors.

After her death a question arose as to whether the capital of her share of the trust-estate had vested in her or had become intestate succession of Mr Dalglish, or had passed in virtue of his settlement to his children who survived her and the issue of those who predeceased her.

In order to the settlement of these questions Mr Dalglish's trustees raised a process of multiplepoinding for distribution of her share.

Claims were lodged by (1) Mrs Bannerman's executors, who claimed the whole fund on the ground that Mrs Bannerman's share had vested in her, and was therefore carried by her will; (2) Ralph Radcliffe Whitehead, the only son of Mrs Whitehead, one of the truster's daughters who had predeceased Mrs Bannerman, who maintained that on a sound construction of the settlement and codicil the share of the truster's estate liferented by Mrs Bannerman had become intestate succession of the truster, or otherwise, that he was entitled to it under the survivorship clause above quoted. Similar claims were lodged for the children of Mrs Price, another daughter of the truster.

On 7th July 1888 the Lord Ordinary (M'Laren) found that the executors of Mrs Bannerman were entitled to be ranked and preferred to the whole fund *in medio*.\*

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\* "OPINION.—The scheme of this will and codicil seems to be that there is first, what is not strictly a residuary destination but a division of the estate unequally—sons receiving larger shares than daughters. And then in the will there follows a proper residuary clause dealing with the case of any of the children dying before receiving payment of his or her share. It appears to me that under the will, apart from the codicil, there cannot possibly be intestacy; because every contingency is provided for.

"Now, the only alteration made upon that scheme by the codicil is this: The testator proposed that instead of giving the daughters their shares absolutely at his death, settlement should be made in their favour, and he directs that to be done by the trustees as soon as his property is realised and capable of invest-

Ralph Radcliffe Whitehead reclaimed, and argued ;—Mrs Bannerman never took more than a liferent of her share. The testator by the codicil

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ment. They are to take separate rights heritably secured in favour of the daughters, with a destination which is there described. It appears to me, therefore, that this case has this analogy with the two cases of *Fulton* and *Lindsay* in 1880, that it is a case of a trust for members of the testator's family to be effected not by the direct and immediate dispositive act of the testator, but by a conveyance to be afterwards executed by the trustees in conformity with directions given to them. Then it will be necessary to consider what would be the true construction of a conveyance of an heritable security to daughters in the terms expressed in the codicil, taking along with the codicil the leading direction of the will, which is referred to in the codicil.

"Now, there is a series of decisions regarding destinations in liferent and fee, and so far as any particular destination has been interpreted the decisions must receive effect, because this branch of the law has been very authoritatively systematised. I must observe, however, that the meaning put upon the same words of destination varies according to the cause of granting, and the same words receive very different interpretations according as they occur in a deed of purchase or in a deed of gift.

"Again, if it is a question of carrying out a power to settle money, we must find out what are the proper words of destination, and give effect to that power ; and we are not necessarily to use the precise words of the power in the deed carrying it into execution. Supposing the destination had been in the very words in the codicil, 'to the child or children of their bodies, if more than one, equally among them in fee.' That, according to the old authorities, would not have vested any beneficial right of fee in the daughter ; she would merely be a liferenter with a fiduciary fee for behoof of her children ; and if no children, the fee is undisposed of under the terms of the settlement. That is, as I take it, the case contemplated by the Lord President in his opinion delivered in the case of *Fulton* ; the fee is untransferred ; and there being no proper residuary clause in *Fulton*'s will the result was that this particular share fell into intestacy. Then it is equally clear that if this had been a case of a title-deed of property purchased by the lady herself, then, according to the destination in the codicil, the daughter would be the fiar, and would hold the fiduciary fee for children, but failing children for herself. In short it would be a right of fee with a simple destination. But now this is a case of a conveyance to be executed by trustees in such terms as will carry out the testator's will, and while my attention has been called to the observation of the Lord President in *Fulton*'s case—that whatever was directed to be done must be held as done—an observation which is of course indisputable—that still leaves open the consideration of the question, what is it that was directed to be done ? This question cannot be determined by merely looking at the bare terms of the codicil. The testator's intention must be collected from the will and codicil taken together. This is the principle, I think, of the later decision in *Lindsay*'s case, a decision pronounced by the two Divisions sitting together. That case I hold to be entirely consistent with *Fulton*, because the Court were dealing with two different things. In *Lindsay*'s case, it is true, you have not a will and a codicil as we have here, but you have two clauses in the same will, which on a first impression appear to be inconsistent with one another, and therefore the question is much the same as if it had arisen in the construction of a will and codicil which were more or less inconsistent.

"Now, the view of the majority of the Court in the case of *Lindsay* (8 R. 281), which view seems to me to be in accordance with the best principle of trust interpretation, is that you are to look at the leading intention in favour of the family, and if there is a leading intention clearly expressed in favour of making an out-and-out gift to the family, and there is in a subsidiary clause a direction to make a settlement, you must frame the settlement in such terms as will prevent the share from going over to another family. So strongly fixed is this principle (that the trustees in framing the deed must ascertain the testator's inten-

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restricted to a liferent what was no doubt under the fourth purpose of the settlement a gift to daughters of a fee. There was no need for attempting to reconcile these provisions. The later in date must have effect. The presumption was that the codicil was intended to make an alteration on the deed. In *Fulton's Trustees v. Fulton*<sup>1</sup> there was in the first instance an absolute gift to children of one share each in the father's estate, the share of each daughter to be invested in heritable security for her in liferent only and her children in fee. A daughter having survived the father but died without issue, it was held that she never had any right but a bare liferent, and that her share was intestate succession of the truster. That case was exactly in point. It was not overruled in the subsequent case of *Lindsay*,<sup>2</sup> as the respondents suggested. The latter was distinguishable, first, because there the truster's object was held to be with regard to part of his estate, to benefit his family by his first marriage, and to secure that a share of his estate which had been liferented by his daughter by that marriage, if she died leaving no issue, should not pass to the children of the second family. In the second place, it was distinguishable, because there the apparent repugnancy occurred between two clauses in the same deed. It was, of course, desirable to reconcile them. But in this case the repugnancy was between the settlement and the codicil, and the presumption was that the latter was intended to alter the former.

Argued for Mrs Bannerman's executors;—No doubt the object of the codicil was to make some alteration on the settlement. But the question was what alteration, *i.e.*, whether an alteration on the constitution of the gift, or an alteration consisting only in a direction to settle in a protected manner the gift already made. The latter—protected succession—was the true intention and effect of the codicil. The case was ruled by those of *Lindsay* and *Gibson's Trustees*. There was no doubt that there was

tion from the whole instrument), that in the two other cases that have been referred to—*Gibson's Trustees*<sup>2</sup> and *Lady Massy*<sup>3</sup>—the Court directed the execution of a deed in the form of a destination which was unfamiliar to Scotch conveyancers (a very unusual form of destination) because that only was supposed to be capable of carrying out the testator's wishes. Accordingly I come to the conclusion that in the present case the trustees would not have carried out the testator's directions if they had taken heritable security in the precise terms used in the codicil. It would be their duty to take into account the leading direction of the will itself, which is in no way expressly revoked, and which directs a partition amongst the families giving certain shares to sons and certain shares to daughters. The security to be taken would have provided that in the case of there being no family the share of the decesser should be divided amongst the surviving children or their issue. I ought to notice that an argument was founded on the closing words of the codicil, 'But providing and declaring that my said daughters, or any of them, may, if so disposed, by a writing under their hands, continue the liferent provisions to their husbands.' I do not found much upon that clause, because it is also capable of being read as a limitation of the fee to the daughters. It would rather be in favour of the daughters having a more limited right than one of fee in the event of there being children of the marriage. But then, in that event, the children were to get the fee, and it is only in that case that it is thought necessary to give the wife a power of continuing her liferent to her husband. These words do not seem to me to militate against the theory that in the event of failure of issue the daughter is to have the reversion of the fee.

"The result is that I sustain the claim of Mrs Bannerman's executors."

<sup>1</sup> *Fulton's Trustees v. Fulton*, Feb. 6, 1880, 7 R. 566.

<sup>2</sup> *Lindsay's Trustees v. Lindsay and Others*, Dec. 14, 1880, 8 R. 281; *Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038.

<sup>3</sup> *Massy v. Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173, 45 Scot. Jur. 127.

vesting a *morte testatoris* under the settlement. In *Fulton's* case there was not, as here, the direct conveyance of the fee to the daughter. But the case of *Lindsay*, if there were not that distinction also between it and that of *Fulton*, must be held to have overruled that authority.

At advising, the opinion of the Court (LORD JUSTICE-CLERK, LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE) was delivered by

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LORD LEE.—The competition which has arisen in this case depends upon the question whether under the trust-settlement of the late Mr James Dalglish his daughter Jane Dalglish or Bannerman, who survived him and died without issue, had a vested right to a share of his means and estate. The Lord Ordinary has decided in favour of vesting as at the testator's death, and I am of opinion that the Lord Ordinary's judgment is right.

The settlement is composed of two parts, the original trust-deed and a codicil. These must be read together, and as the codicil does not expressly revoke any of the provisions of the original settlement, I think that it cannot be construed as altering the settlement excepting to the extent necessary to give effect to the directions which it contains.

The leading purposes of the trust are, firstly, to provide an annuity of £400 to the testator's widow; secondly, in case of his daughter Isabella being unmarried at his death, to pay to her a legacy of £500 over and above her share of his means and estate at the first term of Whitsunday or Martinmas after his decease; and thirdly, to divide the residue among his children in certain proportions. It is upon the terms of the deed and codicil as regards this last purpose that the question has arisen.

The provision of the deed is as follows:—"In the fourth place, I appoint my said trustees to divide the remainder and residue of my said means and estate into twenty-eight equal parts or shares, four of such parts or shares to be paid to each of my four daughters, and six parts or shares to each of my two sons; and on the death of my said spouse, in case she shall survive me, I direct my said trustees to divide the sum set apart for answering her annuity, and the proceeds of the house and furniture liferented by her, among all my children in the same proportions, said shares to be payable to my said children as soon as my estate shall be realised and converted into cash; which provision in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husbands they may presently have or may afterwards marry, and not subject to the debts or deeds of such husbands or the diligence of their creditors, and the same shall be under their entire control and disposal; and in the event of the death of any of my said children before receiving payment of their shares without leaving lawful issue, the share of such deceiver shall be divided among my surviving children or their issue in the proportions foresaid; and in the event of the death of any of my said children leaving lawful issue, the share of such deceiver shall be paid to said issue equally, share and share alike."

But by the codicil the testator, in virtue of the reserved powers in his deed of settlement, directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested, upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use alienably, and to the child or children of their

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bodies, if more than one, equally among them in fee; declaring that said liferent provisions shall be purely alimentary, exclusive of their husbands' *jus mariti*, not attachable for his or their debts, nor assignable by my said daughters. But providing and declaring that my said daughters, or any of them, may, if so disposed, by a writing under their hands, continue the liferent provision to their husbands during their respective lifetimes, burdened with the support of the children, and may divide and apportion the fee among the children in such proportions and under such limitations and conditions as they think proper to impose."

The testator was survived by his widow (who died in 1876), and also by one son and four daughters. The son's share was duly paid to him, but the capital of the shares falling to the daughters was retained to meet the claims of children under the codicil. One of the children, Jane Dalglish or Bannerman, has recently died without issue, but leaving a settlement, and it is her share that is in question.

It is said as against the claim of her testamentary representatives that the effect of the codicil was to suspend vesting, and that her share has either become undisposed of residue or is disposed of by the survivorship clause of the deed.

My opinion is that the codicil was not intended to result in intestacy on the part of the testator with respect to the share of a daughter dying without issue, and I think that its terms do not support a construction of the settlement which shall have that result. It appears to me that the sole object of the codicil is to protect the capital or fee of a daughter's share for her children, if there should be such children. It is settled by the case of *Lindsay's Trustees*, 8 R. 281, that this is a purpose which is not inconsistent with vesting. In that case there was a direction that the £1000 bequeathed to Catherine Bruce Lindsay should be held so as to give "to herself liferent only thereof, and to the lawful issue of her body equally among them the fee thereof." But the sum was, in the first place, bequeathed to her as a legacy payable six months after the testator's death. It was held that the direction to secure the fee to children was contingent on the existence of children, and there being none, that her right was free of the direction, which was applicable only to that contingency. In short, the principle affirmed by that decision was that where a bequest is merely burdened with a trust for children, that burden falls off if children should not exist. The restriction of the parent's right for behoof of his or her children therefore implies no purpose of creating intestacy.

The case of *Fulton's Trustees*, referred to by the reclaimer's counsel, 7 R. 565, was different in one material respect from the present. It was not clear that the terms of the original bequest were such as to confer a fee upon the daughters, whereas in the present case it was conceded by the Dean of Faculty that under the deed of settlement, had it stood alone, the daughter must have taken a fee *a morte testatoris*. But if that case decided the point which is here raised, and which was also raised in the case of *Lindsay's Trustees*, it must be held to have been overruled by the decision in the latter case, which was a unanimous judgment of seven Judges, including all the Judges who took part in the decision of *Fulton's Trustees*.

THE COURT adhered.

CAMPBELL & SMITH, S.S.C.—J. & A. HASTIE, S.S.C.—RUSSELL & DUNLOP, W.S.—Agree.

JAMES COOK Junior, Pursuer (Respondent).—*Salvesen*.  
WALLACE & WILSON, Defenders (Reclaimers).—*Wilson*.

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*Reparation—Apprehension and imprisonment for civil debt—Necessity for notice of petition for warrant to imprison—Civil Imprisonment Act, 1882 (45 and 46 Vict. c. 42), secs. 3 and 4 (subsec. 3).*—The defender in an action for aliment of an illegitimate child was charged to make payment of the sums contained in a decree in the action. On his failure to implement the decree, a petition was presented to the Sheriff, under the Civil Imprisonment Act, 1882,\* craving a warrant to commit him to prison. The Sheriff *de plano* granted warrant to search for and apprehend the debtor, and “to bring him before the Sheriff for examination.” The law-agents of the creditor caused the warrant to be executed. In an action for damages at the instance of the debtor against the law-agents, on the ground that they had put in force an illegal warrant, *held* (1) that the warrant for the debtor’s apprehension was illegal, and (2) that the action against the law-agents who executed the warrant was relevant.

In November 1888 James Cook junior, Glasgow, raised an action against Wallace & Wilson, writers there, concluding for payment of £500 in name of damages. 1st Division.  
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He stated that in 1887 decree was pronounced against him, in the Sheriff Court at Paisley, in an action for aliment of an illegitimate child.

The pursuer averred that he had been charged on 5th January 1888 to pay the sums contained in the decree, but that he was unable to do so.

He further averred,—(Cond. 4) “On or about 19th January 1888 the defenders, as agents for Miss Adam [the pursuer in the action for aliment], presented a petition to the Sheriff of Renfrew and Bute at Paisley, under the Civil Imprisonment Act, craving a warrant to commit the pursuer to prison for a period not exceeding six weeks, or until he should pay to the defender the foresaid sums in name of inlying expenses, aliment, and interest thereon, and expenses of process, amounting in all to the sum of £13, 17s. 4d. The said petition was signed by the defender David Wilson, as law-agent for Miss Adam. On said date the Sheriff-substitute (Cowan) granted a warrant to search for and apprehend the pursuer, and bring him before the Sheriff for examination.” (Cond. 5) “On 24th

\* Section 3 of the Civil Imprisonment Act, 1882, enacts,—“From and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decreed for aliment.”

Section 4.—“Subject to the provisions hereinafter contained, any Sheriff or Sheriff-substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment and expenses of process decreed for, or such instalment or instalments thereof as the Sheriff or Sheriff-substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment together with the expenses of process for which decree has been pronounced against him by any competent Court, provided :— . . . (3) That the failure to pay shall be presumed to have been wilful, until the contrary is proved by the debtor, but that a warrant for imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or Sheriff-substitute shall consider reasonable.”

No. 100. January the pursuer was, about eight o'clock in the morning, and while in bed, apprehended under said warrant, upon the instructions of the defenders as acting for Miss Adam. The pursuer's apprehension caused great commotion and alarm in his father's house. The pursuer's mother was very anxious, and arranged to go to Paisley with him. They accordingly drove to Paisley in pursuer's father's machine, arriving there between ten and eleven o'clock. The Sheriff-substitute (Cowan) being otherwise engaged, the pursuer was detained in custody at the Court-house till about half-past two o'clock, when his Lordship took the matter up, and granted warrant to imprison the pursuer for six weeks, and found him liable in £2, 2s. as the expenses of the application." (Cond. 6; "The pursuer was then removed in custody to Glasgow, and was taken to the defenders' office to endeavour to get the matter settled." (Cond. 8; "The pursuer has been advised that the procuring and enforcing of said warrant to apprehend him, and under which he was apprehended, was wrongous and illegal. No notice was previously given to the pursuer that such a petition was to be presented, and it was only served upon him at the moment of his apprehension. The petition was a civil Sheriff Court proceeding, while the pursuer was treated worse than if he had been under a criminal charge. He was literally dragged from his bed, taken before a Judge without any opportunity of procuring legal advice, and summarily condemned to six weeks' imprisonment. The statute does not authorise apprehension before an order for imprisonment is pronounced, and the fact that imprisonment was the remedy craved did not imply that the pursuer was to be apprehended at the outset of the proceedings."

He pleaded, *inter alia* ;—(1) The warrant to apprehend the pursuer, and his subsequent apprehension thereunder, as condescended on, being illegal and contrary to the statute, and having caused serious loss and damage to the pursuer, the defenders are liable in reparation as concluded for.

The defenders pleaded, *inter alia* ;—(2) No relevant case.

On 7th February 1889 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Repels the second plea in law for the defenders, and appoints the pursuer within eight days to lodge the issue or issues which he proposes for the trial of the cause." \*

\* "OPINION.—In July 1887 the pursuer was decerned, by a decree of the Sheriff of Renfrew and Bute, to make payment to Jessie Adam of certain sums of money as aliment for the support of an illegitimate child of which the pursuer is the father. On 5th January 1888 the pursuer was charged to make payment of the sums contained in said decree; but having failed to implement the charge a petition was presented to the Sheriff under the Civil Imprisonment in Scotland Act (1882), craving the Sheriff to grant warrant to commit the pursuer to prison. On this petition the Sheriff granted a warrant to search for and apprehend the pursuer, and 'bring him before the Sheriff of Renfrew and Bute for examination.' The defenders (acting as law-agents for Miss Adam) put this warrant into the hands of a sheriff-officer for execution. The pursuer was accordingly apprehended by the sheriff-officer and taken before the Sheriff-substitute at Paisley, who, after hearing the pursuer, committed him to prison for six weeks.

"The pursuer now avers that the warrant for his apprehension, and his apprehension following thereon, were illegal, and he sues the defenders for damages on the ground that they obtained the same and gave instructions for the execution thereof. The defenders plead that the action is irrelevant. I am of opinion that that plea should be repelled.

"By the Civil Imprisonment Act it is provided that a creditor in a decree

The defenders reclaimed, and argued;—Under sec. 4 of the Civil Im- No. 100.  
prisonment Act, 1882, the Sheriff might commit to prison until payment

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for aliment which has not been implemented may apply to the Sheriff for a warrant to commit the debtor to prison; and on such an application the Sheriff may commit the debtor to prison for a period not exceeding six weeks, unless it is proved to his satisfaction 'that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default.' It is obvious therefore that before a warrant to commit the debtor can competently be granted, the debtor must have an opportunity of satisfying the Sheriff that he has not been possessed or been able to earn the means of paying his debt. To enable him to do this he must be brought before the Sheriff. But by what form of procedure is he to be brought before the Sheriff? In answering this question it has to be observed that the whole proceedings are taken under the civil and in no sense the criminal jurisdiction of the Sheriff. Now, the ordinary mode by which a debtor is brought by a creditor before the Sheriff to answer in a civil process for his debt or obligation is by citation. It is not material whether the Sheriff grants warrant for the debtor's citation in ordinary form, or ordains the debtor to appear before him at a certain time. These are but two different forms by which the debtor is called on to appear before the Judge.

"In the present case, however, neither of these forms were adopted; the Sheriff granted at once a warrant to search for and apprehend the pursuer; a warrant which was not prayed for in the petition, and a warrant which, in my opinion, was illegal and *ultra vires* of the Sheriff in the circumstances. The statute does not authorise the Sheriff to issue such a warrant; and I know of no authority anywhere in our law conferred upon a Sheriff in the exercise of his civil jurisdiction by which he is authorised *in limine* of the proceedings before him to grant warrant for the apprehension of any debtor or alleged debtor, unless it be in the exceptional case of a debtor said to be *in fuga*, and even there the warrant to apprehend does not proceed on the mere statement of the creditor, but on proof affording a *prima facie* case that the creditor's statements are true.

"If there is no authority in the law for granting such a warrant as that now under consideration, there is neither authority nor excuse for it in our practice. The statute, indeed, is of too recent date to have had any practice founded on it which could be regarded as in any sense authoritative. Such practice as has followed upon the statute has not been uniform, nor in all cases quite regular. I had occasion in the Bill-Chamber to consider a case where the Sheriff, on an application under this statute to commit a debtor to prison, had, without notice of any kind to the debtor, or affording him any opportunity of explaining his failure to pay the debt, *de plano* granted warrant for the debtor's committal to prison for six weeks, a procedure which was not only illegal because contrary to the statute, but obviously unfair to the debtor. I do not know what the practice has been in other counties, but in Forfarshire (with which I was officially connected) the practice was to order intimation of the petition to the debtor, and to appoint him to appear to answer to the same at a specified time. This, I think, is the right practice.

"It was said on behalf of the defenders that to give notice of the petition to the debtor would only enable him to abscond. The same thing might be said of the service of a summons, for it gives notice to the debtor of the claim made against him, and enables him to quit the jurisdiction or dispose of his property before any decree can be obtained. Or take the case of an application for breach of interdict. The citation there would enable the respondent to quit the jurisdiction and avoid the penalty due to his offence; yet even in such a case (which is *quasi* criminal) the respondent is not apprehended, but cited to appear and answer to the complaint. But the proper answer to the objection stated is, that there is no presumption that a law-abiding citizen will fail to render obedience to the citation of a competent Court. The assumption of the power, either by a Sheriff or any other authority, to order the apprehension of any citizen, which



No. 100. of sums contained in a decree of aliment. That power necessarily conferred a power to grant a warrant for apprehension of the debtor. If it did not, and it was necessary to give intimation of the presentation of the petition for imprisonment to the debtor, the Act would defeat its own purpose in many cases, as the debtor would, on getting the notice, abscond. There was no hardship in no notice of the warrant for apprehension being given, because in the charge to pay intimation was given to the debtor that, in the event of payment not being made, imprisonment would follow, and he might have lodged a caveat that he wished to be heard before any warrant was granted.

Counsel for the pursuer was not called on.

LORD PRESIDENT.—I think the reasoning of the Lord Ordinary is quite unimpeachable. Under the Debtors Act, 1880, apprehension or imprisonment for debt is abolished, subject to two exceptions, the second of which is “sums decerned for aliment.” Section 3 of the Civil Imprisonment Act, 1882, enacts that from the commencement of the Act “no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment.” The provision there referred to is contained in section 4, the effect of which is to entitle a creditor in such a debt to commit the debtor to prison, but to do so he must first apply to the Sheriff. That, of course, infers the institution of some sort of summary procedure, and in that procedure it is open to the debtor to satisfy the Sheriff that he cannot pay the debt, and that he has not been able to earn enough to do so. It seems to me that it is a condition of the debtor being apprehended or put in prison that he shall have failed to satisfy the Sheriff on those points. If that be so, I cannot doubt that the apprehension and imprisonment in this case were illegal, and that, therefore, the judgment of the Lord Ordinary is right.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

THE COURT adhered.

STURROCK & GRAHAM, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 101. ROBERT BRUCE (Inspector of Poor of Fordoun), First Party.—*Loc.*  
HONOURABLE CHARLES J. R. H. STUART FORBES TREFUSIS AND OTHERS,  
Second Parties.—*Kennedy.*

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*Poor—Assessment—Concurrence of Board of Supervision to alteration of mod-  
of assessment—Poor-Law Act, 1845 (8 and 9 Vict. c. 83), secs. 34, 36—Poor-  
Assessments Act, 1861 (24 and 25 Vict. c. 37), sec. 1.—Held that a parochial  
board, which had, under sec. 36 of the Poor-Law Act, 1845, with the concurrence  
of the Board of Supervision, adopted, for purposes of assessment to poor-rates,  
a classification of lands and heritages, was entitled to abandon the classification  
without obtaining the concurrence of the Board of Supervision.*

1ST DIVISION. AT a meeting of the Parochial Board of the parish of Fordoun.  
C. Kincardineshire, held on 2d October 1847, it was resolved as follows:—

is not directly authorised by the law, is not to be allowed; and I think the Sheriff in granting the warrant in question assumed a power which he did not possess.

“If the warrant was illegal, there can be no doubt the defenders are liable for instructing it to be executed.”

"1st, That from and after the 26th day of November next, or as soon thereafter as may be practicable, the funds for the support of the poor in this parish be raised by assessment. 2d, That the mode of assessment to be adopted shall be that first narrated in the Act 8 and 9 Vict. cap. 83, namely, one half of the sum required shall be imposed upon the owners and the other half upon the tenants and occupants of lands and heritages within the parish. 3d, Tenants and occupants shall, with concurrence of the Board of Supervision, be classified as under—(1) Tenants and occupants of lands for tillage or grazing, including houses and buildings necessary for their management personally occupied or used by the farmer; (2) Tenants and occupants of shops or other premises in which mercantile or manufacturing business is conducted; and (3) Tenants and occupants of dwelling-houses, gardens, and pleasure grounds. In reference to each of these classes, the following scale of rates shall be adopted:—Whatever rate of assessment it may be necessary to impose on class 1st, double that rate shall be imposed on class 2d, and quadruple the rate charged on class 1st shall be levied on class 3d."

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The terms of the resolution were duly communicated to the Board of Supervision, and the Board intimated their approval thereof.

The assessment was thereafter imposed in accordance with the said classification of lands and heritages until 3d August 1888, when, at a meeting of the Parochial Board, a resolution was carried by sixteen votes to fifteen, "that the existing classification for rating of tenants shall be discontinued, and all classes of property be rated alike," and the inspector was instructed to send a copy of the resolution to the Board of Supervision and to ask if their consent was required. The Board of Supervision intimated that they "cannot approve of the resolution of the Parochial Board." On 18th September 1888, it was moved that the resolution adopted at the meeting of 3d August should be rescinded as not having met the approval of the Board of Supervision. It was also moved that the former resolution be adhered to. The latter motion was carried by seventeen votes to sixteen, and the inspector was instructed "to forward the resolution to the Board of Supervision." The Board of Supervision intimated that they "cannot approve of the resolution of the Parochial Board to impose the assessment without a classification of occupants in terms of section 36 of the Poor-Law Act."

The assessment for the year 1888 having been imposed upon all classes of property alike in terms of the resolution of 3d August 1888, the Hon. Charles J. R. H. Stuart Forbes Trefusis and others, ratepayers in the parish, appealed to the Parochial Board against the assessment on the ground that it was illegal. The Parochial Board dismissed the appeals, but resolved in the meantime not to take legal proceedings against any of the ratepayers for recovery of their rates.

In the above circumstances a special case was, on 18th February 1889, presented for the opinion and judgment of the Court.

Robert Bruce, inspector of poor of the parish of Fordoun, as representing the Parochial Board of the parish, was the first party to the case, and the Hon. Charles Trefusis and others, ratepayers in the parish, were the second parties thereto.

The following questions were stated:—" (1) Whether the Parochial Board, having adopted a classification of lands and heritages, with the concurrence of the Board of Supervision, in terms of the 36th section of the Poor-Law (Scotland) Act, 1845, are entitled, without the concurrence of, and notwithstanding disapproval by, the said Board of Supervision, to abandon the classification so adopted, and to impose the assessment upon the owners and occupants of lands and heritages without any classifica-

No. 101. tion? 2. Whether the assessment imposed in terms of the said resolution of 3d August 1888 is legal, and can be enforced?"

Mar. 7, 1889. The first party contended "that the concurrence of the Board of Super-  
 Bruce v. Rate- vision is not necessary to entitle the Parochial Board to abandon alto-  
 payers of For- gether classification of lands. By the 36th section of the Poor-Law  
 down. Act of 1845 it is made lawful for the Parochial Board to classify lands with the concurrence of the Board of Supervision. The Board of Supervision, however, have no power to compel the Parochial Board to make a classification, and the Parochial Board may impose the assessment upon the owners and occupants of lands and heritages without any classification. That being so, it would require express enactment to prevent the Parochial Board abandoning a classification without any concurrence. The provisions of the Act of 1861 (24 and 25 Vict. c. 37) apply only to parishes which at the date of the Act were raising the funds requisite for the relief of the poor in the manner authorised in the 34th section of the Act of 1845, but repealed by the said Act of 1861."\*

\* By the 34th section of the Poor-Law (Scotland) Act of 1845 it is enacted "that when the parochial board of any parish or combination shall have resolved to raise by assessment the funds requisite, such board shall, either at the same meeting or at an adjournment thereof, or at a meeting to be called for the purpose, resolve as to the manner in which the assessment is to be imposed; and it shall be lawful for any such board to resolve that one half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages, or to resolve that one half of such assessment shall be imposed upon the owners of all lands and heritages within the parish or combination according to the annual value of such lands and heritages, and the other half upon the whole inhabitants, according to their means and substance, other than lands and heritages situated in Great Britain or Ireland; or to resolve that such assessment shall be imposed as an equal percentage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situate in Great Britain or Ireland; and when the parochial board shall have resolved on the manner in which the assessment is to be imposed, such resolution shall be forthwith reported to the Board of Supervision for approval; and if the manner of assessment so resolved upon shall be approved by the Board of Supervision, the same shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision; and if the Board of Supervision shall disapprove of the manner of assessment so resolved upon as aforesaid, the parochial board shall, upon such disapproval being intimated, forthwith meet and resolve upon another mode of imposing the assessment consistent with law, and shall report such resolution to the Board of Supervision; and the manner of imposing the assessment so resolved upon shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision."

By the 36th section it is enacted,—“That where the one half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages, it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively as to such Boards may seem just and equitable.”

By the Poor Assessments Act, 1861 (24 and 25 Vict. c. 37), it is enacted, section 1,—“From and after the first day of January one thousand eight

The second parties contended "that on a sound construction of the No. 101. Acts referred to the Parochial Board were not entitled, without the concurrence or approval of the Board of Supervision, to discontinue, or alter, or depart from the existing mode of assessment, viz., one half on owners and the other half on tenants and occupiers, according to rental with classification; and that as the resolution of the Parochial Board altering the existing mode was submitted to the Board of Supervision and disapproved of, the assessments imposed in terms of the said resolution are illegal and cannot be enforced. If the existing classification were regarded by the Parochial Board as unsatisfactory or defective, their proper course was to have classified as new, and submitted the amended classification for the approval of the Board of Supervision."

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LORD PRESIDENT.—There is here an anomaly, which is perhaps an inexpedient anomaly, namely, that in certain cases the classification of lands and heritages adopted by certain parishes is permanent in this sense, that it cannot be altered without the sanction of the Board of Supervision, while in other cases that Board is not entitled to interfere. But anomalies are often introduced by Acts of Parliament, they are sometimes expedient, and sometimes inexpedient, but if we find them necessarily resulting from an Act we must recognise them, and give effect to them.

hundred and sixty-two, so much of section 34 of the Act of the eighth and ninth years of Her Majesty, entitled 'An Act for the Amendment and better administration of the Laws relating to the Relief of the Poor in Scotland,' as makes it lawful for any parochial board of any parish or combination of parishes in Scotland to raise one half of the funds requisite for the relief of the poor persons entitled to relief from the parish or combination by assessment upon the owners of all lands and heritages within the parish or combination according to the annual value of such lands and heritages, and the other half upon the whole inhabitants according to their means and substance other than lands and heritages situated in Great Britain and Ireland, or to raise such funds by assessment imposed as an equal percentage upon the annual value of lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland, is hereby repealed: And every parochial board of any parish or combination of parishes now raising such funds in terms of the parts of the said recited Act which are hereby repealed as aforesaid, shall, before ceasing to raise such funds, and within two months after the passing of this Act, resolve to adopt the first mode of assessment specified in section 34 of recited Act, and to classify lands and heritages equitably in terms of the thirty-sixth section of the said recited Act, and shall forthwith report such resolution to the Board of Supervision, which is hereby authorised and required to determine whether or not the classification so resolved on is equitable; and in the event of their considering the classification thereby made as not equitable, to vary or alter the same as to them shall seem just; and until the said first mode of assessment so resolved on, with relative classification, shall have been approved of by the Board of Supervision, the assessment for relief of the poor in any parish where the classification may not be approved of shall continue to be raised according to the mode now in operation in such parish; and after the proposed classification in any parish shall have been approved of by the Board of Supervision, it shall not be altered or departed from without the sanction of the said Board: Provided always, that nothing in this Act shall be construed to prevent the parochial board of any parish or combination of parishes from collecting any such assessment actually imposed prior to the first day of January one thousand eight hundred and sixty-two according to the mode legally in force in the parish or combination at the date when such assessments were imposed."

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Now, in the original Poor-Law Act of 1845 it is provided by the 34th section that "When the parochial board shall have resolved on the manner in which the assessment is to be imposed, such resolution shall be forthwith reported to the Board of Supervision for approval; and if the manner of assessment so resolved upon shall be approved by the Board of Supervision, the same shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision." Those are very plain and simple words. They occur in a long section, but in themselves they do not allow of two constructions. That provision is repeated in the 35th section, which deals with parishes in which the assessment has heretofore been imposed according to local Act or custom.

After those two sections comes a section (36) providing for the classification of lands and heritages where the first method of assessment mentioned in sec. 34 is adopted. It is there enacted that "it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively as to such boards may seem just and equitable."

Now, it is not said there that when that classification has been once adopted it shall be permanent, or that it shall be incompetent for the parochial board to alter or depart from it altogether without the sanction of the Board of Supervision. The provision on that matter contained in secs. 34 and 35 is of set purpose omitted from sec. 36. Of course it might be contended that when a classification is once adopted it shall be permanent and unalterable. I should not, however, be inclined to adopt that reading, unless forced to do so by very clear words. I think that nothing would be more inexpedient than to do so. The condition of the lands in the parish may vary very much, and the number of houses, farms, and shops relatively to each other may vary in one direction or the other, and, therefore, it may become very expedient, and even necessary for justice, to vary a classification which has become unsuitable to the times. Now, if the classification is not to be permanent it is impossible to contend that the power to alter is vested in anyone, in the first instance, other than the parochial board; and if there is no provision for the sanction of the Board of Supervision being obtained, it necessarily follows that the discretion to alter is in the parochial board alone.

If that is clear under the original statute, how are we to import into that Act the provisions of the Act 24 and 25 Vict. c. 37, which are distinctly confined to a certain class of parishes and of parochial boards? The immediate object of that Act was to abolish all manner of assessment save one, namely, that of putting one half of the assessment on the owner and one half on the tenant of the land. From the passing of that Act there is no manner of assessment recognised except the one first set forth in sec. 34 of the Act of 1845; all other methods are repealed expressly.

The Act of 1861 says,—“And every parochial board of any parish or combination of parishes now raising such funds in terms of the parts of the said recited Act which are hereby repealed as aforesaid.” There is the nominative of the sentence, and what is said about it is “shall, before ceasing to raise such funds, and within two months after the passing of this Act, resolve to adopt the first mode of assessment specified in section thirty-four of recited Act, and to

classify lands and heritages equitably in terms of the thirty-sixth section of the said recited Act, and shall forthwith report such resolution to the Board of Supervision, which is hereby authorised and required to determine whether or not the classification so resolved on is equitable." Now, that is the end of the first member of the clause, and it can hardly be maintained that, so far as we have gone, the enactment has any application except to those parishes which previously assessed on means and substance, or partly on means and substance and partly on land, and which are hereby ordered in all time coming to assess lands and heritages according to the first mode specified in section 34, and to accompany the mode by a classification in terms of sec. 36.

But then Mr Kennedy seems to think that the clause becomes more comprehensive as it goes on, and includes parishes which are not included in its earlier provisions. It would be very strange if that were found to be the case. The Act consists practically of only one clause, and if it had been intended to do what is maintained, surely the provision would have been found in a separate section. But I think that all the provisions of the Act are in one section, for the obvious reason that all the provisions of the section apply to the same subject, and that is the nominative to the first sentence which I have already pointed out. The section goes on, after the part I have read, in these terms:—"And in the event of their considering the classification thereby made as not equitable, to vary or alter the same as to them shall seem just; and until the said first mode of assessment so resolved on, with relative classification, shall have been approved of by the Board of Supervision, the assessment for relief of the poor in any parish where the classification may not be approved of shall continue to be raised according to the mode now in operation in such parish." That is to say, the parish will continue to levy according to means and substance, or according to means and substance and land until the provision for converting the mode of assessment into the one now prescribed as the regular legal mode has been carried through, and with it the classification. Can that sentence, then, be applicable to any parishes but those which have hitherto levied on means and substance, and are hereby forbidden 'to do so any longer? The section then goes on,—“And after the proposed classification in any parish shall have been approved of by the Board of Supervision, it shall not be altered or departed from without the sanction of the said Board.” Can it be said that in this last member of the sentence the whole subject of the statute is so extended as to apply to every parish in Scotland, whereas the whole of the earlier part of the sentence applies to a limited class of parishes? I think not, and that no benefit can be taken by the objecting ratepayers from this last enactment; and if we are thrown back on the original Act it seems to me, for the reasons I have already stated, that by the strongest implication, almost as strong as express words, the classification of lands once adopted by the parochial board with the sanction of the Board of Supervision must either be permanent (which I think is a hopeless contention), or must be alterable by the parochial board alone.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

THE COURT answered the second question in the affirmative.

WILLIAM B. RAINNIE, S.S.C.—D. LISTER SHAND, W.S.—Agents.

No. 101.

Mar. 7, 1889.  
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No. 102. REV. ROBERT MACPHERSON AND OTHERS (Anderson's Bursary Trustees),  
First Parties.—*Glegg*.

Mar. 7, 1889.  
Anderson's  
Bursary  
Trustees v.  
Sutherland.

WILLIAM SUTHERLAND AND ANOTHER, Second Parties.—*R. L. Orr*.

*Succession—Charitable bequest—Uncertainty.*—A testator bequeathed a sum to found bursaries for behoof of "residents in the parish of Alves, or in the parish and burgh of Elgin." The parish of Elgin extended beyond the burgh, and parts of the burgh were outside that parish. Held that the description included residents in any part of the parish or of the burgh.

2D DIVISION.  
M.

WILLIAM ANDERSON, Elgin, died on 10th May 1884. By his trust-disposition and settlement he directed his trustees to pay "to the ministers of the Established and Free Churches of Scotland in the parish of Alves, the three Free Church ministers and senior Established Church minister in the parish of Elgin, and to Robert Young, solicitor, to be held by the said ministers and their respective successors in office, and by the said Robert Young and his nearest heir-male for the time, who shall be resident in the county of Elgin, in trust to invest the same and to pay the yearly interest thereof for bursaries to four young men at one of the universities in Scotland, the said four young men to be of good character and fair talents, either residents in the parish of Alves or in the parish and burgh of Elgin, whose parents are respectable and in narrow circumstances (residents in the parish of Alves to be preferred on equal terms)." The bursars were to be selected by the trustees in such way as they might consider best.

As the parish of Elgin extended beyond the burgh, and as parts of the burgh were in the parishes of New Spynie and St Andrew's, a difficulty arose as to the meaning of the words "in the parish and burgh of Elgin."

A special case was presented for the opinion and judgment of the Court on the questions,—"(1) Must the persons entitled to the benefits of the bequests . . . be residents in that part of the parish of Elgin which is also in the burgh of Elgin? or (2) Are the terms of the bequest to be construed so as to include residents in any part of the parish of Elgin, and also residents in any part of the burgh of Elgin?"

The first parties were the Rev. Robert Macpherson and others, the trustees of the bursary fund. The second parties were William Sutherland and James M. Anderson, two intending candidates for the bursaries, the former of whom resided in the landward part of the parish of Elgin, and the other in that part of the burgh of Elgin which lay in the parish of New Spynie.

The case stated :—"The landward part of the parish of Elgin, which is of large extent and populous, is without the burgh, and, on the other hand, the burgh of Elgin extends in certain directions beyond the parish of Elgin into the adjoining parishes of New Spynie and St Andrew's. The parish is eleven miles or thereby in length by an average breadth of about three and one-half miles. At the date of the will, the population of the burgh within the parish was returned at 8600; of the burgh outwith the parish, about 1100; and of the parish outwith the burgh, about 1260. There are in the parish of Elgin in all three Free Churches and ministers, two in the burgh of Elgin, and the third in the landward part of the parish at Pluscarden, six miles or thereby distant from the burgh."

The second parties referred to *Bogie's Trustees v. Swanson*,<sup>1</sup> where the Court sustained the claim of the "Mars" Training Ship to share in a bequest "to the Ragged Schools in Dundee," though the ship was moored in the Tay, near the Fifeshire side, and beyond the parish and burgh of Dundee. They maintained that the intention of the testator was to

<sup>1</sup> *Bogie's Trustees v. Swanson*, Feb. 5, 1878, 4 R. 634.

benefit the whole burgh and the whole parish of Elgin. The nomination of the Free Church minister at Pluscarden as a trustee shewed the testator's intention to extend the benefit beyond the burgh. No. 102.  
Mar. 7, 1889.  
Anderson's  
Bursary  
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Sutherland.

LORD JUSTICE-CLERK.—The expressions of this will are ambiguous. The bursars are to be “residents in the parish of Alves or in the parish and burgh of Elgin.” Giving the words a fair construction, I arrive at the conclusion that the contention of the second parties should receive effect. The first area to be benefited is the parish of Alves and the next area is, I think, a parish also, the parish of Elgin. It is difficult to see why the testator should have favoured the parish of Alves, and then limited his gift in naming the next area to that part of the parish of Elgin which is within the burgh. I think the testator's idea was to benefit both parishes and the burgh, thereby extending the benefit to persons residing in parts of the burgh beyond the limits of the parish of Elgin.

LORD YOUNG.—I concur. There is nothing to induce us to think that the testator intended to confine his bounty to residents in that part of the burgh of Elgin which is within the parish of Elgin, that is, to favour only a part of the town of Elgin. I reject that construction of his words. I think the other view is more consistent with his intention as expressed where he describes the objects of his bounty as “residents in the parish” of Elgin, which will include the whole parish and that part of the burgh which is in the parish, and residents “in the burgh of Elgin.” I think your Lordship's view is not only in harmony with the testator's intention, but in accordance with a strict construction of the words.

LORD LEE concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the second question in the affirmative, and found and declared accordingly.

MACPHERSON & MACKAY, W.S., Agents.

THOMAS STURROCK (Clerk to Commissioners of Police of Dalkeith),  
Pursuer (Respondent).—*J. C. Thomson—M' Neill.*

DUKE OF BUCCLEUCH, Defender (Appellant).—*R. Johnstone—  
C. K. Mackenzie.*

No. 103.

Mar. 8, 1889.  
Commissioners of  
Police of Dal-  
keith v. Duke  
of Buccleuch.

*Police—Street—Burgh Footway—Maintenance—Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 101), sec. 149.*—The Police and Improvement Act, 1862, enacts by sec. 149,—“The owners of all lands or premises fronting or abutting on any street shall at their own expense when required by the commissioners cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved . . . and shall thereafter, from time to time, as occasion may require, repair and uphold such footways; provided always that where the lands or premises of any owner front or abut on any street for a continuous length exceeding one hundred yards, and such lands are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure ground, or pertinent of a house.”



No. 103.

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Commissioners of  
Police of Dal-  
keith v. Duke  
of Buccleuch.

These are the material facts. The question in the case does not regard any of them. It is the question of law whether on these facts the Duke is liable to pay the whole expense of the repairs, or is exempt from liability for them, or is bound to make payment in respect of them, but only to the extent of one-third. We heard argument in support of each of these views, and no other view was urged upon us. Now, the first part of section 149 relates to the construction by owners of footpaths fronting their properties, and the repairing and upholding them when formed. The second part of the section is a proviso confined to a case in "which it shall not be lawful for the Commissioners of Police" to require the owner to construct the footway. It is thus expressed,—“Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure ground or pertinent of a house.”

Now, I think there is no room for ambiguity there. Where it is lawful for the Commissioners to require the owner to construct a footway in front of his property he must at his own expense construct and maintain it. That is the first part of the clause. But the second part limits the power of the Commissioners to require owners to construct footways in cases contemplated by it. Where the owner's lands front the street for more than 100 yards, and are unfeued and unbuilt on, then it shall not be lawful for the Commissioners to require the owner to construct the footway. Now, the operation of this upon the first part of the clause is manifest. The Commissioners have unlimited power to oblige the owner to uphold the footway where it is lawful to require him to construct it, but that does not apply where, under the second part of the clause, it, “shall not be lawful” for them to force him to construct the footway. Now, according to the findings in fact which I have read, the lands here in question are within the provisions of the second branch of the section. It is “not lawful” for the Commissioners to oblige the Duke to construct the footway opposite to them. But under the section it was lawful for them if they saw fit to construct it themselves, and “forthwith” to recover from such owner “one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out and used as a garden or pleasure ground or pertinent of a house.” The Commissioners constructed the footpath. They were therefore entitled to recover one-third of the expense of construction. The question, however, is what liability the Duke is under, if any, for the repair of what it was “not lawful” to call upon him to construct? In the second part of the section, unlike the first, there is no provision as to the expense of repairs. But the footpath must be upheld, and there are only two persons—the Duke and the Commissioners—to do it, whether one of them is to do it alone or whether they are to do it between them. The Act says nothing on the subject. Yet a rule must be extracted from it under which the footpaths are to be upheld. I think the fair and reasonable view, and that which must be imputed to the Legislature, is that the cost of upholding the footways should be divided in the same propor-

Police: Therefore decerns against the defender in terms of the conclusions of the petition, and decerns: Finds the defender liable to the pursuer in the expenses of process." \* No. 103.

The defender appealed, and argued;—The only obligation upon him was to pay one-third of the expense of making any footway which the Commissioners should resolve to construct, and this had been paid. Had the Commissioners been in a position to require him to construct a footway, he would doubtless have been obliged to maintain it when constructed, but they were not in that position, for his lands were unbuilt on. Therefore the second part of sec. 149 applied to the case, and that part contained no obligation on owners to maintain footpaths which the Commissioners constructed. The explanation was that the Act contemplated it to be reasonable that those who used streets should bear the cost of the repairs. But so long as the owner's land was unfeued and unbuilt on the footpath could not be required for his use, but for that of the community only. The defender was willing, however, to bear one-third of the expense of maintenance. In no view could he be made to bear more.

Argued for the pursuers;—The Act laid the obligation to maintain upon owners. Owners had both to construct and maintain in some cases, which were dealt with in the first part of the section. In others, dealt with by the second part, they had an exemption from bearing at first the whole cost of construction, but that exemption did not extend to any part of the expense of maintenance.<sup>1</sup> Otherwise the Act did not impose the expense upon anyone.

At advising,—

LORD YOUNG.—The question in this case relates to the liability of the Duke of Buccleuch to repair and uphold certain footways constructed in 1882 by the Police Commissioners of Dalkeith in front of certain property of the Duke in Dalkeith. The answer to it depends on the proper construction of section 149 of the General Police Act, 1862. The Sheriff has found in fact "that the lands or premises of the defender front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length exceeding 100 yards, and are unfeued and unbuilt on," and though some observations adverse to that finding were made at the debate the parties ultimately were agreed that it is right. The next material finding is that the work executed "did not consist of constructing new footways, but in repairing those that had already been formed," and the next that "the cost of making the said repairs amounted to £72, 12s. 3d., the sum now sued for."

\* "NOTE.— . . . The defender maintained that the 149th section of the Act did not impose upon him the burden of repairing footways which had been formed on roads or streets along which his lands fronted or abutted for a continuous length exceeding 100 yards.

"It is clear that under the first part of this section the owners of lands or premises fronting a street for less than 100 yards are bound not only to construct footways but to keep them in repair and uphold them. The second part of the section relieves the owners of lands which front or abut for a continuous length of more than 100 yards of two-thirds of the expense of the construction of the footways, at least until the lands are feued or built on. It is true that this part of the clause says nothing as to the persons who are to keep these footways in repair after they are constructed. The Sheriff, however, although not without hesitation, has come to be of opinion that the defender is bound to keep them in repair, or, if they are repaired by the Commissioners, to repay them the expense of doing so."

<sup>1</sup> Police Commissioners of Old Aberdeen v. Leslie, March 18, 1884, 11 R. 733.

**No. 103.** These are the material facts. The question in the case does not regard any of them. It is the question of law whether on these facts the Duke is liable to pay the whole expense of the repairs, or is exempt from liability for them, or is bound to make payment in respect of them, but only to the extent of one-third. We heard argument in support of each of these views, and no other view was urged upon us. Now, the first part of section 149 relates to the construction by owners of footpaths fronting their properties, and the repairing and upholding them when formed. The second part of the section is a proviso confined to a case in "which it shall not be lawful for the Commissioners of Police" to require the owner to construct the footway. It is thus expressed,—“Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfenced or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually fenced or built upon, or laid out or used as a garden or pleasure ground or pertinent of a house.”

Now, I think there is no room for ambiguity there. Where it is lawful for the Commissioners to require the owner to construct a footway in front of his property he must at his own expense construct and maintain it. That is the first part of the clause. But the second part limits the power of the Commissioners to require owners to construct footways in cases contemplated by it. Where the owner's lands front the street for more than 100 yards, and are unfenced and unbuilt on, then it shall not be lawful for the Commissioners to require the owner to construct the footway. Now, the operation of this upon the first part of the clause is manifest. The Commissioners have unlimited power to oblige the owner to uphold the footway where it is lawful to require him to construct it, but that does not apply where, under the second part of the clause, it, “shall not be lawful” for them to force him to construct the footway. Now, according to the findings in fact which I have read, the lands here in question are within the provisions of the second branch of the section. It is “not lawful” for the Commissioners to oblige the Duke to construct the footway opposite to them. But under the section it was lawful for them if they saw fit to construct it themselves, and “forthwith” to recover from such owner “one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually fenced or built upon, or laid out and used as a garden or pleasure ground or pertinent of a house.” The Commissioners constructed the footpath. They were therefore entitled to recover one-third of the expense of construction. The question, however, is what liability the Duke is under, if any, for the repair of what it was “not lawful” to call upon him to construct? In the second part of the section, unlike the first, there is no provision as to the expense of repairs. But the footpath must be upheld, and there are only two persons—the Duke and the Commissioners—to do it, whether one of them is to do it alone or whether they are to do it between them. The Act says nothing on the subject. Yet a rule must be extracted from it under which the footpaths are to be upheld. I think the fair and reasonable view, and that which must be imputed to the Legislature, is that the cost of upholding the footways should be divided in the same propor-

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tion as the cost of constructing them. There seems to be good reason for that, **No. 103.**  
 and no reason to the contrary. The two alternatives to that course are, first, **Mar. 8, 1889.**  
 that the Commissioners shall pay two-thirds of the cost of construction and all Commis-  
 sioners of  
 sioners of Dal-  
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 the cost of upholding. I think that alternative is not reasonable, and I reject of Buccleuch.  
 it. The other alternative is that the owner shall pay the whole expense of up-  
 holding. An argument worthy of consideration presented in favour of that  
 alternative is that the first part of the section lays on the owner the whole cost  
 of upholding as well as that of constructing, and that while the second part  
 relieves him to a certain extent of the cost of construction it does not relieve  
 him at all of the cost of maintenance, but says nothing upon that subject.  
 That view does not commend itself to my mind. I think that, taking the  
 first part of the section in connection with the second, the obligation to bear  
 the whole expense of upholding is imposed only with respect to footways  
 which it is lawful for the Commissioners to compel owners to construct.  
 The owners are in that case to repair and uphold "such" footways. I should  
 not be disposed to adopt the view that owners are also liable to uphold footways  
 which it is not lawful for the Commissioners to compel them to construct, even  
 if it were more plausible than I think it is. I should rather, if that were neces-  
 sary, be ingenious to avoid it, for the reason and equity of the matter are that  
 the cost of constructing and upholding shall be divided between the parties  
 according to the same rule.

I am of opinion that the defender is liable in one-third of the expense of  
 repairs, but no further.

**LORD RUTHERFURD CLARK.**—I incline to the opinion that the Sheriff is right.  
 I think that the meaning of section 149 is that the Police Commissioners are  
 entitled to require footways to be constructed in front of all properties within  
 their jurisdiction at the expense of the owners, and that when these are con-  
 structed the cost of maintaining them is laid on the owner. In certain circum-  
 stances indeed, which occur here, the obligation to construct is not laid on the  
 owner, but the footways may be constructed by the Commissioners themselves,  
 and they are entitled to recover from the owner one-third of the expense of con-  
 struction forthwith, and the remainder when his lands are feued or built upon.  
 But I think that when the footway is constructed the obligation of upholding it  
 rests with the owner. As I read the section, the obligation to uphold is  
 without exception; the only exceptional case is that in which the owner is not  
 obliged to construct the footway, but the Commissioners may do so.

**LORD JUSTICE-CLERK.**—I have had some difficulty in coming to a conclusion  
 as to the interpretation of the clause which rules this case. I confess my first  
 leaning was to the third of the three views to which Lord Young has alluded,  
 and which has not been adopted either by his Lordship or by Lord Rutherford  
 Clark. My impression was that the obligation on owners to maintain footways  
 depended on whether they were "such" footways as the Commissioners are  
 entitled to require owners to construct as provided by the first part of the  
 section. Where land is unfeued and unbuilt upon for a length of 100 yards  
 the Commissioners are not entitled to require the proprietor to construct any  
 part of the footway. It is only after they have done it themselves that they  
 can exact one-third of the expense from the proprietor. It seemed to me there-  
 fore difficult to read the words "such footpaths"—which refer back to foot-

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paths which the Commissioners can require the proprietor to construct—as applying to footpaths as to which the Commissioners have no such power. But after further consideration I have come to the opinion that the result at which Lord Young has arrived is not only reasonable in itself, but is consistent with the terms of the section, that the measure of the obligation of maintenance is to be found in the extent of the obligation to pay the cost of construction. As the cost of construction is laid upon the owner, so also, and to the same extent only, is the cost of upholding laid upon him. The defender here is liable in one-third of the expense of construction, and I think it is a fair reading of the statute that he is liable in one-third only of the expense of maintenance.

LORD LEE concurred with the Lord Justice-Clerk and Lord Young.

THIS interlocutor was pronounced:—"Find in fact (1) that the lands of the defender referred to in the record front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length of 100 yards, and are unfeued and unbuilt upon; (2) that the work in respect of which the sum sued for is claimed by the Commissioners of Police was executed not in making new, but in repairing existing footpaths *ex adverso* of the said lands: Find in law that in terms of the second branch of the 149th section of the General Police and Improvement Act, 1862, the defender is liable for one-third of the cost of upholding the said footpaths, and no further, as long as the ground opposite to said footpath remains unfeued and unbuilt upon: Therefore recall the judgments of the Sheriff and the Sheriff-substitute appealed against: Ordain the defender to make payment to the pursuer of the sum of £24, 4s. 1d. sterling, being one-third part of the sum sued for: Find no expenses due by either party to the other, and decern."

THOMAS STURROCK, S.S.C.—GIBSON & STRATHERN, W.S.—Agents.

## No. 104.

Mar. 8, 1889.  
Stewart v.  
Highland  
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SIR ARCHIBALD DOUGLAS STEWART, BART., Pursuer (Respondent).—

*Sol.-Gen. Darling—Dundas.*

THE HIGHLAND RAILWAY COMPANY, Defenders (Reclaimers).—

*D.-F. Mackintosh—Low.*

*Railway—Lands Clauses Consolidation Act, 1845 (8 Vict. cap. 19), sec. 120—"Superfluous lands."*—A piece of ground, acquired by a railway company under compulsory powers, had not been used by the company for more than ten years after the completion of their works, and had not been sold by them. It could not be utilised by the company unless they could take additional land from the adjoining proprietor, which was beyond their statutory powers. *Held* that the ground was superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act, 1845.

2D DIVISION.  
Lord Kinnear.  
M.

In April 1888 Sir Archibald Douglas Stewart, Baronet, of Grantully, Murtly, and others, raised an action against the Highland Railway Company, concluding for declarator that certain land in the county of Perth which had belonged to the pursuer's author, and had been acquired in 1856 by the Perth and Dunkeld Railway Company (now represented by the defenders) under the compulsory powers of their Act, had become superfluous lands in the sense of the Lands Clauses Act, 1845,\* and so had vested in him as the owner of the adjoining lands.

\* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 Vict. c. 19),

The land in question, which was a little more than an acre in extent, was separated from the defenders' line of railway (which was a single line) by the public road. It had been used in the construction of the line as a spoil bank, but after the line had been made, more than ten years before the date of the action, it had been applied to no use by the defenders, and they had not sold it. They stated, however, that "the said lands are in a position which may necessitate their use by the defenders, and have not become superfluous lands. In fact the defenders anticipate that the said lands will in the near future be required for the purposes of their undertaking. They expect shortly, *inter alia*, to lay down a double line of rails between Blair-Athole and Stanley, and for this purpose the possession of the said piece of land will be essential. The land has not been let, nor has it been a source of profit to the defenders, but it has been retained by them solely because they saw that it would be ultimately required for the purposes of the railway." They, however, admitted that for this purpose they would require to obtain parliamentary powers, both to divert the public road and to acquire more ground compulsorily from the pursuer.

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The pursuer pleaded;—(1) The land described in the summons not having been required or used by the defenders or their predecessors for the purposes of their undertaking, and having thus become superfluous land within the meaning of the 120th section of the said Act, the pursuer, as proprietor of the adjoining lands, is entitled to decree of declarator as concluded for. (2) No relevant defence having been stated, the pursuer is entitled to decree.

The defenders pleaded;—(1) The land being required by the defenders for the purposes of their undertaking, and having on that account been retained by them, is not superfluous land within the meaning of the statute. (2) The said land not being superfluous land within the meaning of the statute, the defenders should be assolizied, with expenses.

On 27th July 1888 the Lord Ordinary (Kinnear) granted decree in terms of the conclusions of the summons.\*

provides,—“With respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows: . . .” Section 120.—“Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase-money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same.”

\* “NOTE.—The principle upon which it is to be determined whether land is superfluous in the sense of the Lands Clauses Act has been laid down by the House of Lords, in the *Great Western Railway Company v. May*, L. R., 7 Eng. and Irish App. 283, and according to that judgment, the question to be considered is, whether, at the expiration of the statutory period of ten years, the land is required for the purposes of the undertaking? The piece of ground in dispute is separated from the existing line of rails by a public road; and it was stated at the bar that it was originally acquired and used by the promoters of the undertaking as a spoil bank, a temporary purpose which has come to an end. But the defenders allege that they have all along anticipated that, in the natural development of their traffic, it would be required for a more permanent purpose

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The defenders reclaimed, and argued;—The question turned upon the meaning of the word "undertaking." By the term "undertaking" was meant the whole scheme which the company had in view; it was not restricted to the powers actually conferred by the company's Acts, if the purposes were such as were fairly in view of the promoters, although they might have thought it unnecessary to ask for parliamentary powers until they actually came to carry out the whole scheme as originally contemplated.<sup>1</sup> That was the state of matters here, for the doubling of the line had from the first been in the view of the company so soon as the traffic should demand it. The mere doubling of the line they could carry out without additional powers, but they admitted that they could not divert the road without such powers, or at least without arrangement with the road trustees, or acquire more ground compulsorily. The case was distinguishable from that of *May*,<sup>2</sup> relied on by the Lord Ordinary, where the undertaking was in every sense complete. The *onus* was on the pursuer, who had already been paid for the ground which he sought to reacquire for nothing,<sup>3</sup> and he had failed to discharge it.

Argued for the pursuer;—The purposes of the defenders' undertaking were defined by parliamentary powers, and the doubling of this line was not within those powers.<sup>2</sup> It might be that if they had specifically averred that they were going within a definite period to use the land,

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of their undertaking which they expect shortly to carry out, viz., the construction of a double line of rails between Stanley and Blair-Athole, because, in the event of their doubling the line as they propose, the ground will be required both for the purpose of diverting the public road above mentioned, and also for its former purpose as a spoil bank. It may be doubtful whether the latter purpose is sufficient to satisfy the conditions of the Act of Parliament. But if there was a reasonable prospect at the end of the ten years that the ground would be required for diverting the road in order to lay down a double line of rails, that would appear to me to be a purpose for which the company were entitled to retain it, provided that the construction of such a line were within the scope of the undertaking authorised by their Acts of Parliament. The defenders admit that, in order to construct a double line, they must obtain land from the pursuer, which they have no means of acquiring otherwise than by agreement with him; or, in other words, that the purpose for which they desire to retain the land is one which they have no power under the existing Acts to carry into effect. But a purpose which they cannot execute in the exercise of the powers conferred upon them by their Acts of Parliament cannot be within the scope of the undertaking sanctioned by those Acts.

"It is said that according to the judgment of the House of Lords in *Hooper v. Bourne*, L. R., 5 App. Cases, the burden of proving a title to the land as superfluous lies upon the claimant. But in the admitted circumstances of this case, it appears to me that the burden has been discharged. It is admitted that the land has never been used except for a temporary purpose, which ceased with the construction of the railway, and that the only purpose for which the company desire to retain it is one which they cannot execute without the pursuer's consent. But works which cannot be executed under the powers conferred upon the undertakers by their Acts are not part of the statutory undertaking. It follows that the purpose for which the land is required by the defenders is not a purpose of the undertaking; and that is sufficient to satisfy the definition of superfluous land."

<sup>1</sup> *Gardner v. London, Chatham, and Dover Railway Company*, L. R., 2 Chanc. App. 201.

<sup>2</sup> *Great Western Railway Company v. May*, L. R., 8 and Ir. Ap. 283.

<sup>3</sup> *Betts v. Great Eastern Railway Company*, L. R., 8 Exch. 294, 3 Exch. Div. 182, H. L., 49 L. J. Exch. 197; *Hooper v. Bourne*, L. R., 5 App. Cas. 1; *North British Railway v. Moon's Trustees*, Feb. 8, 1879, 6 R. 640.

or even to obtain powers from Parliament to do so, that would be a relevant defence,<sup>1</sup> but their defence did not come up to that. No. 104.

At advising,—

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**LORD JUSTICE-CLERK.**—The pursuer in this case concludes for declarator, “that the portion of land . . . which was acquired by the predecessors of the defenders from the predecessor of the pursuer for the purposes of their undertaking, not having been required or used by the defenders or their predecessors for said purposes prior to the date of citation, . . . has become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act, 1845.” The defence set up by the defenders is, that there is a reasonable probability of their requiring the land in question for the purposes of their undertaking. There is no doubt that if that were made out it would be a good answer to this declarator. But the position of the ground is that the only use that has ever been made of it has been as a spoil bank in the construction of the line. It has never been used in any other way. It is not in immediate contiguity to the line of railway, but is separated from it by the public road. It is moreover not disputed by the Highland Railway Company that they are unable to make use of this piece of land unless they obtain additional powers and acquire additional land. In that state of the facts I think the proper view to be taken is that the land, not having been used for thirty years, and not being capable of being used without new powers, and not having been disposed of to others, does fall under the provisions of the Act, 1845. The defenders say that they propose to double their line at this place, and that to do so they will require the ground, not for their line, but for the purpose of diverting the public road; but that, again, is an end which they cannot accomplish without getting fresh powers from Parliament. Even if they did obtain those powers, it is not disputed that they could not accomplish their object without taking additional land from the proprietor, who now wishes to have it declared that this portion of land has reverted to him, and from whom they could not acquire the ground except compulsorily.

In these circumstances I am of opinion that the pursuer is entitled to the declarator sought.

**LORD RUTHERFURD CLARK** and **LORD LEE** concurred.

**LORD YOUNG** was absent.

**THE COURT** adhered.

**DUNDAS & WILSON, C.S.**—**J. K. & W. P. LINDSAY, W.S.**—Agents.

**JOHN SIM, Pursuer (Respondent).**  
**SCOTTISH NATIONAL HERITABLE PROPERTY COMPANY, LIMITED, Defenders**  
(Reclaimers).—*Murray.*

No. 105.

Mar. 12, 1889.  
Sim v. Scottish  
National Heritable  
Property  
Co., Limited.

*Expenses—Auditor's report—Fees to counsel.*—Held that when no fee has been sent to counsel for a particular piece of business in a cause, it may be sent and made a charge against the opposite party after the party who instructed the counsel has been found entitled to expenses.

<sup>1</sup> *Caledonian Railway Co. v. City of Glasgow Union Railway Co.*, July 2, 1869, 7 R. 956; *Queen v. Wycombe Railway Co.*, Jan. 26, 1867, L. R., 2 Q. B. 310; *Tiverton and North Devon Railway Co. v. Loosemore*, March 25, 1884, L. R., 9 App. Cas. 480.



No. 105. IN an action at the instance of John Sim against the Scottish National Heritable Property Company, Limited, the defenders were successful, and were found entitled to expenses.

Mar. 12, 1889. When their account of expenses came to be taxed by the Auditor, it appeared that fees had been sent to counsel in the earlier stages of the case, viz., for the closing of the record and for a discussion on issues, but

1ST DIVISION. that no fee was sent to junior counsel for attending at the proof.

Lord Fraser. The defenders proposed to charge a fee to junior counsel for attending at that stage of the case.

M.

The Auditor reported the point to the Court.

Counsel for the defenders moved that the proposed fee should be allowed. Under the general regulations applicable to the table of fees of 1876 the rule was, that "a party shall not upon any account be allowed to pay or state higher or additional fees to counsel after he has been found entitled to expenses than were actually paid at the time." Here no fee had been sent for the proof, and the defenders were therefore not proposing to augment the amount of a fee sent at the time, or to send an "additional fee." The fee ought to be allowed on the rule laid down in former decisions<sup>1</sup>—that where fees had not been sent at all during the progress of the case they might, notwithstanding, be charged afterwards.

The pursuer was not represented.

LORD PRESIDENT.—This provision of the Act of Sederunt, Dec. 19, 1835, or of the Regulations of the Table of Fees of 1876, has been several times before the Court, and of course we cannot now go back on the cases which have been cited to us. It is, however, I think, quite in accordance with those cases to hold that when no fee has been sent for a particular piece of business in a case, it may be sent and charged for afterwards, when the party has been successful. Any fee sent at the time must be supposed to be adequate, and the winning party is not entitled to augment it afterwards at the expense of his opponent. The distinction between this case and that must regulate our decision here. Here, at the proof, no fees were sent to junior counsel, and therefore the winning party does not propose to send a higher fee, or an additional fee—that is, to add in amount to a fee sent. On that ground (which is the same as we went on in the case of *Batchelor and Young*) I think this fee ought to be allowed.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

THE COURT allowed the fee in question.

WILLIAM FRASER, S.S.C.—R. AINSLIE BROWN, S.S.C.—Agents.

No. 106. CALEDONIAN RAILWAY COMPANY, Pursuers (Respondents).—*Balfour—R. Johnstone.*

Mar. 14, 1889. ALEXANDER CROSS & SONS, Defenders (Reclaimers).—*Asher—Ure.*

Caledonian Railway Co. v. Cross & Sons. *Railway—Undue preference—Defence to action for carriage of goods—Railway Commissioners—Transference of action—Railways Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 33), sec. 83—Railway and Canal Traffic Act, 1854*

<sup>1</sup> *Tough's Trustees v. Dumbarton Water Commissioners*, May 14, 1874, 1 R. 879; *Batchelor v. Pattison*, July 15, 1876, 3 R. 1086; *Young v. Johnson & Wright*, May 19, 1880, 7 R. 760.

(17 and 18 Vict. c. 31), *secs. 2 and 3—Regulation of Railways Act, 1873* (36 No. 106. and 37 Vict. c. 48), *sec. 6—Railway and Canal Traffic Act, 1888* (51 and 52 Mar. 14, 1889. Vict. c. 25), *secs. 12 and 58.*—In 1888 a railway company sued a firm for sums due in respect of the carriage of their goods over the company's line. The Caledonian Railway Co. v. Cross & Sons. defenders pleaded that the rates sued for were illegal, and averred in their defences, as originally lodged, that the company had conceded to other traders mileage rates for the carriage of their goods "which they refused to concede to the defenders, . . . although the goods are of the same description." Subsequently they added an averment that the company had charged them with higher rates than other traders for the carriage of the same class of goods over precisely the same journey. The Lord Ordinary allowed the defenders a proof of their averments as amended, but disallowed a proof of their original averment, on the ground that the preference therein set forth was only struck at by the Railway and Canal Traffic Act of 1854, and that (on the authority of *Murray v. Glasgow and South-Western Railway Company*, 11 R. 205) the defence founded on that Act was irrelevant, as interdict was the only remedy provided by that statute. The defenders reclaimed, and moved the Court to transfer the cause to the Railway Commissioners, under sec. 58 of the Railway and Canal Traffic Act, 1888, which came into operation on 1st January 1889. The Court adhered to the Lord Ordinary's interlocutor, but further, refused to transfer the cause to the Commissioners, on the ground that the defence under the Act of 1854 would (on the authority of *Murray's case*) be as irrelevant before the Railway Commissioners as it was in the Court of Session, and that, therefore, the defenders could not take any benefit by the transference.\*

\* The following sections of the various Railway Acts were referred to in the case:—

Sec. 83 of the Railway Clauses Act, 1845, provides,—“And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties: It shall be lawful, therefore, for the company, subject to the provisions and limitations herein, and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken either upon the whole or upon any particular portions of the railway as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the same line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway.”

Sec. 2 of the Railway and Canal Traffic Regulation Act, 1854, provides that no railway company “shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,” &c.

Sec. 3 of that Act provides,—“It shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this Act to apply in a summary way by motion or summons . . . in Scotland to the Court of Session in Scotland . . . or to any judge of any such Court, . . . and if it be made to appear to such Court or such Judge on such hearing . . . that anything has been done or omission made in violation or contravention of this Act, it shall be lawful for such Court or Judge to issue a writ of injunction or

No. 106.

Mar. 14, 1889.  
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1ST DIVISION.  
Lord Kinnear.  
C.

IN May 1888 the Caledonian Railway Company raised an action in the Court of Session against Alexander Cross & Sons, seed merchants and manure manufacturers, Glasgow, concluding for payment of £1635, 17s. 11d., being the amount of accounts incurred (after deduction of certain sums paid to account), by the defenders to the pursuers for carriage of goods.

The pursuers in cond. 2 stated the amount of the account.

The defenders answered;—(Ans. 2) “The account is referred to. Admitted that the defenders paid to account £1660, 11s. 4d. *Quoad ultra* denied. Explained that the defenders conduct a large business in the manufacture and sale of chemical manures, which contain from ten per cent to fifty per cent of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless the pursuers have conceded to various oil companies, and amongst others to Young’s Paraffin Light and Mineral Oil Company, Limited, mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the

interdict restraining such company or companies from further continuing such violation or contravention of this Act, and enjoining obedience to the same: And in case of disobedience of any such writ of injunction or interdict it shall be lawful for such Court or Judge to order that a writ or writs of attachment or any other process of such Court incident or applicable to writs of injunction or interdict shall issue . . . and such Court or Judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such Court or Judge shall determine, not exceeding for each company the sum of £200 for every day after a day to be named in the order that such company or companies shall fail to obey such injunction or interdict.”

Sec. 6 of the Railway and Canal Traffic Act, 1873, provides,—“Any person complaining of anything done . . . in contravention of sec. 2 of the Railway and Canal Traffic Act, 1854 . . . may apply to the Commissioners . . . and they shall have and may exercise all the jurisdiction conferred by sec. 3 of the Railway and Canal Traffic Act, 1854, on the several Courts and Judges empowered to hear and determine complaints under that Act, and may make orders of like nature with the writs and orders authorised to be issued and made by the said Courts and Judges, and the said Courts and Judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by that section.”

Sec. 12 of the Railway and Canal Traffic Act, 1888, provides,—“Where the Commissioners (appointed by secs. 2-7 of the Act), have jurisdiction to hear and determine any matter, they may, in addition to or in substitution of any other relief, award to any complaining party who is aggrieved such damages as they shall find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges which, but for this Act, such party would have had by reason of the matter of complaint.”

Sec. 56 enacts that the Act shall come into operation on 1st January 1889.

Sec. 58 provides,—“Every action or proceeding which might have been brought before the Railway Commissioners if this Act had been in force at the time when such action or proceeding was begun, and is at the commencement of this Act pending before any superior Court, may, upon the application of either party, be transferred by any Judge of such superior Court to the Railway and Canal Commissioners under this Act, and may thereupon be continued and concluded in all respects as if such action or proceeding had been originally instituted before that commission, provided that no such transfer, nor anything herein contained, shall vary or affect the rights or liabilities of any party to such action or proceeding.”

said oil companies.\* The pursuers carry goods for the said oil companies and other traders between the following Glasgow stations, viz., Port-Dundas, Stobcross, Buchanan Street, Sighthill, and London Road on the one hand, and the following stations on the other hand, viz., Auchterarder, Bridge of Allan, Brechin, Coatbridge, Cumbernauld, Crieff, Stirling, Balerno, Edinburgh, Midcalders, Biggar, and Lanark. The pursuers carry goods for the defenders between the same stations. For carriage of the same description of goods the pursuers have, in the account sued for, charged to the defenders between these stations, or some of them, higher rates than they have charged to the said oil companies and other traders. In like manner, the pursuers have in the account sued for charged higher rates to the defenders than to the said oil companies and other traders as regards carriage of goods between the following Glasgow stations, viz., Eglinton Street and General Terminus on the one hand, and Bishopton, Port-Glasgow, Kilmarnock, and Stewarton on the other hand."

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The pursuers, in reference to that answer, averred;—"The statements contained in the answer are denied. With reference to the statement added to the record as an amendment, it is explained and averred that the whole of the defenders' goods of the kind mentioned by them are carried to and from their works, near Port-Dundas, and to and from Port-Dundas station of the pursuers' railway, and that no such goods are carried for the defenders between any of the stations mentioned in the amendment, and no charges for the carriage of such goods between these stations are included in the accounts libelled."

The defenders further averred;—(Ans. 3) "Explained that the rates charged by the pursuers in the said accounts are in excess of the charges made to the said oil companies and other traders, and constitute an illegal and unjustifiable preference against the defenders in favour of the said oil companies and other traders. The pursuers have conferred an undue and illegal preference in favour of the said oil companies and other traders, and an undue and illegal prejudice to the defenders, in respect that they have charged a mileage rate to the said oil companies and other traders, and have refused to concede the same to the defenders, although the class of goods conveyed was in both cases of the same description. If the mileage rates charged by the pursuers to the said oil companies and other traders be applied to the said accounts, then the payments already made by the defenders are sufficient to discharge the same. The defenders refer to the Railways Clauses Consolidation (Scotland) Act, 1845, and particularly section 83 thereof, the Railway and Canal Traffic Act, 1854, and particularly section 2 thereof, and to the other statutes applicable to railway rates. The defenders refer also to the private Acts of Parliament applicable to the pursuers' company."

The pursuers pleaded;—(1) The pursuers having carried the goods referred to, and the sum sued for being the balance due and resting owing to them in respect of said carriage, the pursuers are entitled to decree in terms of the conclusions of the summons. (2) The defence stated is irrelevant.

The defenders pleaded, *inter alia*;—(1) The rates charged by the pursuers in the accounts sued on being such as to constitute an undue and illegal preference in favour of other traders, and to the prejudice of the defenders, are not recoverable. (2) The pursuers having given an undue and unreasonable preference to other traders, and having subjected the defenders to an undue and illegal disadvantage by charging the rates in the accounts sued on, are not entitled to decree as libelled.

\* The following averments to the end of the paragraph were added subsequently to the original closing of the record.

No. 106. On 21st January 1889 the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Allows the defenders a proof of their averment that the pursuers have charged lower rates to other traders than the rates charged by the defenders for goods of the same description conveyed or propelled by carriages or engines passing only over the same portion of the lines of the pursuers' railway, and to the pursuers a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be fixed."

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The defenders reclaimed, and argued;—The defence rested on two grounds, viz., that the company had conferred illegal preferences—(1) under the Railway Clauses Consolidation Act, 1845, and (2) under the Railway and Canal Traffic Act, 1854. The Lord Ordinary had allowed proof with regard to the first ground of defence, but refused it on the other as being irrelevant. The reclaimers' motion was, however, that the action should be transferred to the Railway Commissioners acting under the Act of 1888, and it was, therefore, unnecessary to consider whether the defence, so far as based on the Act of 1854, was relevant or not. By section 58 of the Act of 1888, it was provided that such an action as the present might be transferred to the Commissioners, the only condition imposed being that the transference should not affect the rights and liabilities of any party to the action. A transference would not affect the rights of the company here, because, although after the decision in *Murray's case*,<sup>1</sup> it could not be maintained that an action for damages or for repayment of overcharges was maintainable in a Court of law when preferences struck at by the Act of 1854 were complained of, still, the fact of preferences having been granted being established before the Railway Commissioners acting under the Act of 1873, it would be competent for the trader to bring an action for repayment of the overcharges founded on the decision of the Commissioners that an illegal preference had been granted.<sup>2</sup> If that were so the railway company here could

\* "NOTE.—As the record was originally framed, the defenders' averments appeared to me to be irrelevant. It was decided in *Murray v. The Glasgow and South-Western Railway Company*, 11 R. 205, first, that in order to bring the enactment of 1845, upon which the defenders rely, into operation, it was necessary that the traffic carried for different parties should be conveyed for the same distance over the same portion of the line, and secondly, that a complaint under the Statute of 1854 is not competent before this Court. The pursuers maintain that the amendment does not remove the defects of the original averment or record. But I think it may be read as meaning that goods for other traders were carried for lower rates between the same points of arrival and departure; and this is the meaning which the defenders' counsel stated that it was intended to convey. The statement lodged in obedience to the last interlocutor is not a satisfactory compliance with the order; but I am satisfied by the explanation at the bar that the defenders ought not to be considered in default, and that it would be too strict a construction of their averments as now amended to hold them irrelevant on the ground suggested.

"The defenders moved that the case should be transferred to the Railway Commissioners under the 58th section of the Railway and Canal Traffic Act, 1888. The pursuers maintain that the action is not one of those to which that section applies, and that if it were, the transfer, which is not imperative, ought not to be made. It appears to me that it would be inexpedient to decide either of these questions until it has been finally determined whether the defence is irrelevant, and to what extent."

<sup>1</sup> *Murray v. Glasgow and South-Western Railway Co.*, Nov. 29, 1883, 11 R. 205.

<sup>2</sup> *Manchester and Lincoln Railway Co. v. Denaby Main Colliery Co.*, 1883, L. R., 11 App. Cas. 97—per Lord Chancellor, p. 112; *Lancashire Railway Co. v. Greenwood*, 1888, L. R., 21 Q. B. D. 215—per J. Kay, p. 218.

suffer no disadvantage by the transference, for by section 12 of the Act of 1888 the Commissioners were empowered to award damages to a trader complaining of illegal preferences, and the award was to include repayment of overcharges. That section supplied the defect which existed under the previous Acts, where no power was given to the Commissioners to award damages for preferences struck at by the Act of 1854, the trader's remedy being no longer limited to interdict as formerly. If, therefore, the proof as limited here by the Lord Ordinary went on, the defenders might raise separate proceedings against the company before the Commissioners, founding on the company's breach of the Act of 1854. If, therefore, the transference were granted, there would only be one proceeding, and that before the Commissioners, instead of an action in this Court, and a separate proceeding before the Commissioners, as would be the case if the Lord Ordinary's judgment were allowed to stand.

Argued for the respondents ;—The reclaimers had not shewn that they had any interest to ask a transference. The Court had a discretion as to whether they would transfer the cause or not, and here it would be most inexpedient. It was impossible to say when the Commissioners would sit in Scotland, and the transference might result in very long delay. Further, it would still be incompetent in this action, which was raised before the Act of 1888 came into force, to lay anything in the nature of a money claim resting on the 1854 Act before the Commissioners. Such a defence as was made here was incompetent, under the authority of *Murray's case*, not only in this Court, but before the Commissioners, and therefore the transference would be useless as regarded the defence founded on the Act of 1854, and proof had already been allowed of the defence on the Act of 1845.

At advising,—

**LORD PRESIDENT.**—This is an action at the instance of the Caledonian Railway Company against certain traders of the name of Cross & Sons for sums due for the carriage of goods belonging to the defenders upon the pursuers' railway. I do not know whether there is any serious dispute as to the fact that the goods were carried, and that, apart from the defence stated, the amount charged is correct enough. However, that matter will go to probation if it is disputed. But the answer which the defenders make to this claim is substantially contained in the answer to the second article of the condescendence. The first averment there is "that the defenders conduct a large business in the manufacture and sale of chemical manures, which contain from 10 per cent to 50 per cent of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company (Limited) mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies." Now, these averments do not comprehend the averment that the goods of the two parties are carried under the same circumstances over precisely the same line of railway, or anything else that would bring it under the operation of the 83d section of the Act of 1845, and therefore they must be held to apply to the provision of the Act of 1854 against undue preferences. Now, it has been quite settled, I think, by the case of *Murray*, which is referred to by the Lord Ordinary, that no claim can be brought in this Court

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**No. 106.** against a railway company for a violation of the Act of 1854. The only remedy provided by that Act, and the only remedy up to the present day, so far as I know, is that the company which violates that provision shall be restrained from doing so for the future by interdict, and shall also, if they persevere in their evil courses, be subjected to a penalty of so much a day. And, therefore, that part of the averment of the defenders, I think, is entirely irrelevant. If the party who makes that averment could not in an action in this Court enforce any claim against the railway company, just as little can it be pleaded in defence against an otherwise just claim made by the company.

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But there is another part of the averment which the Lord Ordinary has held to be relevant, and has remitted to probation, and that is an averment founded upon the Act of 1845; and we must hold, therefore, with reference to the form of interlocutor, that what he has done is to refuse a proof of the first part of that averment as being irrelevant, and to allow a proof of the second portion of it. He has had some doubt, I think from the terms of his note, as to whether the averment under the Act of 1845 is quite satisfactory or complete, but that has not been raised before us in argument, as I understand, and therefore I see no reason for doubting the propriety of the Lord Ordinary's appointment of a proof in this case, unless we were to yield to the motion of the defenders that this case should be sent to the Railway Commissioners under the Act of last year. Now, I cannot see what benefit the defenders could very well have by this transference of the case to the Railway Commissioners, because if the complaint under the Act of 1854 cannot be made the subject of an action, just as little can it be made the subject of a claim for money to meet the claim of the pursuers. The question would arise in the same way before the Railway Commissioners as it does here, and this averment under the Act of 1854 would be just as irrelevant, and must be just as much disregarded by the Railway Commissioners as it is by this Court, in so far as it is made the foundation of a money claim. It is quite open of course to the defenders to bring some proceeding before the Railway Commissioners for the purpose of preventing the continuance of the illegal practice of which they complain. Whether it is precisely the same now under the Act of 1888 as it was under the Act of 1854 or under the Act of 1873 it is needless to inquire, but it must be in the form of a complaint to stop an illegal proceeding, and not in the form of a complaint for payment of money. I am therefore for refusing the motion and adhering to the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK.—I am of the same opinion.

LORD ADAM.—I entirely concur.

LORD MURE and LORD SHAND were absent.

THE COURT adhered.

HOPE, MANN, & KIRK, W.S.—DOVE & LOCKHART, S.S.C.—Agents.

**No. 107.** MRS MARY JANE LANG, Pursuer (Respondent).—*Balfour*—*C. S. Dickson*.  
ROBERT LATTA AND OTHERS (Lang's Trustees), Defenders (Reclaimers).—*Gloag*—*C. N. Johnston*.  
Mar. 15, 1889.  
Lang v. Lang's  
Trustees.

*Contract*—*Marriage contract*—*Informality*—*Rei interventus*—*Writ*—*Natural execution*—*Agent and Client*.—A widow brought an action of reduction of

her antenuptial marriage-contract against her husband's trustees on the ground that the notary-public who executed the deed on her behalf, she being unable to write, was at the time acting as her husband's law-agent in the matter. *Held* No. 107.  
 that, assuming that the execution of the deed was invalid, the marriage, which took place on the faith of the contract, validated the deed *rei interventu*. Mar. 15, 1889.  
*Lang v. Lang's Trustees.*

*Question*, whether the execution was invalid.

ON 25th October 1887 Mrs Mary Jane Armstrong or Lang, widow of 1ST DIVISION.  
 Walter Lang of Chapelton, near Dumbarton, raised an action against Lord Lee.  
 Robert Latta and others, the trustees of her deceased husband, and C.  
 against her children, concluding, *inter alia*, for reduction of the antenuptial marriage-contract entered into between her and her husband on 30th September 1878, and for declarator that she was entitled to terce and *jus relictæ*, as at the date of his death, which occurred on 28th May 1887.

The following facts were not in dispute between the parties:—In 1868 the pursuer, who was then a widow, became housekeeper to Walter Lang, and continued to be so till 30th September 1878, when he married her.

Prior to her marriage the pursuer gave birth to three children, of whom Lang was the father. All of these children were alive at the date of the marriage, but one of them died before the raising of the action. In September 1878 Lang, who was then upwards of seventy-one years of age, became dangerously ill, and on the urgent request of the minister and certain of the elders of the parish, he resolved to marry the pursuer, and legitimise their children. The pursuer, who was anxious to have her children legitimised, agreed to marry him, and proclamation of banns was made in the Parish Church of Dumbarton on Sunday 29th September 1878, and the marriage took place on the evening of the following day.

Shortly before the ceremony, the antenuptial contract in question was signed by Mr Lang, and was also signed by Mr Robert Macfarlane, writer and notary-public, Dumbarton, on behalf of, and (as was alleged by the defenders, Mr Lang's trustees) on the special authorisation of, the pursuer, who could not sign her own name.

The contract contained a discharge of the wife's legal rights, which were greater than the provisions in her favour in the marriage-contract.

The pursuer averred;—(Cond. 3) "Shortly before the ceremony was performed, the said Walter Lang instructed his law-agent, Mr Robert Macfarlane, writer and notary-public, Dumbarton, to prepare the pretended antenuptial contract now sought to be reduced. The said contract was not submitted in draft to the pursuer, nor to anyone on her behalf. It was not read over by her, nor to her, before it was executed, nor were the contents of it explained to her before it was executed. The pursuer was unable to read or write or to sign her name. The said Robert Macfarlane was present at the execution of the deed as the agent of the said Walter Lang, and he had prepared the deed as Mr Lang's agent. He was then, and had been for some time, the private agent of the said Walter Lang in all his matters of business. The pursuer gave no instructions for the execution of the said deed on her behalf, and had no knowledge of its execution, but it bears to have been executed notarially for her by the said Robert Macfarlane as a notary. The said Walter Lang and the said Robert Macfarlane concealed from the pursuer the provisions contained in the said deed, and she had no knowledge of its contents or effect. They also concealed from her the amount of means and estate which then belonged to the said Walter Lang. The provisions made in favour of the pursuer by the said deed are totally inadequate for her support, and are utterly disproportionate to the means and estate which then belonged to the said Walter Lang, and which were left by him at the time of his death."



No. 107. (Cond. 5) "The said pretended marriage-contract is void, or, at all events, reducible, from the fact that the notary, who is said to have executed it on the pursuer's behalf, was the private agent of the said Walter Lang, and as such prepared the said marriage-contract upon his instructions, and was in attendance at the execution thereof as his agent. It was unlawful for him to occupy the position of agent for the husband and to act as notary for the wife in the execution of the said contract, under which they had conflicting interests. The interests of the pursuer were not protected by the said notary, but, on the other hand, he acted in the interests of the said Walter Lang, and both he and the said Walter Lang fraudulently concealed from the pursuer the provisions and effect of the said contract, and also the amount and value of the said Walter Lang's means and estate, and the legal rights which would accrue to her as his wife."

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The defenders denied these averments.

The pursuer pleaded;—1. The said marriage-contract is null and void, in respect the pursuer never authorised it to be executed on her behalf, and the pursuer is therefore entitled to decree in terms of the conclusions. 2. *Separatim*, The said marriage-contract ought to be set aside, in respect (1) that it was notarially executed for the pursuer by a notary who was at the same time acting as the agent of the other party to the contract; and (2) that the contract was not read over to the pursuer, nor its provisions and effect explained to her, before it was executed. 3. In any event, the said marriage-contract is not binding on the pursuer, in respect that if executed by her authority at all, it was procured from her by fraudulent concealment on the part of the said Walter Lang and his agent as to its nature and effect.

The defenders pleaded;—1. The pursuer's averments being irrelevant, the action ought to be dismissed. 2. The pursuer's averments, so far as material, being unfounded in fact, the defenders ought to be assolizied. 3. The pursuer having suffered no lesion, is not entitled to have the contract reduced.

Proof was led on 29th May 1888. It was proved that the pursuer's main object in entering into the marriage was the legitimization of her children. The proof was mainly directed (1) to prove the relation between Mr Macfarlane (the notary who signed the deed for the pursuer) and Mr Lang, and it was not ultimately disputed that he had acted as agent for Mr Lang on former occasions, and that he so acted in this business; (2) to shew the circumstances in which the deed was signed, and the facts as to the deed being read over to the pursuer, and her authorisation to Mr Macfarlane to sign the deed on her behalf. The more important parts of the evidence on this latter point are given below.\*

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\* The pursuer deponed,—“Were you asked by anybody to sign any paper that day (the day of the marriage)? (A.) No; I cannot write. (Q.) Did anybody speak to you about any paper which you were wanted to sign if you could have written? (A.) No. I did not hear anything that day about a marriage-contract, except what Mr Gray had said.† I saw Mr Macfarlane sign something that day, but I did not know what it was. He asked me to touch his pen with my finger when he was signing, and I did so. This was in Mr Lang's bedroom, after the marriage. I was not told why I was wanted to touch Mr Macfarlane, I just did as I was asked. I did not know what the paper was that he was signing, and no explanation was given to me about what the writing was. When Mr Macfarlane was in the room in the afternoon, on the occasion when he called first, he took me into a room and said Mr Lang was to give me £100, and I asked

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† She had heard Mr Gray, the parish minister, say to Mr Lang that he should get a marriage-contract.

On 29th June 1888 the Lord Ordinary pronounced this interlocutor:— No. 107.  
 “Finds that the notary by whom the deed under reduction was executed

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what it was for, and he said it was merely as a present, and that if Mr Lang did not live I would get a living off the estate with my family. That was all Mr Macfarlane said at that time. . . . (Q.) Was the paper which Mr Macfarlane signed when he asked you to touch his pen read over to you? (A.) There was a paper read, but I don't know what kind of a paper it was. (Q.) Were you asked to attend to it? (A.) No, I never was. I was just ben the room. . . . I was not told what the paper was that was read. (Q.) And did you follow or understand it? (A.) No; I did not. The first that I saw of the paper that Mr Macfarlane had with him was his taking it into Mr Lang's room. I don't know what the draft of a paper is. (Q.) Was any paper put before you that day as what they were going to write out, or was any paper put before you to see if you would agree to that, or take it? (A.) No.”

In cross the pursuer deponed,—“(Q.) Did you ask Mr Macfarlane whether you would be entitled to a third of Mr Lang's estate? (A.) No, I did not. (Q.) Did you say anything about your share in his means and estate? (A.) No. I have mentioned all that passed. (Q.) Did Mr Macfarlane not tell you you would not get that? (A.) That was all that passed. (Q.) Are you quite sure? (A.) Yes, quite sure, as far as I mind. (Q.) Had you any idea that you would get anything if there had not been a marriage-contract? (A.) I never knew anything about it until after Mr Lang died, when Mr M'Arthur read it to me. I never knew anything about a marriage-contract till then. I did not know what Mr Macfarlane was reading when Mr Jardine [one of the instrumentary witnesses to the marriage-contract and docquet] and the others were present before the marriage—whether it was a will or not; but I saw there was writing on the paper. I would hear what was said, but I don't remember at this distance of time what it was. (Q.) Did you not hear what Mr Macfarlane read? (A.) It is very likely I would at the time. (Q.) Did you know it was about the marriage? (A.) I did not know anything about it. I don't remember hearing anything read about the £100 I was to get. I don't remember a word that was read.”

Mr Macfarlane deponed,—“Mr Lang was ill when I went to see him on Monday, 30th September 1878. On reaching the house I saw the pursuer, who ushered me into Mr Lang's room. Mr Lang said,—‘They have been at me to marry her, but I am not going to do it until I have a settlement with her,’ or words to that effect. Mrs Lang was out and in the room while I was there, and I cannot say at this distance of time whether she heard that or not, but I rather think she did. Mr Lang then told me he would marry her when this was arranged, and then he dictated to me what he was going to do for Mrs Lang, and Mrs Lang was there and heard it. I did not write to his dictation; he told me what he was going to do, and I took a note of it in the ordinary way, and came into my office and instructed my clerk, Mr Bayne, to draw up a contract on the notings I gave him. Mrs Lang was present at my meeting with Mr Lang and heard all that passed, and she had nothing to add, as I learned or understood. I went back to Mr Lang's with the draft of the contract. I saw the pursuer on that occasion. I was never there that day without seeing and speaking to her. I was there two or three times. I took the pursuer into a room by herself shortly before the signing of the contract, but we had had communications before that. I took her into the room to make assurance doubly sure, and to explain thoroughly to her the effect of the contract, and to ask if she thought we could get any more out of Mr Lang. I said, ‘Do you think we can get any more out of him?’ We then passed on to a number of other questions, amongst others, whether it was worth while delaying, and the result of it all was that she thought it was best to go on and to sign this. We then came back into the room where Mr Lang was, and I said Mrs Lang plainly understood it, but I will read it over. (Q.) You explained the terms of the deed to her in that room? (A.) I did, most faithfully. (Q.) And are satisfied she understood it? (A.) Thoroughly. (Q.) Did she ask you anything about her legal rights—

No. 107. for the pursuer was acting at the time as the law-agent of the deceased Walter Lang, the other party to the contract, and on his instructions and employment: Finds that as such agent the said notary was personally interested in the deed, and was incapacitated by the law from acting as a notary in the execution of the deed for the pursuer; to this extent sustains the reasons of reduction; therefore repels the defences: Reduces, decerns, and declares in terms of the reductive conclusions of the summons, and appoints the cause to be put to the roll in order that the remaining conclusions may be disposed of.\*

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her *jus relictæ*? (A.) She did. Of course I knew her, being a next-door neighbour, and she had perfect freedom in speaking to me. She said, 'Well, if he dies will I no get a third of his money?' and I said, 'Not if you sign this,' having the contract in my hand. (Q.) Are you quite sure she said that? (A.) Perfectly; words to that effect as near as possible. (Q.) Did she give you the impression that she was aware of a widow's rights in law? (A.) She was aware. She followed up what I have stated by asking, 'Will I not get a third of his rents if he dies?' and I said, 'Not if you sign this.' I did not say anything about her getting a present of £100; nothing like it was ever mentioned. . . . I think I was aware that the pursuer could not write. She authorised me, as a notary, to sign the deed for her. I got the authority before I signed the deed for her. When I got the authority, I wrote the docquet, and the docquet was also read. . . . (Q.) Did you think, in advising Mrs Lang, that Mr Lang would not have married her at all if she had not accepted the marriage-contract? (A.) Clearly he would not. My impression is that he would not have married her at all if he had not thought he was dying. (Q.) Can you say whether that idea was not in Mrs Lang's mind also? (A.) In conversations with Mrs Lang, she was really anxious to get into the position of a married woman, and I discussed with her whether there was any chance of Mr Lang's recovery, and of more being got by delay."

\* "OPINION.—The pursuer of this action is the widow of Walter Lang of Chapelton. She here seeks to reduce an antenuptial marriage-contract between her and her husband, which is alleged to have been executed by her notariaily on the day of her marriage, viz., 30th September 1878. The deed confessedly made a very poor and inadequate provision for her, which was 'accepted by her in full satisfaction of all terce of land, legal share of moveables, and every other thing that she, *jure relictæ* or otherwise, could ask, claim, or demand . . . through his death, his own free will only excepted.'

"But the grounds of reduction which were chiefly relied on go only to this, that the deed was not well executed.

"The pursuer and her husband (whose housekeeper she was) had lived together for about ten years before the marriage, and she had borne him three children. It is not disputed that she desired to marry him for the sake of the children. But the proof shews that in point of fact the marriage was brought about, not by her, but by the parish minister and one or two elders, who were visiting him at a time of severe illness. During the week previous to the marriage he was thought to be dying, and the witness Jardine was sent to Glasgow to find out how a marriage could be accomplished without awaiting the proclamation of banns. During the same week it appears that the witness Mr Macfarlane was busy, as Mr Lang's law-agent, with the preparation of his testamentary settlements. The banns were proclaimed by Mr Lang's instructions on the 29th, and the marriage took place on the afternoon of the 30th. It was not until the morning of the 30th, according to the witness Macfarlane, that he was told anything of the intended marriage. He was then sent for, and received instructions from Mr Lang as to the marriage-contract. He prepared the deed presumably in accordance with his instructions. It gives to the pursuer, as Mr Lang's wife, the same provisions substantially as she was to have received under the unexecuted settlements as Mr Lang's housekeeper and the mother of his illegitimate children. But if the deed under reduction is

The defenders reclaimed, and argued;—There was no authority for No. 107.  
 saying that the mere fact that a notary who signed for one party to a

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valid, she agreed to accept this in full of her legal rights. The question is, whether that deed is ineffectual upon any of the grounds stated?

"The principal objection urged at the debate was that the deed was not well executed, in respect that the notary who signed it on the pursuer's behalf was the agent of Mr Lang, the other contracting party, and was acting at the time under his instructions. In disposing of this objection it must of course be assumed that the formalities required by the 41st clause of the Conveyancing Act were observed; that the deed was read over to the pursuer, and that she gave authority to Mr Macfarlane to subscribe it for her. But if it be the fact that Mr Macfarlane, the notary, acted in all he did as agent for Mr Lang, and was present solely in his interest and for his purposes, I cannot doubt that a serious question arises regarding his qualifications to act as notary in the execution of the deed for the other party.

"It is settled by the case of *Ferrie v. Ferrie's Trustees* (1 Macph. 291), and by the authorities there cited, that a notary cannot as such execute a deed in which he is himself concerned. In that case the deed (a testamentary trust-settlement) was executed notarially and in good form by two notaries and four witnesses, but one of the notaries (Mr Adam Paterson, a well-known solicitor in Glasgow) was also one of the five gratuitous trustees to whom the execution of the testator's will was committed, and the deed authorised the employment by the trustees of one of their own number as agent, with remuneration. It was held that the deed was null, because one of the notaries was disqualified. In the words of the Lord President, 'The law excluded Mr Paterson from acting as a notary in the execution of this deed.' Lord Curriehill's opinion puts his judgment on the ground that it was settled 'that the acts of a notary in the exercise of his office will not be effectual where he is personally interested.'

"In the present case the notary was not interested as a beneficiary under the deed, but the evidence shews that he was intimately concerned in it as the agent of Mr Lang, and was interested to the extent of charging Mr Lang as his employer with his fees, both as agent and as notary. He says that he acted also as agent for Mrs Lang, but he admits that he was not employed by her, and that he took his instructions from Mr Lang. It was on his behalf that he had prepared the deed, and was present to get it executed. He thought the provisions of the deed in favour of Mrs Lang mean and inadequate, but he took, in my view of his evidence, no steps to inform himself as to Mr Lang's means, such as a separate agent would have taken, with a view to advising Mrs Lang concerning the full effect of the renunciation of her legal rights. He trusted to her knowledge on that subject, and states that she asked a question indicating her acquaintance with the legal rights of a widow. Upon this point, however, he is contradicted by Mrs Lang, and is not corroborated. I am not satisfied upon the evidence that she put any such question as he mentions. But the conflict of evidence as to the extent of Mr Macfarlane's explanations to her illustrates the difficulty and danger which must be experienced, even by the most conscientious agent, in attempting to combine agency for one of the contracting parties with the position of notary executing the deed for the other. Mr Macfarlane, I am sure, did not consciously fail to act faithfully towards her, but, upon the evidence, I was satisfied that he acted solely as agent for Mr Lang.

"This being so, did the law allow him, upon the employment of Mr Lang, to act as notary-public in the execution of the deed by the other party? It seems clear that if Mr Lang had happened to be a notary-public himself, he could not have executed it notarially for the other party. Could he, then, do by an agent that which he could not have done himself, supposing that no agent had been employed or required? I think not; and my opinion is that Mr Macfarlane, as Mr Lang's agent, was so much identified with his interests, and so far personally interested in the execution of the deed, that he was disqualified for acting as notary for Mrs Lang.

"I think it unnecessary to go back upon the old authorities, but the case of

No. 107. deed was at the same time agent for the other party nullified the deed.

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Questions of a kindred nature had been before the Court on many occasions during the last two or three centuries,<sup>1</sup> and the fact that this identical question had never been decided was an argument in favour of the view that the objection was bad, as the same facts must have occurred many times before. The case of *Craig v. Richardson* (M. 16,829), which was said to have decided that it was not lawful for the same two notaries to sign for both parties, was perhaps the nearest case to the present; but that case was practically overruled, if indeed it decided that question at all, by the case of *Græme v. Græme's Trustees* (7 Macph. 14). If it were held in this case that the notary's signature was bad, the result would be to add a new disability, which, considering that the office of notary was not merely Scottish but European, would be most inexpedient. In none of the institutional writers was it laid down that such an execution as there was here invalidated the deed so executed. But further, if there were an error here in the notarial execution, it was cured by homologation. The marriage would not have taken place if the contract had not been entered into, and the subsequent marriage cured any mere error in formality.<sup>2</sup>

Argued for the respondents;—Under the authorities referred to by the reclaimers, especially the case of *Ferrie's Trustees*,<sup>1</sup> and the treatise on the

*Græme's Trustees* (7 Macph. p. 14), like the case of *Stoddart* (1799, M. 16,857), appears to me to be distinguished by this, that the judgment was there put upon the ground that the deed was not a contract, but a testamentary and revocable deed.

"The case of *Nisbet v. Newlands* (1630, M. 17,016 and 5682) was referred to. But I think that the separate report, under the head 'Homologation,' shews a distinction. For there was there a conveyance which had taken effect during the husband's life, and the judgment was put upon the ground of homologation.

"I therefore sustain this reason of reduction.

"Secondly, with regard to the question whether the deed was executed by the authority of the pursuer, there is one aspect of it in which I should give my verdict for the pursuer. If Mr Macfarlane was disqualified from acting as notary in the execution of that deed for the pursuer, he was incapable of receiving authority to that effect, and did not receive it. But if I am wrong upon the first ground of reduction, I should hold the evidence insufficient to contradict the notary's docquet, attested as it is, and supported by the evidence of the witnesses Jardine and Bayne.

"Thirdly, upon the question whether the deed was read over to the pursuer, my verdict again is for the defenders. I think that it was proved that it was read over. Mr Jardine's failure of memory is not sufficient to falsify the docquet attested by himself as well as by Bayne (*Frank v. Frank*, 1795, M. 16,825).

"Fourthly, as to the alleged fraudulent concealment, I am of opinion that it is not proved. There was no duty of disclosure imposed upon Mr Lang, excepting in so far as the employment of his own agent to act as a notary for the pursuer may have given rise to an obligation to see that she was fully advised. I am assuming at present, however, that the deed was well executed. In this view it was a deed between parties of full age, and not to be set aside without proof of fraud. Fraud not being proved, the pursuer cannot set aside the deed on the ground merely that she agreed to a bad bargain."

<sup>1</sup> *Scot v. Lord Drumlanrig*, 1628, M. 846; *Russel v. Kirk*, Nov. 27, 1827, 6 S. 133; *Stoddart v. Arkley*, 1799, M. 16,857; *Craig v. Richardson*, 1610, M. 16,829; *Græme v. Græme's Trustees*, Oct. 21, 1868, 7 Macph. 14, 41 *Scot Jur.* 15; *Ferrie v. Ferrie's Trustees*, Jan. 23, 1863, 1 Macph. 291, 35 *Scot Jur.* 196.

<sup>2</sup> *Cheap v. Mowat*, 1626, M. 17,014; *Muir v. Crawford*, 1628, *ibid.*; *Nisbet v. Newlands*, 1630, M. 17,016; *Braidy v. Braidy and Muir*, 1662, M. 17,018; *Forrest v. Robertson's Trustees*, Oct. 27, 1876, 4 R. 22, *Lord Deas*, p. 37.

"office of notary,"<sup>1</sup> this deed was bad. A notary could not on these authorities, apart altogether from the Statute (1579, c. 80), execute a deed as notary to which he was a party. Here he was acting for one of the parties, and the same principle ought to apply to such a case. There were conflicting interests in the matter, and Mr Macfarlane could not properly serve both parties. His primary duty was to the husband, on whose behalf he had many times acted as agent, and on whose behalf he was so acting on the occasion in question. A notary, considering the solemn nature of his duties, should be in a position of perfect neutrality.<sup>2</sup> The error here was not merely technical but substantive. The deed was really an unsigned document. All the cases cited by the defenders, with regard to homologation, were cases of statutory informality, and therefore had no application here. There could be no homologation here unless it were proved that the marriage would not have taken place unless the contract was signed, and Mr Macfarlane's evidence did not amount to that. It was distinctly decided in a recent case by the House of Lords that marriage could not validate a marriage-contract entered into under essential error.<sup>3</sup> Such error was here proved by Mrs Lang's testimony.

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At advising,—

LORD RUTHERFURD CLARK.—This is an action to set aside an antenuptial marriage-contract into which the pursuer is said to have entered on 30th September 1878. It is directed against the trustees and executors of the pursuer's late husband, and also against her children. She has a very material interest to reduce the contract, because it contains a discharge of her legal rights, which are of greater value than the conventional provisions.

The pursuer had for a considerable time been the mistress of the late Mr Lang, and had borne three children to him. In 1878 Mr Lang became seriously ill, and he was urged by his friends to marry the pursuer. He does not appear to have been very willing to do so. But he ultimately consented, and the marriage was celebrated on 30th September 1878, the marriage-contract having been previously executed on the same day.

The marriage-contract was prepared by Mr Macfarlane, a writer in Dumbarton, on the instructions of Mr Lang, and he says that he received his instructions in the presence of the pursuer. He further states,—Mr Lang said, "They have been at me to marry her, but I am not going to do it until I have a settlement with her." As the pursuer could not write, the contract was executed by her notarially, and Mr Macfarlane acted as the notary.

The sole ground of reduction relied on in argument was that Mr Macfarlane was disqualified from acting as notary inasmuch as he was the agent of the other party. The pursuer did not attempt to set aside the contract on the plea that it was obtained from her by misrepresentations or undue influence. It is true that she says that she was ignorant of its terms, and that she did not understand that she was entering into a marriage-contract. These matters are, however, introduced into the case not as substantive grounds of reduction, but as indicating the reason of the rule for which the pursuer contends.

I have further to observe that the objection on which the pursuer relies is not an objection which appears *ex facie* of the contract. On the contrary, so far as the deed shews, the prescribed legal formalities were duly observed.

<sup>1</sup> On the office of Notary, 6th edit. (1821) p. 248.

<sup>2</sup> Laird Gormock v. The Lady, 1583, M. 16,874.

<sup>3</sup> Cooper v. Cooper, Feb. 24, 1888, 15 R. (H. L.) 21.

No. 107. The question which is thus raised is important. I do not think that it is ruled by any of the cases that were cited to us. It was decided in *Ferrie's Trustees* (1 Macph. 291) that a trust disponee cannot act as the notary of the truster, though there something may have turned on the fact that the notary might and probably would have a personal benefit from the settlement, inasmuch as he was the agent of the truster, and as the deed contained an express dispensation of the ordinary law applicable to a trustee who acts as agent for the trust. In the old case of *Craig* (M. 16,829) it was held that the same notary cannot subscribe for both the parties to a contract. But the soundness of this decision was more than doubted by Lord Deas in the case of *Græme* (7 Macph. 14), though it was regarded with more favour by Lord Ardmillan. The latter case was decided on the single ground that no statutory nullity was incurred because the same notaries had subscribed for each of the two parties to a mutual disposition and settlement which bore to be revocable by either. These are the only cases which have any direct application to the present, and they do not give us much assistance in the determination of it.

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I confess that I think it very undesirable that the agent of the one party to a contract should act as the notary of the other. It is of great importance to preserve the purity of the office of notary, and to require that he shall not be under any influence which might induce him to be either corrupt or careless in the discharge of his duty. And these considerations present themselves with great force, when we keep in view the duties which devolve on the notary who acts for an illiterate person. But there is a very analogous case when such considerations would not, I think, prevail against the validity of the deed. If the pursuer had been able to write, and if the same agent had acted for both parties, the contract would not be void but only voidable, though the Court, before sustaining it, would require to be satisfied that it was obtained with perfect fairness, and with full intelligence on the part of the wife.

I am glad to think that we need not decide this difficult and delicate question, because we can determine this case on another ground.

It is to my mind quite certain that before the marriage was celebrated the parties intended to enter into a marriage-contract, and we have in writing the contract which they intended to execute. The pursuer, no doubt, says that she did not know that she was entering into any contract, and affects to say that she knew nothing of what was done. I cannot take this off her hands. I prefer the testimony of Mr Macfarlane, whose veracity and honour were not impeached, and who is supported in the main by the other parties who were present. He gives distinct evidence to the effect that he read over the deed to the pursuer, and explained the meaning and effect of it. That the deed was read over is clear from the evidence of the pursuer herself. For she says that she "did not know what Mr Macfarlane was reading when Mr Jardine and the others were present before the marriage." Unless Mr Macfarlane was guilty of a fraud, which he had no interest to commit, and which it is not alleged that he did commit, the whole proceedings were conducted with perfect fairness, and the intended contract was fully understood by the pursuer.

The marriage followed upon it, and in my opinion any imperfection in the mode of execution has been removed *rei interventu*. The case of *Nisbet* (M. 17,016) is a direct authority to that effect, and it is in accordance with the recognised law that informal contracts may be so validated. There the Court had to consider a marriage-contract where only one notary subscribed for each

party. It is clear that this was no subscription at all, and that so far as mere execution went the contract was absolutely void. But it was held that the contract was not challengeable provided marriage had followed upon it, because marriage is an act of homologation which bars objections. The worst that can be said of the contract in question is that it was not signed by the pursuer by reason of the disqualification of the notary. But the marriage followed upon it, and I think that we may accept the statement of Mr Macfarlane, which is in accordance with the reasonable and legal inference, that the marriage would not have taken place if the contract had not been executed. In sustaining the marriage-contract in question we are within the rule of the case to which I have referred, and we are merely acting on the well-established principle, which applies to marriage-contracts, as it applies to all other contracts, that informality in legal execution is cured *rei interventu*.

LORD ADAM and the LORD PRESIDENT concurred.

LORD MURE and LORD SHAND were absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assolized the defenders from the conclusions of the summons.

GILL & PRINGLE, W.S.—T. & W. A. M'LAREN, W.S.—Agents.

HUGH HOGARTH AND OTHERS (Owners of "Westfalia"), Pursuers  
(Respondents).—*C. S. Dickson—Ure.*

ALEXANDER MILLER, BROTHER, & COMPANY, Defenders (Reclaimers).—*Sol.-Gen. Darling—Murray.*

No. 108.

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Hogarth v.  
Miller,  
Brother, & Co.

*Ship—Charter—Freight—Hire payable in advance—General average agreement.*—In a charter-party the charterer became bound to pay hire for a steam-vessel at a certain rate per month, and the owners to provide the officers and crew and stores.

It was stipulated that "in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On 30th September 1887, on a voyage from the West Coast of Africa to Harburg, the high-pressure engine broke down, and the vessel put in to Las Palmas in the Canary Isles, where she was pronounced to be unfit to proceed on her voyage. As repairs could not be effected in that port, the owners and charterers arranged to send from England a tug to bring the ship to Harburg, it being agreed that the cost should be treated as general average.

The ship arrived at the port of discharge by the use of her low-pressure engine and with the assistance of the tug. The charterer paid £867 as his share of general average.

In an action by the shipowner against the charterer for hire of the ship from the time she left Las Palmas with the assistance of the tug till she was discharged, *held* (1) (*rev. judgment of Lord Trayner*) that the ship had not been "in an efficient state" from the time of the accident, and that in terms of the charter-party the owner had no claim to hire for the subsequent voyage, but (2) (*dub. Lord Young*) that the charterers must pay hire for the period during which she was necessarily engaged in discharging her cargo at the port of arrival.

By charter-party, dated 26th February 1887, Alexander Miller, Brother, & Company, Glasgow, hired from Hugh Hogarth, the managing owner, the steamship "Westfalia" (1135 tons), "to be by them employed in carrying lawful and non-injurious merchandise between such ports within the following limits, viz., Swansea and Rotterdam, or other ports in the United King-

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**No. 108.** dom and Continent, to such safe ports on the West Coast of Africa as charterers direct and back to Europe. . . .”

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It was provided by the charter-party that the owners should provide and pay for the provisions and wages of the captain and crew, and for the insurance of the ship and for her stores, and “maintain her in a thoroughly efficient state in hull and machinery for the service.” On their part the charterers agreed to provide and pay for “all the coals, port charges, pilotages, agencies, commissions, expense of loading and unloading, and all other charges whatsoever, except those before stated.”

The charterers agreed “to pay for the use and hire of said vessel at the rate of 8s. sterling per gross register ton per calendar month [about £15 per day], . . . hire to continue until her redelivery to the owners (unless lost) at a safe port in the United Kingdom or on the Continent (between Havre and Hamburg inclusive). Payment of the said hire to be made in cash in Glasgow monthly in advance. . . .” The captain though appointed by the owners was to be under the direction of the charterers. The charterers were to have the option of continuing the charter for a further voyage on giving the owners fifteen days’ notice prior to the expiration of the first mentioned term.

The charter-party also provided that “In the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease till she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers’ risk and expense.” It further provided that “should the vessel be lost any freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers.”

After the completion of the first voyage the charterers exercised their option to continue the charter for a second voyage, and despatched the vessel to the West Coast of Africa for a cargo of kernels and palm-oil to be brought to Harburg on the Elbe. Having loaded her cargo she started on the homeward voyage on 14th September 1887. On the voyage she called at Las Palmas in the Canaries for coals on 29th September. The next day, 30th September, when about ninety-six miles from Las Palmas, her high-pressure engine broke down in consequence of the breaking of the piston-rod and of damage to the piston and other machinery. It was found necessary in consequence to put back to Las Palmas, which was done partly under sail and partly by means of the low-pressure engine. The ship would not steam astern, so that there was considerable difficulty found in getting her safely into the harbour.

The ship was surveyed at Las Palmas. The surveyors refused to certify that she was seaworthy and could proceed home under her low-pressure engine. Intelligence of the break-down and of the survey was telegraphed to the owners. There were not materials for repairing the vessel at Las Palmas, and it was calculated that it would take two months to send out materials and tools to repair her there. Negotiations took place between the owners and the charterers as to whether the ship should be discharged at Las Palmas, brought home and repaired, and then sent out again for the cargo, or whether an attempt should be made, taking all risks, to bring her home with her cargo under her low-pressure engine alone, or whether a tug should be sent out to tow her home. Before the course to be taken had been settled Hogarth, the managing owner, telegraphed to his underwriters’ agents on 7th October, — “Been endeavouring all week, coax ‘Westfalia’ home, own power, but the sur-

veyors consider it unwarrantable. Waiting your response about towage." No. 108. The underwriters on the ship agreed to authorise that the vessel should be towed home. The owners and charterers also agreed that that course should be adopted. The latter were anxious to get the cargo home, as they had sold it in anticipation of its arrival. A tug was hired for £1100 to go out to bring the ship home, and on a computation of the relative value of the ship in her broken-down state and of the cargo it was estimated that as a matter of general average the share of the charterers in this expense would be about £800, and that of the owners about £300.

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The tug started from Las Palmas with the "Westfalia" in tow on 18th October, and after a passage of eleven days reached the mouth of the Elbe on 29th October, and Harburg on the 31st. This length of voyage little, if at all, exceeded an average passage. During the voyage the "Westfalia" used her low-pressure engine, which had the effect of shortening the time of the voyage by three or four days.

On 1st November the ship began to discharge, the discharging being done by the charterers. Repairs were also proceeded with at the same time, without interrupting the discharge. The discharge was not completed till 10th November. This period was somewhat longer than the average period for discharging the vessel. The charterers' proportion of the expense of bringing home the ship and cargo was fixed by an average adjuster at Harburg at £867, 9s. 11d. This sum they paid to the owners. Hogarth, as managing owner, claimed payment for the hire of the ship from 18th October, when she left Las Palmas with the tug, to 10th November, when her discharge was completed. This hire at the rate stipulated in the charter-party amounted to £341, 4s. 8d.

The charterers having refused to pay this sum, the owners, on 13th March 1888, raised an action against them to recover it. They averred;—"At least from and after 18th October the said ship was in an efficient state to resume her service; and she was, from at least 18th October, engaged on her service under said charter and actively pursuing her voyage, and continued to do so till 18th November. If the said ship had not been efficient, and but for the services rendered by her upon and after 18th October, neither she nor the cargo would have reached the port of discharge till long after they did, and the defenders would thus have suffered very serious loss. The value of the services thus rendered by the said ship to the defenders, and the benefit thereby derived by the defenders, who in consequence recovered their full freight and got the said ship ready for another voyage, all precisely as if there had been no accident, amounts to not less than the sum sued for."

The defenders averred;—(Stat. 5) "From 30th September 1887, when the 'Westfalia's' machinery broke down, till 11th November 1887, when the repairs upon it were completed (which includes the period for which hire is claimed in the summons), the ship was not in an efficient state to resume her service." (Stat. 6) "The expense of bringing the ship and the cargo from Las Palmas to Harburg was submitted to an average adjuster, who fixed the proportion payable by the defenders at £867, 9s. 11d., and the defenders paid that sum to the pursuer Hogarth acting as aforesaid. Instead of the said sum of £867, 9s. 11d., the sum which the defenders would have had to pay as hire, had the ship been efficient, is the sum sued for,—that is to say, only £341, 4s. 8d."

The pursuers pleaded;—(2) In terms of the charter-party, freight being due for the period from 18th October, decree should be granted as concluded for. (3) In respect of the services rendered by the said ship to the defenders on and after 18th October, which benefited the defenders to at least the extent of the sum sued for, the pursuers are entitled to decree as concluded for.

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The defenders pleaded;—(2) In terms of the clause of the charter-party quoted, no freight having been due for the period from 30th September to 10th November, the defenders are entitled to absolvitor. (3) The charter-party having, between 18th October and 10th November, been superseded by the average agreement, and the defenders having paid their contribution under that agreement for bringing the ship and cargo to Harburg, as fixed by the average adjuster, are entitled to absolvitor, with expenses. (4) The defenders not having benefited by the services founded on, but, on the contrary, having had to pay a sum greatly in excess of the value of said services, are entitled to absolvitor, with expenses.

After a proof, from which the facts above narrated appeared, the Lord Ordinary (Trayner) pronounced this interlocutor :—“ Finds the defenders liable to the pursuers in the sum of £320 sterling, with interest as concluded for, for which decerns: Finds the defenders liable in expenses.”\*

\* “OPINION.—The ‘Westfalia’ was chartered by the defenders, they binding themselves by the charter-party to pay hire for the steamer at a certain rate per registered ton. It was stipulated, however, ‘that in the event of any loss of time from . . . break-down of machinery . . . the payment of hire shall cease until she be again in an efficient state to resume her service.’

“The high-pressure engine of the ‘Westfalia’ broke down on the morning of the 30th September, and the ship put back to Las Palmas, where she remained till 18th October, during which time she was surveyed and declared, by some of the surveyors at least, to be unseaworthy. No repairs were executed on the engine at Las Palmas, because there were no means there of executing such repairs. The ‘Westfalia’ left Las Palmas on 18th October under steam, with her low-pressure engine alone working, accompanied, and in some measure assisted, by a tug-steamer sent out from England. She arrived at Harburg, her port of destination, on the 31st October, where she delivered the part of her cargo deliverable there. The high-pressure engine was repaired at Harburg, and the ‘Westfalia’ sailed again for Antwerp with the remainder of her cargo on 11th November.

“The pursuers seek decree for the hire of the steamer for the period between 18th October and 10th November, which the defenders refuse to pay on the ground that the ‘Westfalia’ was not in ‘an efficient state to resume her service’ during that period. I think the defenders are wrong. The service which the steamer was bound to render to the defenders under the charter-party was to carry the cargo to the port of delivery. That the ‘Westfalia’ was in a condition efficiently to render this service is best proved by the fact that she did it. The cargo was carried and safely delivered. The break-down in the machinery had not rendered the steamer inefficient for her service, although it had made her less efficient than she had been; and had she proceeded on her voyage, instead of putting back when the engine broke down (as on the evidence I am prepared to hold she could quite safely have done), I think there would have been no reason for suggesting that her full hire had not been earned.

“The defenders, however, plead that they are not liable for the hire sued for, because they have had to pay more than the amount of the hire on account of the tug-steamer sent out to her aid. I think this affords no answer to the pursuers’ claim. The tug was sent out because all concerned were desirous of having the ‘Westfalia’ home as soon as possible, for the reasons stated by Mr Hogarth. Had the expense of the tug been borne by the pursuers alone, the defenders could plainly not have pleaded that the assistance rendered by the tug had absolved them from their liability for the hire of the ‘Westfalia.’ Nor, in the circumstances, can they plead this, although they paid a part of the expense of the tug, for they agreed that the whole expense of the tug should be treated as general average, and it was so treated. But payment of general average, whether the amount be large or small, does not exempt a consignee from liability for freight, nor affect the shipowner’s right to his hire, which comes to him in place

The defenders reclaimed, and argued;—The Lord Ordinary had failed No. 108. to observe the difference between this charter-party and the ordinary form of a contract of affreightment. He had decided the case on the principle that if a ship arrive, however unseaworthy, she had earned her freight. But that consideration did not apply to a charter under which freight was to be payable monthly in advance, and was to be so independent of the bringing home of the cargo that even if ship and cargo were lost, the freight was payable up to the date of the disaster. This was indeed not a charter-party for the carriage of goods, but a charter-party for the letting of the ship, the law of which was that which applied to the hiring of any moveable.<sup>1</sup> For that reason "hire," and not "freight," was correctly said in the charter to be payable by the defenders. Now, there was no doubt in fact that the ship broke down. The surveyors at Las Palmas distinctly gave it as their opinion that she could not safely go home with her cargo under her low-pressure engine alone, and the defenders were not bound to submit to the risk of allowing her to make the attempt. It was said that, assuming her unseaworthiness, the tug made her seaworthy by supplying the power in which she was deficient, and the Lord Ordinary had held that with the aid of the tug she had performed the contract. But if the ship was unseaworthy, or not "efficient," as the charter expressed it, the tug would not make her so, and the ship did not in point of fact perform her contract. She only did so by the power of the tug, for which the defenders had paid more than £800. The pursuers did not ask hire for the time when the ship lay disabled at Las Palmas. But nothing was done there to repair her, and therefore the condition on which hire was to be resumed did not come into operation till she was repaired at Harburg, and again "in an efficient state to resume her service." As to the period during which the vessel lay at Harburg to be unloaded, the vessel was not then "efficient," and hire could not be due. The repairs were not finished till the 11th November, before which time the discharge was at an end. The pursuers might as well sue the defenders for hire for the period during which the vessel lay broken down at Las Palmas. But for the contribution by the defenders towards the expense of the tug, the pursuers might have recovered hire for the discharging under the doctrine of recompense, but

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of freight. There is no evidence whatever that the arrangement made as to average was intended to supersede or affect to any extent the rights and obligations of parties under the charter-party.

"It was suggested rather than argued that the 'Westfalia' was unable to earn her hire from Las Palmas, because she was declared to be unseaworthy. But an unseaworthy ship may earn freight, of which there was a notable instance in the case of *Turner* (1 Macq. 334), where freight was earned by a ship rendered so unseaworthy during her voyage that her owners were held entitled to abandon her as a constructive loss. As I have said, the hire of the 'Westfalia' came to her owners in place of freight, and was earned if the service was rendered, whether the 'Westfalia' was seaworthy or not.

"The voyage in question from Las Palmas did not exceed much, if any, the average time occupied by the 'Westfalia' on such a voyage. Yet it does appear from the evidence of the pursuers' own witnesses that the 'Westfalia' did not go at the full speed customary with her when both her engines were working. Whether this, on a strict construction of the charter-party, entitles the defenders to any deduction from the stipulated hire, I am by no means clear, but I think they are in equity entitled to some deduction in the circumstances, and accordingly I will allow them £21, 4s. 8d., which is nearly equal to the amount of the steamer's hire for a day and half."

<sup>1</sup> Carver on Carriage by Sea, sec. 112, and sec. 542; *Havelock v. Geddes*, 1809, 10 East, 555.

No. 108. here the defenders were not *lucrati* to any extent, and nothing was due under the contract. The hire now sued for had contributed nothing to the general average expense of towing, which it ought to have done if the pursuers intended to charge hire.

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Argued for the pursuers;—The charter-party was not a mere agreement for hire of a moveable, but an ordinary contract of affreightment.<sup>1</sup> The cost of bringing home the ship, as the defenders' own pleas shewed, was to be treated as general average. On that footing they joined in getting the tug. But, as the Lord Ordinary remarked, payment of general average did not affect the shipowners' right to the hire of their ship. It was the defenders' interest to get the cargo home, as they had sold it while in transit, and for that reason they joined in getting the tug. If the pursuers alone had paid for the tug, the defenders could not have maintained their defence, and the fact that they had made a voluntary arrangement to join in hiring the tug, for their own interest, without any stipulation that they should be free from paying hire under the contract, should not make any difference. The ship, with the help of the tug, had made the voyage in an average time, and indeed could have made it under her low-pressure engine alone. At all events, with the tug's aid she was quite seaworthy and efficient.

As to the period while the ship lay at Harburg for discharge.—The ship was perfectly fit to give delivery of her cargo. She kept it dry and safe, and it made no difference for that purpose that the high-pressure engine was still unrepaired.

At advising,—

LORD JUSTICE-CLERK.—This case relates to a claim for freight, or rather claim for hire of a vessel—the “Westfalia”—for a certain period under a charter-party which is somewhat peculiar in its terms. The defenders hired the ship from the managing owner, Mr Hogarth, for the purpose of a voyage or voyages within certain limits at “8s. per gross registered ton per calendar month.” The hire was to continue during the whole time, “until her redelivery to the owners (unless lost) at a safe port in the United Kingdom or on the Continent (between Havre and Hamburg inclusive).” The ship was under the care of a captain and crew engaged by the pursuers, the captain being, however, under the defenders' orders, according to the arrangement, and acting as their servant in all matters relating to the trading purposes of the vessel.

On the 30th September, on a homeward voyage, the ship's high-pressure engine broke down, and she was compelled to put into Las Palmas in the Canary Islands. Now, the charter-party stipulated that “in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service.” Therefore no question could arise as to any period exceeding forty-eight hours during which the vessel should be at Las Palmas in an inefficient condition. No hire was payable while she lay there unable to resume her voyage. The owners, the pursuers, then entered into negotiations with the defenders as to the course to be followed. The former were desirous, if possible, that the vessel should be sent home under her low-pressure engine only, the high-pressure engine having broken down, and, as one of the telegrams expresses it, they tried to “coax her home” under the low-

<sup>1</sup> Scrutton on Charter-Parties, p. 2.

pressure engine alone—that is, they endeavoured to induce the official surveyors at Las Palmas to authorise her to come away from that port as seaworthy and make for her port of discharge under her low-pressure engine. But the surveyors declined to do this. They thought they could not allow her to leave Las Palmas under her low-pressure engine alone as a seaworthy ship. On the evidence I think they were plainly right. The very difficulty which the ship experienced in getting into the port of Las Palmas under her low-pressure engine shews, I think, that it would have been dangerous to the ship and cargo to have attempted in the condition in which she was to make the voyage to Europe. But it is not necessary for us to come to a definite conclusion on that matter. The question whether, as between the pursuers and defenders, the ship was seaworthy when at Las Palmas, seems to be conclusively settled by the fact that the surveyors at that place would not allow her to proceed to sea as a seaworthy ship.

In these circumstances the pursuers and defenders arranged that a tug should be sent out to aid the ship to come home. The expense of the tug was estimated to be £1100, and the pursuers negotiated with the defenders as to what proportion of that sum they, as interested in getting their cargo home, would be willing to pay. The pursuers' own interest, on the other hand, was to get their ship home. She could be repaired much more easily and cheaply in Europe than at Las Palmas, where there were no means of repairing her, and to which place, if she were to be repaired there, materials would have required to be sent out at a loss of time which, according to the proof, would have been about two months. It was clearly for the interest of both parties, therefore, that means should be taken to get her home at once. It was arranged that the defenders should pay £800 and the pursuers £300 of the £1100. Thereafter the tug was sent out, and on 31st October the ship arrived at Harburg under tow of the tug, with her low-pressure engine aiding. She was then discharged, the discharge being completed about 10th November.

The pursuers claim hire for the period occupied by this voyage from Las Palmas to Harburg and for the period when she lay at the latter place to be discharged. These two demands must be dealt with separately. As to the former, the pursuers say that the ship was made seaworthy by having the assistance of the tug; that it does not matter if she were in herself unseaworthy (which, indeed, they do not admit) if, being provided with the tug, she was able to come safely home, and they point to the fact that she did come safely home. That is the view which the Lord Ordinary has adopted. I cannot concur in it. The position of the parties when the negotiations began was, that they were both dealing with an unseaworthy vessel, and devising an expedient to get her home in her unseaworthy condition. I think she was plainly unseaworthy, "broken down" as the pursuers themselves expressed it in their letter, and that they were quite right to deal with the vessel on that footing. She could not come home by her own power, for the surveyors would not allow her to go, and it would take two months to repair her, and therefore as a special arrangement for a special period, during which she was unseaworthy and required to be brought home in that condition, the tug was hired and sent out. The same arrangement settled between the parties their whole relative duties and liabilities for the period during which the vessel was thus being brought home in her broken-down state, and I think the defenders' sole duty for that period was to pay the £800 which they agreed to pay as their share in that transaction. That is my opinion as to

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No. 108. the first of the periods I have mentioned, and, according to that opinion, the defenders must succeed.

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But the defenders also decline to pay hire for the period during which the vessel was being discharged at Harburg. The discharge took longer than it should have done, in consequence, it is said, of what Mr Hogarth calls in one of his letters "your bungling stevedores." It is probable enough that the stevedores, knowing that the ship could not sail again until repaired, were not very expeditious in discharging her. The defenders, in one of the letters before us, pointed this out, and told them that such delay would not do, as they, the defenders, had to pay hire for the ship while she lay for discharge. Now, I think that was right, and that the defenders must pay for a portion of this disputed period at least. Though unseaworthy for the purpose of navigation, the ship was lying at the port with their cargo in her, keeping it dry and safe, and she was quite fit to be discharged in the ordinary way without special labour owing to her condition. Therefore during the time of discharge she was fulfilling all the duty she could be called on to fulfil, and her power to do so was not affected by her unfitness to go to sea, and therefore I hold that the hirers must pay for the time of discharge. But it is another question whether the defenders must pay for the whole period. I think they must pay for so many days as with ordinary promptitude in the work it would have taken to discharge the ship. My opinion therefore is that the interlocutor of the Lord Ordinary ought to be recalled, and that the pursuers should only have decree for hire for so many days as would ordinarily be occupied in discharging the vessel.

LORD YOUNG.—I concur. In order, however, to express my own opinion upon this question of interest (upon which, but that we are differing from the Lord Ordinary, I should have simply concurred with your Lordship), I think it desirable to express my own views in my own language.

The action is for hire of a ship from 18th October to 10th November, under a charter-party dated 24th February 1887. If during that period the vessel was in the defenders' hands in a condition of efficiency as required by the charter-party, the action is unanswerable. The question therefore is whether during that period the vessel was in the hands of the defenders in an efficient condition. My opinion is that she was not. The charter-party though not at all unprecedented is a somewhat unusual one. It is not a contract for the carriage of goods. It is a contract for the hire of a ship, and the shipowners are no more carriers of goods than would be the owners of a waggon who hired it out to a carrier of goods, or to a man who wished it to carry his own goods. This vessel then was hired with the undertaking on the part of the owner to maintain it in an efficient state in hull and machinery. The charterer is to employ it only in carrying "lawful and non-injurious merchandise," and between ports within certain wide limits. The hire is to be paid monthly in advance, and its payment does not at all depend on the carriage of goods, for it is to be paid though no goods are carried, or though the goods are lost, and indeed assuming a loss it would have been paid in advance up to the hour of the loss. This, of course, differs much from the case of an ordinary charter-party, under which, as a contract for the carriage of goods, there is no freight payable except for goods delivered in safety and in like condition as when shipped. That is a significant distinction between this charter-party and an ordinary charter-party, under which if the ship after

performing the longest voyage were lost at the harbour mouth, no freight would be payable. No. 108.

Now, in this charter-party there is necessarily a provision made for a calamity overtaking the vessel. Under the ordinary contract if the voyage is impeded by some calamity, it will not signify that there has been delay. The vessel on arrival and safe delivery of her cargo will earn her freight. But here the provision for a break-down of the ship (exceeding forty-eight hours), is that the payment of hire shall cease until she be in an efficient state to resume her service.

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Such being the contract under which it is said that the vessel was in the defenders' hands during the period sued for, what are the facts? The ship's high-pressure engine broke down on 30th September. She thereby ceased to be in an efficient state in hull and machinery. She was with some difficulty (which is described in the evidence) got into Las Palmas in her broken-down, inefficient, and unseaworthy condition on 2d October. The goods however were safe on board her. When was anything done to her to render her safe and efficient? Nothing was done to her till she reached Harburg. Therefore if she was inefficient when the accident occurred to her on 30th September, and continued so until 18th October, she remained inefficient—a broken-down, unseaworthy ship—until she reached Harburg at all events. I think it is admitted by the pursuers that she was inefficient from 30th September till she left Las Palmas on 18th October, for, if not, they would be demanding hire for that period,—Why not, if she was efficient? Now I put the case during the argument—Suppose the charterer had found another vessel in good condition at Las Palmas which could bring home his goods, would he not have been entitled to take his goods out of the “Westfalia,” and bring them home in it? The answer I got at first was “Certainly,” but that was afterwards modified to “Certainly, if the ship was unseaworthy, which is not admitted.” Assuming the unseaworthiness therefore, it was conceded that the owner of the cargo might tranship it to another ship. That must be because in that case this contract by the charter-party was at an end. Now that is a mere illustration, because there was no other ship at Las Palmas to which the cargo could have been transferred. But it shews that the contract by the charter-party, and the obligation to pay hire, had ceased if the ship was unseaworthy, and the owner of the cargo decided to get his cargo home in another way. Let me put another illustration. Suppose the ship had been obliged, instead of putting into Las Palmas, to put into a desert island in her unseaworthy condition, the cargo being safe but useless in the place where it lay, the owner would have required to send out for it and bring it to a place in which it would have some value, and would have held the contract to pay hire for the vessel at an end. Indeed, the case of putting into Las Palmas is not very different from that case, for the cargo was of little or no value there, and the ship could not in reasonable time have been repaired there. It was the interest of the cargo-owner to have his cargo brought to Harburg, which this ship could not do, and it was the interest of the shipowner to have his ship brought where it could be repaired and employed. Accordingly, the owner of the cargo agreed with the shipowner that the best way of rescuing both was to have the vessel towed to Harburg, for although the ship could not bring the cargo she could hold it. The expense was to be divided in the proportion or ratio of the value of the cargo to the value of the ship. That was not done under the charter-party. The charter-



No. 108. party had nothing to do with it. It would have been the appropriate arrangement if there had been no charter-party at all. It might possibly be called a salvage agreement, but at anyrate hire had nothing to do with it.

Mar. 15, 1889. *Hogarth v. Miller, Brother, & Co.* It is said by the Lord Ordinary, and it was argued to us, that "had the expense of the tug been borne by the pursuers alone, the defenders could plainly not have pleaded that the assistance rendered by the tug had absolved them from their liability for the hire of the 'Westfalia.' Nor, in the circumstances, can they plead this, although they paid a part of the expense of the tug, for they agreed that the whole expense of the tug should be treated as general average, and it was so treated." I am not, however, at all sure that the claim of the ship for freight would have been irresistible if her owner alone had paid for the tug, unless indeed the cargo-owner had consented to that course. To take again the supposition that there had been at Las Palmas another ship ready to take the cargo home, the owner of the cargo could surely have chosen to send the cargo home by it, for it is not the same thing to have a valuable cargo tugged home on board an unseaworthy ship as to have it carried home by a seaworthy ship. I think that the merchant would have been quite entitled to decline such an offer, and that the shipowner would not have been fulfilling his obligation under the charter-party by offering to substitute a tug for the ship's own power. But that was not done. The ship came to Harburg under quite another arrangement, and I think nothing can be decreed for under this action for that voyage. I do not, of course, think for a moment that a mere temporary break-down which can speedily be repaired would bring this contract to an end. Under the contract there is a provision for such a case. Indeed, the contract is that any stoppage which is not greater than forty-eight hours is to be allowed without any damage at all, and if it exceeded that time there must be a limit, and it would be exceeding that limit if, as the pursuers contend, the agreement for hire were allowed to go on as before, deducting only the time during which the cargo was lying useless at Las Palmas.

The vessel arrived at Harburg on 31st October still in an inefficient condition, and the owners set about repairing her so as to return her to the same merchants, the defenders, as soon as the repairs should be completed. The question as to the liability to pay freight while the cargo was being taken out of her is attended with some doubt in my mind. My inclination is to allow nothing, but as a solution of the difficulty, I would assent that there should be allowed, in the circumstances, a sum for a reasonable period in which to discharge the ship, and that four days would be such a period, and the sum £60.

LORD LEE.—I concur, though it is with some hesitation that I have come to a conclusion opposed to that of the Lord Ordinary, whose experience and authority on questions of maritime law and practice I desire to recognise. But I do not find it necessary to differ from the Lord Ordinary in point of law. I assent to his Lordship's observation that "payment of general average . . . does not exempt the consignee from liability for freight, nor affect the shipowner's right to his hire, which comes to him in place of freight." But it appears to me that the question is whether the arrangement made in this case between the shipowner and the charterers was such as to give to the shipowner a claim for hire under the contract for the period between the 18th October and the discharge of the cargo at Harburg, notwithstanding the condition of the steamer during that time. That question seems to depend on whether the arrangement was one

for getting the steamship to a place where she could be repaired and discharged, No. 108. or was one whereby she was to be held as efficient for her service. The words of the charter-party must be attended to. They are very explicit. They are "that in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." Now, it is to be observed that this is not an agreement that time lost in consequence of a break-down shall be deducted. It is an agreement that in case of a break-down the hire shall cease until the ship is again efficient for her service. I think that when the break-down which took place here had occurred, and when the shipowner was making the arrangement about bringing the ship home which he did make, he should have made it clear that the hire was to go on from the date of the arrival of the tug, if he intended to maintain that it did so. The ship could not be repaired at Las Palmas, and the shipowner had been endeavouring, as the telegram to which reference has been made expressed it, to "coax" the surveyors to let her return home with her low-pressure engine alone. But that attempt had failed. I think that knowing as the shipowner did the clause of the charter-party, it was for him when he came to arrange with the owner of the cargo that the tug should be sent out—an arrangement which the owner of the cargo was not bound to agree to—to see that it was understood as a part of the arrangement that the hire of the vessel should run on as if the ship were efficient and the break-down had not taken place. But he made no such provision in coming to that arrangement.

*Prima facie* his position was, after 30th September, that of owner of a ship which was not in a position to earn hire under the charter-party. The view of the Lord Ordinary is that the ship was not inefficient, for he says, "The cargo was carried and safely delivered. The break-down in the machinery had not rendered the steamer inefficient for her service, though it had made her less efficient than she had been; and had she proceeded on her voyage instead of putting back when the engine broke down (as on the evidence I am prepared to hold she could quite safely have done), I think there would have been no reason for suggesting that her full hire had not been earned." I think that view is disproved by the evidence. The ship did not by her own power make the voyage, and she was not fit to make it. It was made by means of the tug. In these circumstances, I concur with both your Lordships in holding that the hire for the voyage from Las Palmas to Harburg cannot be claimed.

There remains the question as to the time during which the ship was unloaded at Harburg. I think the ship while she lay there was efficient for the purpose of safely holding the cargo and discharging it. The view Lord Young has expressed on this matter is certainly difficult to overcome, but I think it is possible to hold that, while the ship lay in Harburg for the purpose of discharging cargo, she was not inefficient for her service. As to the time which ought to be allowed for that, I think that there is some evidence in the letter of 7th November 1887 addressed to the stevedores,—“We were very much surprised and annoyed to learn from your letter of 3d inst., received this morning, that the ‘Westfalia’s’ kernels would only be finished discharging on Saturday, thereby taking a whole week, or at the very least double the time that should have been spent.” I think, having in view that letter, that the shipowner may be

- No. 108. allowed four days as the time reasonably necessary for the discharge. For the shipowner was not responsible for slowness of the stavedore.

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LORD RUTHERFURD CLARK was absent.

THIS interlocutor was pronounced:—"Recall the interlocutor: Find the defenders liable to the pursuers in the sum of £60 sterling: Ordain them to make payment to them of that sum accordingly: *Quoad ultra* assoilzie the defenders from the conclusions of the action: Find the pursuers liable to them in expenses: Remit," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—DAVID TURNBULL, W.S.—Agents.

- No. 109. MRS JANE M'NAB AND OTHERS, Pursuers (Appellants).—*Gloag—Murray*.  
Mar. 16, 1889. DAVID WILKIE CLARKE, Respondent.—*D.-F. Mackintosh—Salvesen*.  
M'Nab v.  
Clarke.

*Cessio Bonorum—Notour bankruptcy—Insolvency—Prima facie evidence—Expiry of charge on undisputed debt—Debtors Act, 1880 (43 and 44 Vict. c. 34), secs. 6, 8, and 9.*—Section 6 of the Debtors Act, 1880, provides that in any case under the Act where imprisonment is rendered incompetent "notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment."

Section 8 provides that any creditor of a notour bankrupt may present a petition to the Sheriff, setting forth that his debtor "is unable to pay his debts," and praying for decree of *cessio*.

Section 9 provides that on any such petition being presented, "(1) the Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy," shall proceed with the petition in the manner provided.

*Held* that where in a petition for *cessio* there is produced an expired charge on an undisputed debt, neither paid nor offered to be paid, a presumption of insolvency is raised, and that therefore *prima facie* evidence of notour bankruptcy, within the meaning of section 9 of the Debtors Act, 1880, is established.

*Observed* that "insolvency" means, in the sense of the Act, present inability to pay a debt due.

*Right in security—Bond and disposition in security—Personal obligation—Sale.*—*Held* (following *M'Whirter v. M'Culloch's Trustees*, 14 R. 918) that the creditor in a bond and disposition in security, in the form prescribed by the Titles to Land Consolidation Act, 1868, is entitled to recover his debt either by proceeding on the personal obligation, or by exercising the power of sale contained in the bond.

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ON 13th October 1876 David Wilkie Clarke and others granted a bond and disposition in security over certain heritable subjects in favour of Mrs Jane M'Nab and others, in respect of a loan of £2000.

ON 24th January 1888 the lenders charged Clarke, under the personal obligation in the bond, to repay the loan.

The days of charge expired on January 31st without payment being made.

ON that day Clarke presented a note of suspension of the charge, but the note was refused on 14th March by the Lord Ordinary on the Bills, and on 26th May the First Division adhered to his interlocutor.<sup>1</sup>

ON 4th October the creditors in the bond intimated to Clarke, in terms of the A. S. of 22d December 1882, their intention of presenting a petition for *cessio*, and on 15th October they presented a petition in the Sheriff Court at Dundee.

The state of debt sent with the intimation and lodged with the petition

<sup>1</sup> See *Clarke v. M'Nab*, May 26, 1888, 15 R. 670.

included interest on the debt down to the date of the petition, and the expenses of presenting the petition. No. 109.

On 21st November the Sheriff-substitute (Campbell Smith) pronounced this interlocutor:—"Finds that the pursuers' averments and relative documentary evidence do not sufficiently warrant the granting of the petition, in respect, and *separatim*, first, that they do not indicate any interest that the pursuers have to refrain from exercising the power of sale and preferring another process manifestly penal and ruinous to their debtor; second, that the intimation demanding payment and threatening cessio involves a *pluris petitio* in regard to the debt due, and was, moreover, made four days before it could appear that the charge for payment would be disobeyed; and third, that the inference deducible from the documents does not amount to *prima facie* evidence of insolvency; therefore dismisses the petition."\* Mar. 16, 1889.  
M'Nab v.  
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The petitioners appealed, and argued;—The first ground stated by the Sheriff was ruled by the case of *M'Whirter v. M'Culloch's Trustees*.<sup>1</sup> The second ground proceeded partly upon an error in fact, as the charge had expired months before the intimation of the petition; and further, the doctrine of *pluris petitio* was only applicable to adjudications. Besides, the petitioner was entitled to claim interest up to the date of the petition, and the expenses of bringing it. With regard to the third ground, there was ample *prima facie* evidence of insolvency and notour bankruptcy. The expiry of the days of charge without payment being made raised a presumption of insolvency, particularly when a suspension of the charge had been refused, as that took away the only other possible ground for nonpayment, viz., that the debt was not really due. Insolvency was presumed in such circumstances.<sup>2</sup>

Argued for the respondent;—It could not be maintained after the decision in *M'Whirter* that the Sheriff's first ground of decision was well founded. On the second ground.—The claim here was in excess of what was due, and therefore the whole claim was bad. The expenses of the petition had not been incurred when the intimation and state of debt was sent to the respondent. On the third ground.—An expired charge was not of itself sufficient to create a presumption of insolvency. There might be other grounds on which the debtor refused to pay the sum claimed, e.g., that the debt was not due. Prior to the Act of 1880 an expired charge alone was not sufficient to establish insolvency, and the

\* "NOTE.— . . . There is no evidence of insolvency except the expired charge, and I am not disposed to hold that every expired charge for every debt, however small, is proof of notour bankruptcy against any debtor, however rich, more especially when the creditor has a power of sale, be it under a bond or a pawning, and shrinks at the same time from taking payment of his own debt in the readiest way, as also in proving his averment of insolvency if that averment be really true. But I am satisfied in this case the petitioners' own state of debt contains *prima facie* evidence of solvency. This state shews that within the last six months, or rather five months, the rents of the property exceeded the interests and outlays by £80, and that in that time the petitioners' debt had been reduced from £2000 to £1907. Therefore it seems to me that the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt, and about the regular and termly payment of interest, that there is no *prima facie* evidence of insolvency, and that there is *prima facie* evidence that the process is attempted for some other and less justifiable object than the mere payment of debt."

<sup>1</sup> *M'Whirter v. M'Culloch's Trustees*, July 9, 1887, 14 R. 918.

<sup>2</sup> Bell's Comm. p. 317, 5th edit.; *Black v. Watson*, Nov. 29, 1881, 9 R. 167; *Knowles v. Crooks and Balgarnie*, Feb. 1, 1865, 3 Macph. 457, 37 Scot. Jur. 226; *Teenan's Trustees v. Teenan*, March 19, 1886, 13 R. 833.

No. 109. Debtors Act of 1880, which put a debtor so completely at the mercy of his creditor, ought to be very strictly construed, and the standard of evidence required to bring that Act into operation should be very high. Here insolvency was to be inferred solely on the strength of an expired charge nine months old, which could not give rise to any such presumption.

Mar. 16, 1889.  
M'Nab v.  
Clarke.

At advising,—

LORD ADAM.—The appellants in this case are the creditors of the respondent, David Wilkie Clarke, under a bond and disposition in security, dated 13th October 1876, for £2000, under which Clarke and the other granters of the bond bound themselves to pay that sum conjunctly and severally, and conveyed certain heritable subjects in security for the debt.

On 24th January 1888 the respondent Clarke was charged under the personal obligation in the bond to pay the amount of the debt. The charge expired on 31st January, and on the same day the debtor brought a suspension of the charge. On 14th March the Lord Ordinary in the Bill-Chamber refused the note, and his interlocutor was adhered to on 26th May by this Division.

On 4th October the appellants intimated to the respondent, in terms of the Act of Sederunt 22d December 1882, that they intended to apply for an order for cessio, and they did so on 15th October.

It appears that the respondent lodged a caveat, the result being that both parties were heard before the Sheriff-substitute, who thereafter pronounced the interlocutor of 21st November, which is now appealed against.

In that interlocutor the Sheriff-substitute finds that “the pursuers’ averments and relative documentary evidence do not sufficiently warrant the granting of the petition.” He gives three reasons for this finding; the first is, “that they do not indicate any interest that the pursuers have to refrain from exercising the power of sale, and preferring another process manifestly penal and ruinous to their debtor.” Now, it is quite settled that the creditor in a bond and disposition in security is entitled to proceed either on the personal obligation in the bond or to exercise his power of sale. It is entirely in his discretion which he does, and I need only add that that was decided in the recent case of *M'Whirter*, 14 R. 918. There is nothing therefore in the Sheriff's first ground of judgment.

The Sheriff's second ground is, that “the intimation demanding payment and threatening cessio involves a *pluris petitio* in regard to the debt due, and was, moreover, made four days before it could appear that the charge for payment would be disobeyed.” With reference to the last observation, as I have already pointed out, it is not true in point of fact, because the charge expired on January 31st, and intimation of the petition was not given till October. With the doctrine of *pluris petitio* we have nothing to do, as it is admitted that the appellants are creditors of the respondent, and that is sufficient to entitle them to proceed with their petition.

The third ground is thus stated,—“The inference deducible from the documents does not amount to *prima facie* evidence of insolvency.” It is this last point which we have taken time to consider, but I am of opinion that it is equally ill-founded with the other reasons stated by the Sheriff. The question depends on a consideration of the terms of the Debtors Act, 1880 (43 and 44 Vict. c. 34), under which the cessio proceedings are taken. The 8th section of that Act provides that “any creditor of a debtor who is notour bankrupt within

the meaning of the Bankruptcy (Scotland) Act, 1856, or of this Act, may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of cessio." To see what is notour bankruptcy under that Act we must turn to sec. 6, which provides that "In any case in which under the provisions of this Act imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment . . ." That being so, sec. 9 shews what the Sheriff has to do when a petition for cessio is presented. It provides, subsec. 1, that "the Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette* intimating that such petition has been presented," and so on.

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Now we have undoubtedly here one element of notour bankruptcy, viz, the expiry of the days of charge without payment being made, and, therefore, the only other thing to consider is whether there is *prima facie* evidence of insolvency. That is the question which the Sheriff has negatived. Now, we must first ascertain what is the meaning of "insolvency" in the sense of the Act. I think it just means present inability to pay. If a man cannot meet his obligations he is insolvent, and it is no answer for him to say that if he is given time to realise his means he will some day be able to pay.

If that is the meaning of "insolvency" then I think that the fact that the days of charge have expired without payment is *prima facie* evidence of insolvency; I do not see how there could be better *prima facie* evidence. The presumption is that the debt has not been paid because the debtor could not pay. It might be said that the debt was not paid because it was not really due, but that answer is not open here, for the charge has been under suspension since already, and as the suspension was refused, and payment has not yet been made, we must take it that the debtor cannot pay.

But we have further a statement of the Sheriff's grounds for thinking that he had not before him *prima facie* evidence of insolvency. At the end of his note he says,—“But I am satisfied in this case the petitioners' own state of debt contains *prima facie* evidence of solvency. This state shews that within the last six months, or rather five months, the rents of the property exceeded the interests and outlays by £80, and that in that time the petitioners' debt had been reduced from £2000 to £1907. Therefore it seems to me that the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt, and about the regular and termly payment of interest, that there is no *prima facie* evidence of insolvency, and that there is *prima facie* evidence that the process is attempted for some other and less justifiable object than the mere payment of debt.” It is quite clear where the error of the Sheriff lies. He says that there is no *prima facie* evidence of insolvency, because the petitioners can be under no reasonable apprehension of ultimate payment. But as I have already stated the question is not one of ultimate payment, the question is whether there is evidence that the debtor can make present payment. It appears to me on the whole matter that there was here ample *prima facie* evidence of insolvency, and I have no doubt that when

**No. 109.** the expired charge was produced there was *prima facie* evidence of notour bankruptcy, and that therefore the Sheriff should have gone on to grant the prayer of the petition. I think, therefore, we should remit to him to proceed with the petition.

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**LORD LEE.**—My opinion is that the Sheriff-substitute has gone too fast in throwing out this petition. The case, as was explained to us, was before him on a caveat, and the only question therefore was, whether the petition should be entertained and proceeded with in terms of the statute. It was admitted at the bar that the Sheriff-substitute had erred in supposing that the charge had not expired when the notice was given. There was no dispute, at least no relevant dispute, that the petitioner was a creditor, and I think it impossible to hold that the application was vitiated, either by the fact that interest on the debt was calculated down to the date of presenting the petition, or by the expenses of presenting the petition being stated as a part of the claim. There was therefore a competent petition before the Sheriff.

The only point, therefore, for consideration is, whether there was *prima facie* evidence of notour bankruptcy sufficient to entitle the petitioner to a warrant in terms of the 9th section of the Act. I think that the statute requires the Sheriff to consider this point, and that he is not bound to accept, as in all cases sufficient and conclusive, the fact that a charge for payment has expired. To constitute notour bankruptcy the statute requires that insolvency shall concur with the expired charge. But in the case of an undisputed debt, neither paid nor offered to be paid, I think that an expired charge is sufficient to raise a presumption of insolvency, and therefore affords *prima facie* evidence of notour bankruptcy.

The provisions of the second and third subsections of clause 9, as to the procedure which is to follow, appear to me sufficient to enable the Sheriff to afford the bankrupt an opportunity at a later stage of shewing that the petition ought to be refused.

**LORD PRESIDENT.**—I am entirely of the same opinion.

**LORD MURE** and **LORD SHAND** were absent.

THE COURT recalled the interlocutor appealed against, and remitted to the Sheriff to proceed.

J. SMITH CLARK, S.S.C.—WATT & ANDERSON, S.S.C.—Agents.

**No. 110.** MARGARET GRANT OR WEIR, Pursuer (Appellant).—*A. J. Young—M'Lennan.*

Mar. 16, 1889.  
Weir v. Coltness Iron Co., Limited.

THE COLTNESS IRON COMPANY, LIMITED, Defenders (Respondents).—*J. C. Thomson—C. S. Dickson.*

*Reparation—Title to sue—Parent and Child—Bastard.*—Held that the mother of a bastard child has no title to sue an action of reparation in respect of his death.

**MRS MARGARET WEIR** raised an action in the Sheriff Court of Lanarkshire at Airdrie against the Coltness Iron Company, Limited. She averred that on 5th May 1888 her illegitimate son, James Grant, a workman in the defenders' employment, had been killed through their fault in one of their pits.

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She further averred that the deceased had been born prior to her marriage with her husband Robert Weir, a miner, that Weir was not his father, that he (deceased) resided with her and contributed to her support, and that she was living apart from Weir.

The defenders pleaded, *inter alia* ;—(1) No title to sue.

The Sheriff-substitute (Mair) repelled *in hoc statu* this plea, and before answer allowed a proof.\*

The pursuer appealed for jury trial, and proposed an issue for the trial of the cause.

The defenders opposed the motion, and argued;—There was no title in the mother of a bastard to sue for damages in respect of his death. The case of *Renton* referred to by the Sheriff-substitute was the only instance of such an action being entertained. The Court had been always careful not to extend the class of persons who might sue such actions, and had confined the class to (1) husbands and wives; (2) fathers and mothers of legitimate children; and (3) legitimate children. The Court had refused to entertain such actions at the instance of a sister in respect of the death of her brother.<sup>1</sup> It would be anomalous to exclude that relation and to include the relation of bastards to their parents. The pursuer had a husband and legitimate children to support her if indigent, and therefore she could not have obtained support from the deceased.<sup>2</sup> In England a mother could not sue in respect of the death of a bastard child, for Lord Campbell's Act gave no such title.

Argued for the pursuer;—The mother of a bastard son was, it might be, as much injured in her feelings by his death from fault as the mother of a legitimate son. She had also the same right to support from him if indigent.<sup>3</sup> The cases quoted for the defenders shewed that on these two

\* "NOTE— . . . The defenders plead first, that the pursuer has no title to sue. . . . The first of these pleas raises the question whether the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child. So far as I am aware, this question has never been authoritatively decided by the supreme Court. Cases of reparation have hitherto been confined to fathers and mothers and their lawful children, and in the two cases of *Greenhorn v. Addie*, 13th June 1855, 17 D. 860, and *Eisten v. North British Railway*, 13th July 1870, 8 Macph. 980, the Court has refused to sustain the title of brothers and sisters to sue such actions. In the latter case, however, the Lord President (Inglist) observed,—‘It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination, our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium* where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved.’

“In the present case the deceased was the pursuer's illegitimate son, and there can be no doubt, as between the two, there existed during life a mutual obligation of support in case of necessity. In the recent case of *Samson v. Davie*, 26th November 1886, 14 Rettie, 113, it was held that a bastard son was liable to maintain his mother. This, in my opinion, is sufficient for the disposal of the defenders' plea. But the question was raised in the case of *Renton v. North British Railway*, 1869, to be found only in the 6th volume of the *Scottish Law Reporter*, 255, in which it was held by Lord Jerviswoode (Ordinary) that the mother of an ‘illegitimate child has a title to sue an action of damages and *solatium* for the death of her child.’ So far as appears, the judgment of the Lord Ordinary was acquiesced in. . . .”

<sup>1</sup> *Greenhorn v. Addie*, June 13, 1855, 17 D. 860; *Eisten v. North British Railway Co.*, July 13, 1870, 8 Macph. 980, 42 Scot. Jur. 575.

<sup>2</sup> *Samson v. Davie*, Nov. 26, 1886, 14 R. 113.



No. 110. considerations in combination the title to sue rested. They were not both present in the case of brother and sister, and that was the reason of the judgment in the cases of *Greenhorn* and *Eisten*.  
 Mar. 16, 1889. At advising,—  
*Weir v. Coltness Iron Co., Limited.*

LORD YOUNG.—This is an action by the mother of a bastard. It is raised in respect of injuries received by the bastard (who was a young man of twenty, residing with the pursuer) in a coal-pit in which he worked. In consequence of the injuries he died, and the action is raised for damages and *solatium* for his death. The preliminary defence is stated that the pursuer has no title to sue. The Sheriff-substitute has repelled the plea, and decided that the mother of a bastard has a title to sue an action of damages for *solatium* for the death of the child. He says,—“So far as I am aware, this question has never been authoritatively decided by the supreme Court. Cases of reparation have hitherto been confined to fathers and mothers and their lawful children, and in the two cases of *Greenhorn v. Addie*, 13th June 1855, 17 D. 860, and *Eisten v. North British Railway*, 13th July 1870, 8 Macph. 980, the Court has refused to sustain the title of brothers or sisters to sue such actions. In the latter case, however, the Lord President (Inglis) observed,—‘It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life between the deceased and the claimant of a mutual obligation of support in case of necessity. On these two considerations in combination, our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium*, where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved.’”

I think it is accurately stated in what I have read that, with one exception, to which I shall immediately allude, no such action as that now before us has been sustained. Cases of reparation have, as the Sheriff-substitute says (apart from the case of spouses) been confined to fathers and mothers and their lawful children. There is therefore no custom,—that is, no common law,—extending the title beyond fathers and mothers and their legitimate children. Nor is there any statute extending the right to sue further. In England the law on the subject is wholly statutory. It depends on Lord Campbell’s Act, and that Act gives no right to recover at the instance of the parent against a person who by his fault has caused an injury to a bastard child of that parent. That is the latest expression of the view of the Legislature on the subject. There is therefore neither practice, which is just common law, nor statute which can be cited in support of the action.

It seems, indeed, that in one such action—an action by a mother for the death of her illegitimate child—the title to sue was sustained by Lord Jervis-woode. His Lordship repelled the plea of no title to sue, and that case went no further. The question remains open for us, notwithstanding that decision in the Outer-House, for I cannot regard that solitary expression of opinion by a Lord Ordinary in the Outer-House as evidence of the state of the common law.

Another case which was laid before us in argument was the recent decision in *Samson v. Davie*, 14 R. 113, in which it was held in this Division of the Court that a bastard son was liable to an inspector of poor in relief of advances made to his mother. If that case were decisive of the present we should have required further argument, and probably a consultation with other Judges, before coming

to the conclusion to which we have come. But I think it is not conclusive of the present. I dissented from the opinion of the majority, and am still, for my own part, of the opinion I then expressed, and I think the case merits reconsideration. I may mention, as another reason for its being reconsidered on a fitting occasion, that the parties, I have been informed, after an appeal had been taken to the House of Lords, settled the case on the footing that the judgment should be held as reversed, with costs. But it is sufficient for the present purpose that the case does not rule the present. The question here is one of title to sue, and I am of opinion that the pursuer has no title to sue. In our practice in Scotland we have limited the right to sue to parents and legitimate children, and there is no authority for extending it. If that practice is thought to limit it too much there must be legislation on the matter. I do not know whether if there were such it would be thought fit by the Legislature to make the law in Scotland different in this respect from the law as the statute which regulates the matter in England has fixed it. Probably that would not be done.

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These actions are of a somewhat anomalous character. When children sue in respect of the death of a father they sue the wrongdoer as a body or family. If a man who had numerous children, some of them out in the world and others living in family with him, were killed through the fault of a wrongdoer, each individual child could not bring an action for his death, so that if there were a dozen children there would be a dozen actions. They could sue only all as a family, and their one action would be for distribution of the compensation among all who suffered.

Again, it was argued that wherever the feelings of the relative were grievously injured there might be an action for *solatium* against the party in fault. But that cannot be maintained as an accurate proposition in law, for the law refuses actions at the instance of a sister for her brother's death, or at the instance of a brother for that of a sister. Yet the brother and sister may have lived many years together, and loved each other as much as it is possible for people to do, and the death of the brother may have deprived the sister of her home. But yet the law does not allow an action in such circumstances.

I think it would be a source of great perplexity if we admitted such actions. A woman might have many bastards, and if this case were decided otherwise than we propose to do she might have an action for the death of each of them from fault, and in like manner each of them would have an action for her death. That would surely be extravagant. I think that there must be some limit, and that it should be according to our customary law, which does not extend the title to sue further than the case of parents and their legitimate children.

I therefore am of opinion that we should sustain the plea of no title to sue, and dismiss this action.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD LEE concurred.

THE COURT recalled the interlocutor of the Sheriff-substitute, sustained the plea of no title to sue, and dismissed the action.

THOMAS LIDDLE, S.S.C.—W. G. L. WINCHESTER, W.S.—Agents.

No. 111.

MARY CAIRNS, Pursuer (Appellant).—*Law.*CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—*R. Johnstone.*

Mar. 19, 1889.  
Cairns v. Caledonian Railway Co.

*Reparation—Railway—Master and Servant—Reasonable precautions for safety of workmen.*—A surfaceman in the employment of a railway company was killed, when engaged in work on a siding, by being struck by the tender of an engine which was proceeding, tender first, along the siding towards an engine-shed. It was necessary to take the engine in that way to the engine-shed, and it was not being driven at excessive speed. The engine-driver's view of the place where the deceased and the men working with him were engaged was obstructed by the coals on the tender till it was too late to avert the accident. No other precaution to warn the deceased had been taken than a whistle from the engine, but this, owing to frequent whistling and other noises at the place in question, had not attracted notice.

In an action by the widow of the deceased against the railway company for damages for his death, *held* that the defenders were responsible for the accident, in respect that they had failed to take precautions for securing that the line should be cleared before engines moving tender first were allowed to pass the place at which the accident occurred.

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MRS MARY CAIRNS raised an action against the Caledonian Railway Company for damages in respect of the death of her husband, Francis Cairns, surfaceman, Lochee, through the fault, as she alleged, of the defenders.

The pursuer's husband was a surfaceman in the defenders' employment. On 8th July 1887 he was killed on the defenders' line in the following circumstances. He was engaged on the morning of that day, along with other surfacemen, in "packing sleepers" on a siding between the end of Magdalen Green, Dundee, and the defenders' passenger station in Union Street there. The siding was one leading from the main line between Dundee and Perth to an engine-shed, and was one of a large number of sidings covering a breadth of several hundred yards. Many engines passed over these sidings in the course of the day, and there was necessarily a great deal of noise from shunting of waggons and whistling of engines. While the deceased was engaged at work about seven o'clock A.M., an engine which had brought a goods train from Carlisle overnight and had cast it off at the goods station, which lay somewhat to the east of the point at which the surfacemen were working, had to return towards the engine-shed, to the west of that point. In order to do this, it had to proceed along the part of the siding at which the sleepers were being packed, and as the turning-tables were at the engine-shed and not at the goods station, it had to proceed backwards, having the tender in which the coals were heaped up in front. The engine-driver whistled before leaving the goods-shed at the main line, but owing to the frequency of whistling at the place, or to some other cause, his whistle did not attract the attention of the surfacemen. The engine-driver was engaged leaning over the side of the engine watching whether a certain signal dropped, and whether the points were clear, when he suddenly observed the surfacemen. At that time the engine was about fifty yards from them, and travelling at the rate of about twelve miles an hour. He at once whistled, and did all he could to bring the engine to a stand. The men did not, however, observe him in time for them all to escape, and the engine was only brought to a stand just as the tender struck the deceased. One of the wheels of it ran over him, and he was mortally injured.

The above facts were admitted or proved.

The pursuer further averred that it was the duty and custom of the defenders to have a flagman or other person to watch the sidings and lines

in order to warn the surfacemen of danger, and to warn the drivers of approaching engines. It was not, however, proved that it was the custom to provide a man to perform this duty, and the defenders led evidence to shew that there was no such custom where men were working in such a place as that in question. No. 111.  
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Cairns v. Calderonian Railway Co.

On 8th August 1888 the Sheriff-substitute (Campbell Smith) pronounced this interlocutor:—"Finds that on or about 8th July 1887 the pursuer's late husband, while working on the defenders' line of railway, was struck down by a tender driven in front of an engine, and sustained injuries from which he died in a few hours: Finds that his death occurred through the fault of the defenders, and to the loss, injury, and damage of the pursuer: Therefore finds the defenders liable in damages; assesses the same at £40 sterling, for which decerns in favour of the pursuer."\*

The defenders appealed to the Sheriff (Thomson), who on 6th October 1888 recalled the interlocutor of the Sheriff-substitute, sustained the defences, and assolizied the defenders.†

\* "NOTE.— . . . Several very slight and inexpensive precautions might have prevented the loss of this man's life. I do not know enough of railway matters to be able so much as to guess at them all; but I feel perfectly certain that it would not have required much intelligence and inventive skill, applied by anticipation, to have prevented this man's death; and I am of opinion that it is the duty of railway companies to devise special precautions for special localities—such as this crowded, noisy locality, in order to avoid the sacrifice of human life, even to the extent of trying to preserve men and women against their own negligence. Now, the death in question could have been prevented had there been a man or boy or even a woman watching for the safety of the squad (and many a maimed victim of previous accidents would be glad to watch at a small remuneration); it could have been prevented by the use of a red flag, or rather of two red flags; it could have been prevented by placing fog-signals at a moderate distance from the squad, or a spring gun that the engine would fire, or a bell that it would ring in passing, and in many other ways. . . ."

† "NOTE.— . . . The only fault alleged by her on record is the failure to place 'a flagman or other person to watch the said sidings and lines, in order to warn the drivers of any approaching train or engines, and also to warn the deceased of any approaching danger.'

"The whole circumstances of the unfortunate occurrence, and also the practice of the defenders, and of other railway companies, have been fully gone into in the proof, and if it had been established that the defenders had been guilty of neglect which led to the death of the pursuer's husband, other than that specially averred on record, I should not have hesitated to make them answerable.

"But I am of opinion that no fault or neglect on the part of the defenders has been proved.

"On the one hand the deceased accepted an employment attended with a considerable amount of hazard, and which imposed upon him the duty while at work of keeping a sharp look-out for his own safety. On the other hand the defenders were bound to adopt all usual and reasonable precautions to insure his safety. 'Reasonable' is not an absolute or intrinsic but a relative term, and I understand the law on the subject to be that those precautions will be deemed reasonable which a man of ordinary prudence and experience could, with due regard to the circumstances and nature of the business, be expected to adopt.

"Now, it appears that no such precaution as that desiderated by the pursuer on record, nor any of those suggested by the Sheriff-substitute are considered necessary, or have ever been adopted, or are in the view of practical men desirable. If that be so, it seems to me that the defenders are not to blame for their non-adoption."

No. 111. The pursuer appealed to the Court of Session.  
At advising,—

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Cairns v. Caledonian Rail-  
way Co.

LORD JUSTICE-CLERK.—The pursuer is the widow of a surfaceman who was at the time of his death employed by the Caledonian Railway Company on their line between Dundee and Perth. The circumstances in which he met his death are simple, and I do not think that there is much doubt as to the particulars. The deceased was one of a gang of surfacemen who were making some repairs on the line at a place where there were numerous sidings by which goods trains are taken into or out from the loading-sheds. The place of the accident is not on, but it is near the place where the siding joins, the main line. The accident occurred thus. A goods train which had come by night from Carlisle, was on the morning of 8th July 1887 run into one of these sidings. The practice was for the engine to be shunted on to another line by which it ran back towards the main line, so as to reach the engine-shed, and so get on to a turn-table to be turned. To accomplish this, the engine had to be run out tender first. The platelayers were working at this line, by which it had to approach the main line. The tender, heaped up to some extent with coals, being in front, the driver was not able to see directly ahead of him. He was engaged in looking to see if a particular point was in its proper position for his engine, when at the last moment he observed the platelayers. He did all he could to avoid the accident which was then imminent, but the deceased was struck by the tender. One of its wheels passed over him, and he suffered fatal injuries. There is no reason to suppose that the driver had not whistled before he backed his engine, and so far as he was concerned, I do not think blame can be attached to him. Some argument was offered as to the rate of speed at which the engine was going. The speed seems to have been about ten or twelve miles an hour. If anything turned on that matter, I think I could not have held it to be an excessive speed, but the case does not in my opinion depend on that question at all.

These being the circumstances, the question is whether the defenders are liable for the accident by reason of their not having taken proper precautions for the safety of their men. The circumstances, it will be observed, are somewhat different from those in which the surfacemen and the engine-driver find themselves when work is being done upon a main line. In that case the surfacemen have a view of the line for some distance, and know on what line the train must come, while the engine-driver has also a view of the line for a considerable distance, and can see the surfacemen and give them warning of his approach by whistling. An accident of the kind on the main line is therefore of somewhat rare occurrence. But in such a case as the present the defenders must have known that an engine could only proceed in circumstances which made it difficult, indeed impossible, for the engine-driver to keep a proper look-out, and also that the place is one in which whistling must be very frequent, and in which, therefore, the ordinary modes taken for giving the alarm to those who may be in the way, and conveying the information to them that an engine is approaching, are inapplicable. After much consideration and frequent consultation with your Lordships, I have reached the conclusion that the defenders were not justified in having taken no special precautions to meet the necessities of the case, the ordinary precautions used to indicate and avoid danger not being available. In this case we have the concurrence of the circumstances that the engine must go backwards, that the driver can get no

proper view in front of him, that the place, as the Sheriff-substitute mentions, No. 111. was one in which the many signals which were being given made ordinary whistling unavailable as a precaution for surfacemen on the line. I agree with a remark of the Sheriff that "the deceased accepted an employment attended with a considerable amount of hazard, and which imposed upon him the duty, while at work, of keeping a sharp look-out for his safety." But at the same time that circumstance does not absolve the defenders from the duty of taking precautions adapted to the particular circumstances of the place. As to the question what precautions were necessary, it appears to me that a very simple precaution would have been to have forbidden any driver to pass the place until intimation was made to him by hand or flag signal that the line was clear. The deceased could not have been expected when engaged at his work to observe the approaching engine himself. An engine approaching at a slow speed would make but a slight noise, which he would be unlikely to observe. But there could have been no accident if the driver had been debarred from passing over the place until he was signalled to come forward.

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I am, on these grounds, of opinion that the defenders were in fault, and that the pursuer is entitled to damages.

On the question of the amount of damages which ought to be awarded, I think that a sum of £100 would be a proper award.

LORD YOUNG and LORD LEE concurred.

LORD RUTHERFURD CLARK was absent.

THIS interlocutor was pronounced:—"Find that on the occasion libelled the deceased Francis Cairns, husband of the pursuer, while engaged with other surfacemen in ballasting a siding of the defenders' railway leading from the main line from Dundee to Perth to their engine-sheds was knocked down and mortally injured by the tender of an engine belonging to the defenders which was being shunted from the goods siding tender first, and that it could not be brought out of the goods siding in any other way; that the driver of the engine was prevented from seeing him by the tender with its load of coals which was being backed in front of the engine, and it was only when stretching out to see a point on the line that he caught sight of the workmen, and instantly pulled up the engine, but not in time to avoid them; that the place at which the deceased was working was one at which there was much noise and whistling from railway engines; that the accident was due to the fault of the defenders in failing to take precautions for securing that the line should be cleared before engines, moving tender first, were allowed to pass at such a place as that in which deceased was working, and that they are liable in damages to the pursuer accordingly: Therefore sustain the appeal: Recall the judgment of the Sheriff appealed against: Affirm the interlocutor of the Sheriff-substitute in so far as said interlocutor pronounces findings on fact and in law: Recall said interlocutor in so far as it assesses damages at £40: Ordain the defenders to make payment to the pursuer of the sum of £100 in name of damages."

ALEXANDER NICHOLSON, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

No. 112. CALEDONIAN RAILWAY COMPANY, Pursuers (Reclaimers).—*Balfour—*

*R. Johnstone—C. J. Guthrie.*

Mar. 19, 1889.  
Caledonian  
Railway Co. v.  
Chisholm.

JOHN CHISHOLM, Defender (Respondent).—*Sir Charles Pearson—  
C. S. Dickson.*

*Expenses—Incidental procedure in cause—Reservation followed by general decree for expenses.*—Held that where the expenses of any incidental procedure in a cause are reserved, they fall to be dealt with by the Court which disposes of the general question of expenses, and that a general finding for expenses covers the expenses so reserved.

1st DIVISION. **M.** IN an action at the instance of the Caledonian Railway Company against John Chisholm, sack-contractor, Perth, for payment of an account in respect of the carriage of the defender's sacks over the company's lines of railway, the pursuers lodged with the summons an account as the basis of their claim.

After a considerable amount of procedure the pursuers lodged another account in process which they proposed to substitute for that originally lodged.

On 30th October 1886 the Lord Ordinary (M'Laren) refused to allow the substitution.

On a reclaiming note the First Division, on 10th December 1886, recalled the Lord Ordinary's interlocutor, and allowed the record to be amended, by substituting one account for the other, "reserving all questions of expenses."

On 13th March 1888 the Lord Ordinary assolized the defender, and found "the defender entitled to expenses."

On 8th February 1889 the First Division on a reclaiming note adhered, and found "the defender entitled to additional expenses," and remitted his account to the Auditor to be taxed.

The Auditor, on 15th March 1889, taxed the expenses:—"Reserving for the determination of the Court the question of the liability of the pursuers for the Inner-House expenses claimed by the defender in connection with the reclaiming note for the pursuers against Lord M'Laren's interlocutor of 30th October 1886, amounting, as taxed by me, and noted on the margin of the account, to the sum of twenty-four pounds fourteen shillings (£24, 14s.), included in the taxed amount now reported."\*

When the report came before the Court for approval the defender, *inter alia*, submitted that the expenses in question ought to be allowed.<sup>1</sup>

\* In a note to his report the Auditor stated:—"It humbly appears to me that this portion of the account should be disallowed; the substitution of the one account for the other did not in any way affect the conclusions of the summons or even the amount sued for. The pursuers, by reclaiming, obtained what they sought from the Lord Ordinary, and while I think it only reasonable that they should pay the expenses incurred by the defender in the Outer-House discussion, I consider it too great a penalty that, after succeeding in obtaining a recall of the Lord Ordinary's interlocutor, they should have to pay, in addition to their own Inner-House expenses, the expenses incurred by the defender in opposing them unsuccessfully. The reservation attached to the Inner-House interlocutor might, I assume, have been obtained from the Lord Ordinary. Of course all previous expenses properly incurred by the defender, in connection with the account No. 6, and rendered of no avail by the substitution of No. 34, must be allowed, and in the audit I have endeavoured to give effect to this view. In regard to this point, I have only to add, that while in the great majority of cases 'reserved expenses' follow the issue of the cause, it has been held by the Court that there is no absolute rule withdrawing such expenses from the consideration of the Auditor."

<sup>1</sup> *Authorities cited.*—*Macfie v. Blair*, Dec. 12, 1884, 22 S. L. R. 224; *Gardiners v. Victoria Estates Co., Limited*, Oct. 27, 1885, 13 R. 80.

LORD PRESIDENT.—As regards the question of expenses reserved by the Auditor, I am of opinion that where expenses are reserved in some incidental procedure, such as a reclaiming note on a point of form, or where expenses are incurred at such a stage in the course of an action that the Court does not think itself in such a position that it would be convenient or reasonable then to dispose of the question, the reservation means that the expenses shall fall under the general account of the winning party. There may be reasons for suggesting to the Court or to the Lord Ordinary that they ought not so to be dealt with, but if it is intended to raise that question the unsuccessful party should bring it under the view of the Judge when deciding as to the general expenses in the cause, and if he does not do so then, the general finding must be held to include the reserved expenses.

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Here Lord M'Laren, on 13th March 1888, assolizied the defender, and found him entitled to expenses, and that finding, I think, included the expenses reserved in our interlocutor of 10th December 1886. If it did not include those expenses, then the case might have been in a curious position, for the Lord Ordinary's interlocutor of 13th March 1888 might have been acquiesced in, and in that case these expenses must have remained reserved till the end of time, and never could have been disposed of.

I am fortified in my view in this case by the case of *Gardiner*, and I see that in the case of *Macfie v. Blair* there is a judgment of Lord Kinnear to the same effect as my opinion in *Gardiner's* case. That judgment was not brought under review, but there is a very valuable note to the same effect as I have already stated on the question of reserved expenses.

LORD RUTHERFURD CLARK.—I entirely concur. It has always been my idea that where any expenses are reserved for the consideration of the Court the question as to them must be disposed of by the Court which decides the general question of expenses, whether that Court be the Lord Ordinary or the Inner-House, and therefore I think that, when Lord M'Laren found the defender entitled to expenses generally, these reserved expenses were included in the finding.

LORD ADAM.—I concur. In my opinion, where any question of expenses is reserved, the meaning is that it is reserved for the Lord Ordinary, or for the Court, as the case may be, to decide when the general question of expenses is dealt with. If any special ground is stateable by the unsuccessful party why the reserved expenses should not fall under the general finding, he should bring that before the Lord Ordinary or the Court when the general expenses are being disposed of. That was not done here, and therefore I think these reserved expenses fall under the general finding.

I know no ground for saying that the Auditor is in such circumstances to come into the position of the Court, and to apply his mind to the question whether the reserved expenses should be allowed or not. That is the position he seems to take up here, but I think it is quite unwarranted.

LORD MURE and LORD SHAND were absent.

THE COURT allowed the defender the expenses in question.

HOPK, MANN, & KIRK, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.



No. 113. SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Appellants.—  
Jameson.

Mar. 19, 1889.  
Scottish Union  
and National  
Insurance Co.  
v. Surveyor of  
Taxes.

JAMES S. SMILES (Surveyor of Taxes), Respondent.—A. J. Young.

*Expenses—Case under Taxes Management Act, 1880 (43 and 44 Vict. c. 19), sec. 59—Expenses of preparation and adjustment.—Held that the expenses of preparation and adjustment of a case stated under sec. 59 of the Taxes Management Act, 1880, incurred before the case is sent to the roll, are not proper charges against the unsuccessful party in the case.*

1ST DIVISION.  
M. (SEE *ante*, p. 461.)

In this case, stated by the Commissioners of Income-Tax, the appellants were found entitled to expenses.

In taxing their account the Auditor disallowed, *inter alia*, all charges in connection with the preparation and adjusting of the case before it appeared on the rolls of Court.

When the Auditor's report came before the Court for approval the appellants objected to those charges being disallowed, and argued;—By the Act under which this case was stated the Court had power to pronounce such order as they saw fit with regard to expenses.\* This case was very complicated, and there had been much difficulty in obtaining a satisfactory case stating the facts and determination as required by the statute. A great part of the case was prepared by the appellants at the request of the Commissioners.

Counsel for the Surveyor of Taxes was not called on.

LORD PRESIDENT.—The Court knows nothing about such a case as this till it is presented to them for consideration, and we are instructed by the statute that such cases are to be prepared by the Commissioners of Income-Tax. When the case is presented we have nothing to do but to hear parties on it, and therefore the expenses we have to award are, I think, just what would be called in ordinary cases "expenses of process," and such expenses do not include the expense of wranglings with the Commissioners as to the statement of the case. I think the Auditor was right in disallowing these expenses.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

THE COURT approved the Auditor's report.

COWAN & DALMAHOY, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents.

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\* Sec. 59 of the Taxes Management Act, 1880, provides,—(1) That anyone, if dissatisfied with the Commissioners' determination as being erroneous in point of law, may "require the Commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court thereon. The case shall set forth the facts and the determination. . . . (2) The High Court shall hear and determine the questions of law arising on a case transmitted under this Act, . . . and may make such order as to costs as to the High Court may seem fit."

WILLIAM AITON, Pursuer (Reclaimer).—*Sir Charles Pearson—Murray.* No. 114.

JOHN DUGUID MILNE AND ANOTHER (Russell's Executors), Defenders  
(Respondents).—*D.-F. Mackintosh—Begg.* Mar. 19, 1889.

Aiton v.  
Russell's  
Executors.

*Superior and Vassal—Personal obligation in feu-contract—Obligation on vassal, "his heirs, executors, and successors whomsoever."*—A feu-contract bore that the vassal "binds and obliges himself and his heirs, executors, and successors whomsoever" to make payment of a certain sum in name of feu-duty. The vassal having died, his heir declined to take up the feu. In an action against the vassal's executors for payment of the feu-duties which had become due since his death, and for damages for breach of contract, in failing to take up the feu on the heir declining to do so, *held* (1) that there was no obligation upon the executors to pay feu-duties accruing after the date of the vassal's death, and (2) that they were not liable in damages for breach of contract.

By feu-contract, dated 17th and 26th September 1879, and recorded 6th November following, William Aiton, of Boddam, Aberdeenshire, disposed to James G. F. Russell of Aden, "and his heirs and assignees as after mentioned," certain portions of ground, amounting to over nine acres, being part of the lands of Boddam adjoining Mr Russell's property of Buchanness. It was expressly provided that the portions of ground so disposed should remain attached to Buchanness, and that they should "in all time coming descend to and be acquired by the heirs and successors" of Mr Russell in Buchanness Lodge and grounds.

The clause dealing with the payment of feu-duty was as follows:—"For which causes, and on the other part, the said James George Ferguson Russell binds and obliges himself and his heirs, executors, and successors whomsoever to make payment to the said William Aiton, and his heirs and assignees, of the sum of £117, 15s. sterling yearly, being at the rate of £12 per imperial acre, in name of feu-duty for the said pieces of ground and others hereby disposed, and that at the term of Martinmas yearly, beginning the first term's payment thereof at the term of Martinmas next, 1879, for the year ending at that date, and so forth yearly in all time thereafter."

Mr James G. F. Russell died on 15th April 1887 and was succeeded in the entailed estates of Aden and others, including Buchanness Lodge, by his brother Colonel F. S. Russell. By Mr Russell's will he bequeathed his whole personal estate to his wife, and appointed Mr J. D. Milne of Melgum, Aberdeenshire, and another, his executors.

The feu-duty above mentioned was paid down to Martinmas 1886.

Colonel Russell on succeeding to the estates refused to take up the feu.

On 12th March 1888 Mr Aiton brought an action against the executors for payment of £117, 15s., the feu-duty due at Martinmas 1887, and for damages for breach of contract.

The pursuer averred that on the declinature of the heir to take up the feu the pursuer had called upon the executors to pay the feu-duties, and also either to take up the feu or to pay damages, but that they had refused to do so.

The pursuer pleaded;—(1) The defenders, as executors foresaid, are due and resting owing to the pursuer the feu-duty payable for year ending at Martinmas last to the superior under the said feu-contract, or, at least, the proportion thereof to the date of Mr Russell's death. (2) The defenders, as executors foresaid, are liable to the pursuer in implement of the obligations in his favour contained in the foresaid contract of feu. (3) In consequence of the breach of said contract as condescended upon, the said defenders are liable to the pursuer in damages as concluded for.

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The defenders tendered £50 of the feu-duty so far as accrued up to the day of the deceased's death.

The defenders pleaded;—(1) The averments of the pursuer are irrelevant. (2) On a sound construction of the feu-contract libelled, the present defenders are not liable for any feu-duties after the death of the vassal, the late Mr Russell. (4) No damages are due, in respect that there has been no breach of contract or fault on the part of the late vassal or the present defenders, and, *separatim*, that the pursuer has suffered no damage.

The Lord Ordinary (Kinnear), on 12th June 1888, gave decree for the £50; *quoad ultra* sustained the first and second pleas for the defenders, and in respect thereof assoilzied the defenders.\*

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\* "OPINION.—This action is founded upon a feu-contract between the pursuer and the late Mr James Russell of Aden, in Aberdeenshire, by virtue of which Mr Russell held certain lands under the pursuer from 1879 till his death on 15th April 1887. The pursuer avers that the heir of line of the deceased vassal has refused to take up the feu, or to perform the obligations incumbent on the vassal; and, in consequence of this declinature, he claims a right to recover from the defenders, as the late Mr Russell's executors, the feu-duty which fell due at Martinmas 1887, the term following their author's death, and £2000 as damages for breach of contract.

"I do not think it doubtful that the vassal's executors are liable for the feu-duties accruing due during his lifetime; and I shall accordingly give decree for £50, which is admitted to be the proportion of the feu-duty payable at Martinmas 1879 corresponding to the period of Mr Russell's survivance of the last term. But I think it equally clear in law that no action lies against the executors, either for feu-duties accruing due since the last vassal's death, or for damages in respect of the heir's failure to enter.

"The obligation for payment of the feu-duty is in the usual terms. The feuar binds himself and his heirs, executors, and successors whomsoever; and there can be no question as to the construction of such an obligation in a feu-contract. It must be read, as the Lord President explains in *The Police Commissioners of Dundee v. Straton*, 11 R. 590, as an obligation on the original feuar himself, 'so long as he remains vassal and lives, and, after his death, on his heirs and executors for payment of arrears, and on his successors in the feu, for payment of the feu-duty in the future.' It is possible for the feuar to bind his heirs, executors, and successors, so as to make them all liable, jointly and severally, to fulfil the whole obligations of the feu; and the case just cited is a good instance of such a contract. But in the present case there is no room for a construction which would make the several successors of the original feuar liable *singuli in solidum*. The feuar binds himself, so long as he lives and continues to be the vassal in the feu, in the whole prestations of the contract; he binds his successor in the feu in like manner in the whole obligations of the contract after his death; and he binds his heirs and executors for the arrears, which may be due at his death, and for nothing more. The pursuer's counsel accordingly did not maintain in argument that the executors would continue liable along with the successor in the feu-right, if the latter had completed a title, and entered with the superior. But if they are not liable jointly with the heir of the investiture, there appears to me to be no ground in law upon which they can be made liable for future prestations at all. The several liabilities of the successor in the feu on the one hand and the personal representatives of the deceased vassal on the other are perfectly clear and distinct; and if there be no joint liability, I am unable to see any reasonable ground for subjecting representatives, who cannot succeed to the feu, to the liabilities attaching only to the vassal.

"But it is said that there is no successor in the feu, because the heir of the investiture declines to take up the estate; and therefore that the representatives of the first vassal must be liable for the feu-duties, because his liability can only be extinguished *delegatione*, by the substitution of a new vassal in his room.

The pursuer reclaimed, and argued;—1. In a feu-contract there was a double liability (1) on tenure; and (2) on contract. Each liability might be extinguished *delegatione*. Where there was no extinction *delegatione*, there was a continuing liability on the part of the executors of a deceased vassal for payment of feu-duties until the executry estate was exhausted. This had not yet been decided in a case of feu, but it had been so decided by Lords Gifford and Shand in a case of lease.<sup>1</sup> In a lease there was a personal contract on the part of the tenant and his representatives to pay the tack-duty, which, when the lease was assignable, could be got rid of by assignation.<sup>2</sup> The defenders here left the contractual relation which existed between superior and vassal out of sight. The existence of the double relation was supported by the authority of the case of *Shaw*,<sup>3</sup> where the opinions of the majority of the Judges proceeded upon that footing. The view stated by Bankton<sup>4</sup> that there was no such contractual relation in the constitution of a feu-right had since been held to be wrong; and the results which he said would flow from the existence of such a relation must therefore follow, viz., that there would then be a personal action for payment of feu-duties. The case of the *Police Commissioners of Dundee*,<sup>5</sup> founded on by the Lord Ordinary, applied only where there was a successor in the feu. The case of *Burns*,<sup>6</sup> in which the decision in the *Dundee* case was approved, did not advance the matter further. The dicta of the consulted Judges in *Stewart's*

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I know of no authority for this proposition. It is not, in my opinion, supported by the case of *Hyslop v. Shaw*, on which the pursuer's counsel relied. It was held, in that case, that an entered vassal continues liable for feu-duties, even after he has sold the lands, until a new vassal shall have entered with the superior. But the ground of judgment was that the disponent continues vassal until the entry of the disponent, and therefore cannot escape from the liabilities attaching to that character. This is perfectly consistent with the doctrine laid down by the Lord President in the case of *Straton*, that the original feuar remains liable 'so long as he lives, and continues vassal'; but he ceases to be vassal when he dies. His death vacates the feu, and the whole rights and liabilities of the feu-contract or feu-charter, if he has not disposed the estates during his life, thereupon pass to the heir of the investiture. No one else can take the place of the deceased vassal, or be affected by liabilities which are inseparable from the tenure. If the heir does not choose to enter, the superior had his remedy by declarator of non-entry under the old law, and he has an analogous remedy under the Statute of 1874. But there is no authority in principle or precedent for sustaining a personal action against representatives who have no right to the character of vassal, and no title to take up the feu. The only ground on which such an action could be maintained is that of personal obligation imposed upon the deceased vassal's representatives by a special stipulation for that purpose. Whether there is such an obligation in any particular feu-contract, is a question of construction, and in the present case the construction of the contract does not appear to me to be doubtful.

"I am unable to follow the reasoning upon which it is proposed to subject the defenders in damages. If they are liable for the feu-duties, their liability must be limited to the amount actually due. If they are not liable they have committed no breach of contract."

<sup>1</sup> *Bethune v. Morgan*, Dec. 16, 1874, 2 R. 186.

<sup>2</sup> *Skene v. Greenhill*, May 20, 1825, 4 S. 25.

<sup>3</sup> *Hyslop v. Shaw, &c.*, March 13, 1863, 1 Macph. 535, Lord Deas, p. 581; cf. also *Marquis of Abercorn v. Marnoch*, June 26, 1817, F. C.; *Hunter v. Boog*, Dec. 16, 1834, 13 S. 205, *vide* p. 208; *Prudential Assurance Co., Limited, v. Cheyne*, June 4, 1884, 11 R. 871.

<sup>4</sup> Bankton, ii. 144.

<sup>5</sup> *Police Commissioners of Dundee v. Straton*, Feb. 22, 1884, 11 R. 586.

<sup>6</sup> *Burns v. Martin*, Feb. 14, 1887, 14 R. (H. L.) 20.

No. 114. case<sup>1</sup> relating to the extinction of such obligations *delegation* in a feu-contract supported the reclaimer's argument as strongly as those in the *Dundee* case supported the respondents'. None of the cases cited on the other side touched the case of the death of the vassal. The death operated a divestiture of the person of the vassal merely; the contractual liability still remained an obligation against his estate. 2. The pursuer was further entitled to damages for breach of contract.

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Argued for the respondents;—1. The case turned upon the construction of the words "binds and obliges himself, and his heirs, executors, and successors whomsoever." These were the ordinary words of style by which a vassal bound himself to pay feu-duty, and they did not impose any different liability from that imposed by the reddendo clause in a feu-charter.<sup>2</sup> In the feu-charter the obligation to pay feu-duty arose out of the principle of the tenure, and ceased with the tenure. There was no difference between a feu-contract and a feu-charter in regard to the obligation. The only difference was in the enforcement of it, the registration clause in the contract providing for the use of summary diligence. In either case divestiture put an end to the vassal's liability. Divestiture took place either (1) by death; or (2) by delegation. It had never been suggested that the personal representatives of the vassal were liable for more than the arrears due at his death, or that there was a continuing liability imported by the ordinary words of style.<sup>3</sup> It was different with a ground-annual, but the law relating to ground-annuals and leases had no bearing on the present question.<sup>4</sup> The case of the *Police Commissioners of Dundee* was differentiated from the present, as was clear from the opinions in that case, by the use of the words "conjunctly and severally." The Lord Ordinary was therefore right. 2. As to the conclusion for damages, it could not be said that there was default on the part of the deceased, still less was there on the part of the defenders. The pursuer's only remedy in the circumstances was a declarator of non-entry.<sup>5</sup>

At advising,—

LORD PRESIDENT.—The late Mr Russell of Aden died on 15th April 1887. He had been for some years a vassal of the pursuer under a feu-contract, dated in 1879. The heir of investiture is not inclined to take up the succession to the feu, and will not enter, and the consequence is that the pursuer as superior has brought this action against Mr Russell's executors for the purpose of compelling them to pay the feu-duty for the feu in question for the year ending Martinmas 1887, and he also concludes for £2000 in name of damages for breach of contract.

<sup>1</sup> *Stewart v. M'Callum*, Feb. 14, 1868, 6 Macph. 382, at p. 390-91; *cf. also* *The King's College of Aberdeen v. Lady James Hay*, March 11, 1852, 14 D. 675, 24 Scot. Jur. 342, H. L., August 11, 1854, 1 Macq. 526; *Stair*, ii. 3, 34.

<sup>2</sup> *Duff's Feudal Conveyancing*, p. 133; *Juridical Styles*, 3d ed., vol. i., p. 32.

<sup>3</sup> *Peddle v. Gibson*, Feb. 27, 1846, 8 D. 560 (Lord Wood, p. 567), 18 Scot. Jur. 578; *King's College of Aberdeen v. Lady Hay*, March 11, 1852, 14 D. 675, Lord Colonsay, p. 701-2.

<sup>4</sup> *Bell's Conveyancing*, ii. 1067; *Stewart v. M'Callum*, 6 Macph. 382, *affd.* H. L. 8 Macph. 1; *Bethune v. Morgan*, 2 R. 186; *Scott's Executors v. Hepburn*, June 14, 1876, 3 R. 816; *King's College of Aberdeen v. Lady James Hay*, *supra*; *Small v. Miller*, Feb. 3, 1849, 11 D. 495, 21 Scot. Jur. 143; *Gardyne v. Royal Bank*, March 8, 1851, 13 D. 912, 23 Scot. Jur. 410, H. L., May 13, 1853, 1 Macq. 358.

<sup>5</sup> *Duff's Feudal Conveyancing*, p. 477.

I think the case is a very clear one, and I entirely agree with the view which the Lord Ordinary has taken. The relation of superior and vassal may be constituted either by a feu-charter or by a feu-contract; the difference between the two is very slight, and indeed is immaterial. Under a feu-charter the vassal, by acceptance of the feu, puts himself under a personal obligation to pay the reddendo, and subjects his representatives to pay whatever feu-duties may become due during his possession of the feu. That obligation becomes on his death a personal debt. On the other hand, his heir, if he takes up the succession, in like manner becomes liable for future feu-duties; and if the feu be sold by the original or by any subsequent vassal, then the successor in the feu, after he is infeft, becomes liable for the feu-duty, and the seller is discharged. Such is the ordinary effect of a feu-charter. In that way the feuar binds himself and his executors to a certain extent, and his successors in the feu to a further extent. All that is implied in a feu-charter, although it is not expressed. In the present case it is expressed and not implied, because the writ is in the form of a feu-contract and not of a feu-charter. The feuar in words binds "himself and his heirs, executors, and successors whomsoever"; that is, he binds them in such a way as they would be bound in a feu-charter. Nothing more is done than is effected by the mere acceptance of a feu by the feuar in a feu-charter. There is a variety of obligations which may be introduced into a feu-contract which do not affect the present question. If it be desired by the parties, any kind of obligation may be so introduced, but I cannot conceive that the representatives of a deceased feuar are, apart from special stipulation, subject to more than the limited liability to which I have referred.

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No doubt the wording of the contract might be varied so as to imply a permanent personal obligation against the representatives of the feuar. Such cases have occurred, and there cannot be a better illustration of them than the case of the *Police Commissioners of Dundee*, to which the Lord Ordinary has referred. In that case, as in the present, the vassal bound himself, "his heirs, executors, and successors" whomsoever, but there were added the words "conjunctly and severally," and it is impossible to construe these words otherwise than as importing that each obligant was bound conjunctly with the others. Each one of the persons obliged was bound to the full extent, and the obligations were not separate. In that case the Court were all of opinion that but for these words the result would have been the opposite of what was the finding of the Court. I am reported to have said,—“If the clause had stood precisely as it does, but without the words ‘conjunctly and severally,’ it could not have been contended that any party was bound but those who would generally be bound under such clauses in an ordinary feu-contract. The imposition of the obligations on the vassal, his heirs, executors, and successors, would have been read according to inveterate practice as an obligation on himself so long as he remained vassal and lived, and after his death on his heirs and executors for payment of arrears, and on his successors in the feu for payment of the feu-duty in the future.” That is the very case we have to determine here, and the case of the *Dundee Police Commissioners* therefore becomes indirectly an express authority on the point.

LORD ADAM.—I also think that this is a clear case, and I concur with your Lordship.

The case turns upon the construction of what we should call the reddendo

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clause in a charter, and the construction to be put upon that clause is, I think, rightly explained by your Lordship in the case of the *Police Commissioners of Dundee v. Straton*. Mr Russell bound himself for payment of the feu-duty so long as he remained vassal in the feu, and after his death his heirs and executors for payment of arrears, and he bound his successors in the feu for payment of the feu-duty in the future. That is the only sound reading of the clause, and if so the only persons bound to pay the feu-duties becoming due after Mr Russell's death are his successors in the feu. If the defenders are not his successors in the feu there is no obligation upon them. The answer is irresistible, that they are not his successors.

But there is another ground on which it is sought to enforce liability against the defenders. It is said that Mr Russell bound himself by the contract that there should be a successor to him in the feu in all time coming, and upon that ground a claim of damages is supported. But no such obligation was undertaken. What was undertaken was that if his successors took up the feu they should pay a certain amount of feu-duty—there was nothing more.

LORD FRASER was present at the advising, but not having heard the argument gave no opinion.

The LORD PRESIDENT intimated that LORD MURE, who was absent from illness, concurred in the judgment.

THE COURT adhered.

TODS, MURRAY, & JAMIESON, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 115.

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Scott v.  
Scottish Accident Insurance  
Co., Limited.

JOHN SCOTT, Pursuer (Reclaimers).—*Ure*.  
SCOTTISH ACCIDENT INSURANCE COMPANY, LIMITED, Defenders  
(Respondents).—*Jameson—Crole*.

*Insurance—Construction—Liability defined by notice on policy.*—A policy of insurance with an accident insurance company set forth that “if the insured shall sustain any bodily injury . . . which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200,” and in the event of permanent partial disablement not being suffered £3 a-week for a period not exceeding twenty-six weeks was allowed. On the back of the policy there was the following:—“Notice.— . . . Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight.” In an action on this policy for £200 the pursuer averred that he had met with an accident whereby he had suffered permanent partial disablement, but he admitted that he had lost neither a hand, nor a foot, nor his sight. *Held* (*rev. judgment of Lord Trayner*) that the action was relevant.

2D DIVISION.  
Lord Trayner.  
M.

ON 27th October 1887 John Scott, timber merchant, Glasgow, brought an action for £200 against the Scottish Accident Insurance Company, Limited.

The pursuer founded on a policy effected with the defenders on his life, the material portions of which are quoted below,\* and averred that he

\* The policy contained the following clause:—“If the insured shall sustain any bodily injury caused as aforesaid (*viz.*, by violent accidental means) which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200 within one calendar month after satisfactory proof of such disablement shall have been furnished to the directors, and if such injury does not entitle the insured to

had met with an accident, and had sustained injuries to his spine, which he detailed, involving permanent partial disablement, but he admitted that he had not lost a hand or a foot, and that he had not suffered complete and irrecoverable loss of sight. No. 115.

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The pursuer pleaded ;—(1) The pursuer having, in consequence of the accident in question, suffered permanent partial bodily disablement, is entitled to decree as concluded for, with expenses.

The defenders pleaded ;—(1) The pursuer's averments are not relevant. (2) The pursuer not having suffered permanent partial bodily disablement as defined by the policy, the defenders ought to be assoilzied, with expenses.

Upon 14th November 1888 the Lord Ordinary (Trayner) sustained the first plea in law for the defenders, dismissed the action, and decerned.\*

The pursuer reclaimed, and argued ;—The "notice" on the back of the policy did not bear to be, and was not, a definition of permanent partial disablement. It merely mentioned one or two cases about which there might be some doubt, and said that these were to be taken as cases of permanent partial disablement. To say that no other injuries, however severe, were to be regarded as cases of permanent partial disablement

compensation for permanent total or permanent partial disablement, as above provided, but shall independently of all other causes immediately and totally disable and prevent him from attending to business of any kind, then compensation shall be paid to him at the rate of £3 per week for the period of such continuous total disablement as shall immediately follow the said accident and injury, or at the rate of 15s. so long as he shall be thereby rendered partially unable to attend to business. But the period during which compensation for total or partial temporary disablement, or both, is to be paid shall not for any single accident exceed twenty-six consecutive weeks from the date thereof."

On the back of the policy was the following :—"Notice.—Permanent total disablement implies the loss of both hands or of both feet, or the loss of a hand and a foot. Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight."

\* "OPINION.—The pursuer in this action claims payment from the defenders of a sum of £200, which he says is due to him in respect of an insurance effected by him with the defenders. The defenders deny liability on the ground that the injuries suffered by the pursuer, as alleged, are not covered by the policy.

"By the policy issued by the defenders they undertake to pay the pursuer the sum of £200 in the event of his sustaining any bodily injury caused by violent, accidental, external, and visible means, 'which shall occasion permanent partial disablement (as defined on the back hereof).' On the back of the policy is printed this notice,—'Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight.' If this is regarded as an exhaustive definition of the 'permanent partial disablement' of the policy, then this action cannot be maintained, for the injuries sustained by the pursuer do not fall within the definition. But the pursuer contends that what is called a definition is only illustrative ; and that while permanent partial disablement implies the specific injuries enumerated, it does not exclude other injuries having the effect of permanent partial disablement. If the word 'implies' on the back of the policy is to be regarded etymologically, and apart from the language of the policy itself, I agree with the pursuer. But I cannot so regard it here. The parties, by issuing and accepting the policy respectively, have agreed to regard the 'notice' on the back of it as a definition ; and as a definition covers the whole limits or signification of the thing defined, I must hold that permanent partial disablement in the sense of the policy means, and means only, the special forms of injury enumerated in the so-called definition. I am therefore of opinion that the pursuer has not set forth relevant grounds to sustain an action on the policy in question."



No. 115. was absurd as matter of fact, and was not the legal inference from this policy. If the defenders proposed to carry on business on that footing, they must make their meaning unequivocally clear, which they had here failed to do.

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The respondents argued;—This notice was a definition. It was so described in the policy, for it was the only writing on the back. "Implies" not only meant "involves," but also "signifies," "imports," "denotes," "means." The pursuer was not deprived of redress. There were really two contracts in this policy—one for certain payments down, and the other for weekly payments in cases not embraced under the definition.

LORD JUSTICE-CLERK.—The policy here provides that "if the insured shall sustain any bodily injury caused as aforesaid, which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200." The pursuer claims £200 for permanent partial disablement through an accident which he describes on record. The defenders maintain that under the terms of the notice on the back of the policy they are not liable as for permanent partial disablement. The policy refers to what is in the notice by the words "as defined on the back hereof," and what is to be found on the back is in these terms:—"Notice.—Permanent total disablement implies the loss of both hands or of both feet, or the loss of a hand and a foot. Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight."

Now, this notice does not bear on the face of it to be a definition, and can only be taken as such because so referred to in the policy. Whatever it is to be called, however, its terms are most ambiguous, and no better test of their ambiguity can be given than the fact that the counsel for the defenders read to us fifteen different synonyms for the only verb used. All depends on the meaning to be attached to the word "implies." If the notice is to be regarded as a notice to the insured, it must be held to mean whatever the insured could reasonably regard it as meaning. The ambiguity is not to be interpreted in favour of the party who draws up the policy, but is to be interpreted in the most favourable sense for the insured.

So regarding it, I cannot read the policy as the Lord Ordinary has done. He thinks that in no case of injury can a person recover as for permanent partial disablement unless he has lost one hand or one foot, or both his eyes. That would be to give the policy an extraordinary meaning. There is nothing to lead anyone to read it in that way. Such an interpretation would be contrary to the common sense of mankind. A policy may conceivably be limited to the case of the loss of a hand or of a foot, but such a limitation must be expressed in the most absolutely unambiguous language, and I suspect that very little business would be done by the defenders if people thought those policies were only to be read as they suggest.

It was said that there are here two contracts, and that the pursuer has a claim under the second one, although not under the first. But under the former the most he can receive is £78, or £3 for twenty-six weeks, which is very different from £200 down, and the defenders' contention would make a man who has met with an injury to his spine or to his head entitled only to so much a-week. If that was the intention of the defenders they should have made it impossible to read their policy in any other way. Here I think the policy is to be read in the

way most favourable to the pursuer. I am, therefore, for sustaining the appeal, No. 115. and repelling the first plea in law for the defenders.

LORD YOUNG and LORD LEE concurred.

LORD RUTHERFURD CLARK was absent.

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THE COURT recalled the Lord Ordinary's interlocutor, found the action relevant, and remitted to the Lord Ordinary to proceed.

REID & GUILD, W.S.—J. & R. A. ROBERTSON, S.S.C.—Agents.

WILLIAM HENDERSON, Pursuer (Appellant).—*Sym.*  
THE CARRON COMPANY, Defenders (Respondents).—*D.-F. Mackintosh—*  
*C. J. Guthrie.*

No. 116.

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Henderson v.  
Carron Co.

*Reparation—Master and Servant—Master's duty to take proper precautions for servant's safety.*—A workman engaged in charging an iron smelting furnace was fatally injured by a sudden outburst of flame, caused by the fall of incrustations in the furnace (known as "scaffolds"). The furnace had for about nine months been in a dangerous state from scaffolding, during which period the employer had made various ineffectual attempts to remove the defect. The only remaining remedy was to blow out and clear the furnace, which would have removed, for a time at least, the cause of danger, but would have been expensive. *Held* that the employer was liable in damages for the workman's death, in respect that there had been fault in allowing the furnace to be worked for so long a period in a dangerous condition.

THIS action was raised in the Sheriff Court at Glasgow by William Henderson against the Carron Company, to recover damages for the death of the pursuer's son, Alexander Henderson, who had received fatal injuries while in the defenders' employment at one of their smelting furnaces. 2D DIVISION.  
Sheriff of  
Lanarkshire.  
I.

The accident occurred on 10th November 1887 while the deceased was opening the door of No. 9 furnace to allow another workman to throw into it a barrow-load of coal and ironstone. The deceased was injured by a sudden outburst of flame when he opened the door, caused by the fall of a mass of incrustations ("scaffolds") from the sides of the furnace.

The pursuer averred that the accident happened through the fault of the defenders in not providing suitable apparatus to ensure that the work of charging the furnace could be safely accomplished, and in having their furnace in a defective and unsafe condition at the time of the accident.

The defenders stated that scaffolding was a common and unavoidable incident in blast furnaces, and that an accident from that cause formed one of the risks of the deceased's employment.

They also stated that the deceased "was well aware of the risks of his work, and that he and all the workmen employed about the furnace knew that it was scaffolding, and liable to 'slip.'"

The defenders pleaded;—(3) The injuries libelled having been due to inevitable accident, the defenders are entitled to absolvitor, with expenses. (4) The accident libelled having been one of the risks of the deceased's employment, the defenders are not liable in damages, and should be assoilzied, with expenses. (5) The injuries to the deceased not having been caused by any fault of the defenders, they should be assoilzied. (6) The deceased having worked in face of a known possible danger, the defenders should be assoilzied.

The following were the material facts disclosed at the proof: The

No. 116. deceased, who was about seventeen years of age, had been for some time in the employment of the defenders. For about a month before the day of the accident he had not been working at No. 9 furnace. Prior to that, however, he had worked for eight or ten weeks at that furnace. No. 9 furnace differed from the other Carron furnaces in the way in which it was charged. It was charged by the workman opening a door near the top of the furnace and tipping the contents of his barrow of coal or coke and ironstone into the furnace. There was no means of protection for the workman if, when he was so engaged, a fall of scaffolding sent up tongues of flame through the door. The furnace, however, was proved to be constructed on much the same principle as furnaces at other large iron-works, such as Gartsherrie, and the evidence of experts was to the effect that it was impossible to devise for such a furnace a shelter for the men at the time of filling. The other furnaces at Carron were, however, of a kind also quite common, and known as "bell-topped furnaces," which did not expose workmen to the same danger, as they could be protected by a metal screen. John Colquhoun, a furnaceman, one of the pursuer's witnesses, deponed in cross,—“We were paid 3s. 9d. shift wages and 4s. on No. 9, because it was hotter than any of the rest, and we got 3d. a shift more to fill it. That was 3s. 9d. to 4s. a-day for seven days a-week. They pay the fillers higher on No. 9. (Q.) Is that because it is more dangerous? (A.) Yes, dangerous, hot and all.”

“Scaffolding” was proved to be a common occurrence in close-top furnaces, as all the Carron furnaces were, and to be injurious to the quality of iron, and dangerous owing to the consequent tendency to slipping. It existed to some extent in the old open-top furnaces. The precise cause of it was not ascertained. The scaffolding in No. 9 furnace was proved to have existed for a number of months before the accident on 10th November. It had begun at least some weeks before 1st May 1887, when a new manager named Love came to the works, and it had never been cured. Frequent slips had taken place. Measures were taken to remove it in June by altering the blast, but these were ineffectual. In July, September, and October, Love, with the view of curing the scaffolding, blew the furnace down very low by not putting in new fuel while continuing the blast, and then charged it up again, so as it possible to burn away the scaffolding. The skilled evidence was to the effect that this was the course usually followed in other iron-works, at all events until the scaffolding proved to be too obstinate to be so removed. It was not effectual in this instance; while certain temporary benefit was done it was evident that the scaffolding remained uncured. On that remedy failing, the only other known remedy was to blow out the furnace clear away the scaffolding, and start the furnace again. This remedy however, would have been somewhat expensive.\*

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\* The manager, Love, deponed that to blow out a furnace generally involved reconstruction, on account of the effect produced on the brickwork by the removal of the scaffolding, which “is very costly. It costs hundreds of pounds. it might be from £1000 to £2000, assuming the furnace to be rebuilt.” He admitted, however, that when No. 9 was blown out in January 1888 it was not found necessary to renew it in a single brick. It then took about five weeks to cool and to be got in blast again. For the first five weeks after that it cast inferior iron as compared with the others. The manager calculated the expense of blowing out No. 9 at “something like £700,” in consequence of the production of inferior iron, loss of time, &c. He did not, however, allow in making this calculation for the fact that the furnace had not been turning out the best quality of iron before the accident.

There were upon the furnace certain valves and explosion doors, No. 116. intended to vent flame, smoke, and gas. The pursuer sought to shew on the proof that these were too small in capacity for their purpose, and that some of them were not working properly. The defenders, on the other hand, sought to shew that they were sufficient and in good order, and that in no view would they have prevented the accident, because on the slip occurring while the furnace was being charged, the flame would have rushed out by the open charging door as the point of least resistance.

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After the accident on 10th November the working of the furnace was continued as before. On 31st December following, another workman, John Barriscell, was severely injured by an accident exactly similar at the same furnace, a slip having occurred while he had the charging door open.\*

After that accident the furnace was blown out, cleared of the scaffolding, and again kindled.

The Sheriff-substitute (Erskine Murray) found that the pursuer had failed to prove fault on the part of the defenders, and assoilzied them.†

\* Barriscell raised an action against the Carron Company for damages for his injuries, which was disposed of in both Courts at the same time and in the same way as the present case.

† "NOTE.—. . . The pursuer's main contention is, that the defenders were in fault in not adopting sooner the remedy of blowing out the furnaces entirely. On the whole the Sheriff-substitute is unable to agree with this contention. It was a matter of opinion which remedy was the better to adopt; and the Sheriff-substitute does not think that defenders were in fault in not adopting sooner the very exceptional and unusual course of blowing the furnace out, which it must be remembered would by no means necessarily ensure the future efficiency of the furnace. . . .

"A third ground of liability is, that whereas on some of the blast furnaces there is a shelter for the men, there was none on No. 9. This arises from the nature of the furnaces. Some of the close-topped furnaces are on the bell system. In furnaces on this system inside the top of the furnace there is a 'bell' or inverted funnel, which, when raised, touches with its sides the sides of the mouth of the furnace, so that all round it there is a circular cavity into which material, as it is technically called 'burden,' and coals are thrown; while this is being done there is no danger whatever, as there is no opening down to the furnace. But when the outsides of the bell are fully charged, the bellman, by machinery at a little distance, lets down the bell; of course all the material falls off into the furnace, and there being so much of it, there is necessarily an upward rush through the large opening of flame and gas. To shelter the men on the bell furnaces, at the moment of lowering the bell, a screen has been erected. But No. 9 is not charged by a bell, but by four doors. Only one door is opened at once, and thus a comparatively small charge is put in. But thus, while on the one hand there is not the reason as in the case of the bell furnaces to expect a fiery rush, there is on the other hand no possibility of sheltering the men; for they must bring the barrow to the door and empty it right into the open furnace. So a screen in the case of No. 9 would be useless.

"Again, the pursuers contend that there is a defect in the defenders' ways, &c., in their not providing sufficient valves or explosion doors, by means of which the force of the explosion would have expended itself otherwise, instead of rushing through the charging doors at which Henderson and Barriacell were burned.

"But the ordinary valves of No. 9, though not quite so large as those at Gartsherrie, seem large enough for all practical purposes. There are also explosion doors at the ends of the upper cross tube, with the view that, if such a heavy explosion were to take place that the gases could not readily enough escape by the valves, they might find a vent without blowing off the machinery. But whether or not the explosion doors had in this case got jammed intentionally or unintentionally is really a matter of little moment, for even had they been

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The pursuer appealed, and argued ;—The scaffolding was of a dangerous and persistent kind, and this was known to the manager. He knew also that the efforts to remove it had been unsuccessful. It was conceded that he was justified in making a fair trial of other measures before blowing out the furnace, and probably had the accident happened in June or July there might have been no liability, but it inferred fault that he had gone on with the defect unremedied for about nine months between his coming to the work and the second accident. The proof did not shew that it would have been so expensive to blow out the furnace as the defenders suggested, but in any view they were not entitled to expose life to a danger which was capable of being remedied, merely because the remedy might be expensive. At anyrate, if they wished to avoid that expense they must take the responsibility of the accidents which were induced by their avoiding it. The Sheriff-substitute seemed to think, and the defenders had contended before him, that all the ordinary valves and explosion doors could not have been expected to avail the workmen if a slip occurred, because it was a scientific truth that the flame must rush through where the way was most open for it. But that was the very reason why it was reckless to continue over a long period to send men to expose themselves at the most dangerous place. Further, it shewed that there ought to have been a screen. It was said to be impossible to devise one. But the bell-mouthed furnace would have avoided this danger, and it was impossible for the defenders to maintain that it was a dangerous furnace, for most of their furnaces were of that kind.

Argued for the defenders ;—The accidents were not the result of fault either of master or servant. They arose from an unavoidable risk of the work, incident to it, and of which the workmen who accepted that kind of work could not be ignorant. It was impossible to provide such furnaces as No. 9 with a shelter at the charging-door. But No. 9 was a furnace of an ordinary kind, extensively used in similar works, and a master need not do more than provide such. The mere occurrence of an accident raised no presumption of fault. Again, "scaffolding" was a thing which no means yet discovered could prevent. The pursuer had received extra wages on account of the extra risk at No. 9. He therefore knew of the risk, and willingly incurred it.

LORD JUSTICE-CLERK.—Without going into any detail, I think this case may be very shortly dealt with. The defenders have certain bell-topped furnaces and other furnaces fed by doors. The case for the defenders is that to feed these latter furnaces it is absolutely necessary that the material should be emptied into them by men. I accept that as a fact, and I also accept it as a fact that these furnaces are of the ordinary build and are fitted with all the modern appliances yet devised. But inside all furnaces—since the tops were closed—there is a tendency for the material to cake at the top of the "boshes," by which "scaffolds" of hanging material are formed at the sides.

These "scaffolds" are injurious to the satisfactory output of iron, and are dangerous to those employed in charging the furnaces, because if they "slip"

in working order the gas would have preferred to rush out by the charging door, which was wide open, than to take the trouble of opening a door at all, as it always must follow the line of least resistance.

"On the whole, therefore, the Sheriff-substitute cannot see that the accidents either to Henderson or Barriscall were occasioned by any fault on the part of the defenders. There was no fault on the part of the men injured, so the fatality must be put down to misadventure."

there is a considerable rush of flame upwards, and that goes out at the doors, if they are open, as the easiest mode of escape. I accept the defenders' statements that science has not yet explained how that "scaffolding" occurs, and that no remedy has yet been devised to protect workmen against such risks. I accept also the statement that there is no means by which coals and ironstone can be admitted without the man feeding the furnace being burnt to death if there should be a rush of flame to the door. That such should be the case is incredible to my mind, but I accept it because it is according to the evidence. The question then is, whether the defenders were entitled to go on struggling with this "scaffolding" for nine months, or whether they were not bound to put an end to it before then by the admittedly competent method of blowing out the furnace? I think their action was not justifiable. Seeing that the danger was unavoidable except by one method, they were not entitled to go on for nine months without having recourse to that method. That the danger was considerable is shewn by the fact that two very serious accidents occurred within six weeks of each other. I am therefore for recalling both interlocutors and finding both pursuers entitled to damages. I propose that we allow £100 of damages to the workman who lost his son, and £50 to the workman Barriscell, who was himself injured.

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LORD YOUNG and LORD LEE concurred.

LORD RUTHERFURD CLARK was absent.

THIS interlocutor was pronounced:—"Find in fact (1) that on the occasion libelled the pursuer's son, Alexander Henderson, then in the employment of the defenders, was sent by their night superintendent to the top of their furnace No. 9, to open its doors for the men putting in charges of coal and ironstone; (2) that on his opening one of the doors a 'slip' or fall of material adhering to the interior of the furnace took place, causing an up-rush of flame, by which he was burnt severely, and in consequence of which he died; (3) that the said furnace had been in a dangerous state from the formation of 'scaffolding' therein, which had repeatedly caused such slips in the furnace during the previous nine months, and the death of the said Alexander Henderson is attributable to the fault of the defenders in allowing the furnace to be worked for so long a period in the state in which it was, notwithstanding the fact that all efforts to remove the 'scaffolding' had failed: Find in law that the defenders are liable in damages and *solatium* to the pursuer for the loss of his son: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against: Assess the damages and *solatium* at £100: Ordain the defenders to make payment of that sum to the pursuer: Find him entitled to expenses in the inferior Court and in this Court: Remit," &c.

W. COTTON, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

FRANCIS ERSKINE VINCENT AND GUARDIAN, Petitioners (Appellants).— No. 117.  
*Balfour—Murray.*

EARL OF BUCHAN, Respondent.—*D.-F. Mackintosh—Low.*

*Domicile—Change of domicile—Proof—Onus.*—A Scotswoman, the daughter of a Scottish peer, married the proprietor of an entailed estate in Scotland, on Mar. 19, 1889.  
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**No. 117.** which the spouses resided till the husband's death in 1883, when the estate passed to his nephew. The widow thereafter resided in London till her death in 1888.

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A petition by her nephew, her sole next of kin according to the law of Scotland, to be decerned her executor-dative was opposed by her brother consanguinean, who claimed to be one of the next of kin according to the law of England. He alleged that she died domiciled in England.

It was proved that the deceased for a few months after her husband's death continued to reside in his house in London, which, with the furniture, he had left to her; that she then sold this house and subsequently lived in furnished houses or in lodgings in London, sometimes leaving London for a few months to reside on the Continent. She frequently expressed her intention to have no permanent home anywhere, and stated that she had no intention of returning to live in Scotland, as the climate did not suit her. Her principal adviser in business matters was the factor on the entailed estate, and her late husband's law-agents in Edinburgh continued to manage two farms in Scotland left to her by her husband (which she desired to sell), and her investments generally. It appeared that she resided in London chiefly for the sake of being near her stepmother.

*Held* that the *onus* lay upon the respondent of proving that the deceased had *animo et facto* abandoned her domicile of origin, and that he had failed to prove her intention to abandon it.

1st Division.  
Sheriff Com-  
missary of  
Midlothian.  
M.

**LADY ELIZABETH LEE HARVEY**, daughter of the twelfth Earl of Buchan, by his second marriage, was married to Henry Lee Harvey of Castlesemples, Renfrewshire, in 1855. She was born in Scotland, where her father had his domicile. After her marriage she resided principally at Castlesemples until her husband's death, which took place in May 1883, but for a portion of each year she and her husband occupied a house, No. 113 St George's Square, London, belonging to the latter.

Mr Lee Harvey's estate of Castlesemples was entailed, and passed at his death to the heir of entail. He left his wife two farms—the only unentailed heritable property which he possessed in Scotland—his house in London, and all his moveable property.

Lady Elizabeth survived her husband for five years. She lived for a few months after his death at 113 St George's Square, but as that house did not suit her she sold it, and she thereafter lived in furnished houses and lodgings in London, sometimes going abroad for several months at a time, until her death. She died intestate and without issue at 85 Cadogan Square, London, on 13th January 1888. Her investments and business matters were managed by the firm of Dundas & Wilson, C.S., Edinburgh, who had been her husband's law-agents.

Francis Erskine Vincent, son of the Reverend Sir William Vincent Bart., thereafter presented a petition to the Sheriff of the Lothians at Edinburgh, in which his father, as his curator, concurred, claiming to be decerned executor-dative *qua* next of kin of the deceased. He was the only child of Lady Margaret Erskine or Vincent, who was Lady Elizabeth's sister german.

He stated that Lady Elizabeth was a domiciled Scotswoman at the date of her death, and that although she had resided during the latter part of her life chiefly in London, she had never intended to change, and in point of fact never had changed, her Scotch domicile.

Answers to the petition were lodged for the Earl of Buchan, who was Lady Elizabeth's eldest brother consanguinean and one of her next of kin according to the law of England, by which brothers and sisters consanguinean were entitled in cases of intestacy to the office of executor equally with brothers and sisters german. He contended that Lady

Elizabeth was a domiciled Englishwoman at the date of her death, and No. 117.  
that her succession fell to be regulated by the law of England.

He stated, *inter alia*;—"After Mr Lee Harvey's death Lady Elizabeth Lee Harvey only once visited Scotland for a very short time on business. She resolved to make London her home, and expressed her intention to that effect. Most of her friends were there, and she enjoyed better health in London than anywhere else. She had always found the Scotch climate too cold for her, and she stated her intention not to reside there again."

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The petitioners pleaded;—The petitioner Francis Erskine Vincent being the next of kin of the said deceased Right Honourable Elizabeth Lee Harvey, is entitled to be decerned her executor-dative, and the said Reverend Sir William Vincent, Baronet, being his father and curator and guardian, and administrator-in-law, is entitled to be decerned along with him.

The respondent pleaded, *inter alia*;—(1) The deceased having died domiciled in England, and the respondent as one of her next of kin being in course of applying to the Courts of that country for a grant of letters of administration to her whole estates in the United Kingdom, the prayer of the petition ought to be refused, with expenses.

On 16th March 1888 the Sheriff-substitute (Hamilton) allowed a proof, the petitioners being appointed to lead, and on 31st March following the Sheriff (Crichton) adhered, objection having, *inter alia*, been taken before him to that part of his Substitute's interlocutor which appointed the petitioners to lead.

The above-stated facts were proved by the evidence which was led, and in regard to the intentions of the deceased a large number of witnesses were examined, the most important portions of whose testimony are given below.\* A number of letters were also produced.

\* For the petitioners there were examined, *inter alios*, the following witnesses:—

The Countess-Dowager of Buchan deponed,—“I think I met Lady Elizabeth after her husband's death at the house in St George's Square. She never intended to remain there from the beginning, but she went to make some disposition of the affairs and furniture, and she was then living in the two rooms below. . . . She was about four or five weeks in this house, but when she left me I think she went there. (Q.) And then she went to different houses—furnished houses—in Cadogan Place? (A.) I think it must have been four or five houses in succession. (Q.) You saw her from time to time at those different houses, did you not? (A.) Very frequently. (Q.) And did you know that she went abroad every summer? (A.) Yes, usually. (Q.) Did she tell you why she was in London from time to time? (A.) I suppose because she had to look after her furniture and affairs, but I think it was on my account. She was a kind good daughter; and she said so repeatedly—it was really only for me. (Q.) What did she say; do you remember what sort of expression she made use of when she said that? (A.) Well, I think you would get it from some people to whom she said it very distinctly more accurately than from me; but I know she always implied that to me, and she sometimes said it very distinctly—that she only came for me. Her first idea, I believe in the world, was that she never would have a home again after losing her husband and child. Then she came to London, and she always disliked London excessively, and came, I believe, only because she knew I was so much attached to her. (Q.) Did she ever speak to you about living abroad? (A.) No; she always said she never would live anywhere, but she meant to go abroad. I daresay it would have ended in her living chiefly abroad and only coming to England and Scotland occasionally. (Q.) As to Scotland, did she ever say anything about being in Scotland again? (A.) . . . She two or three times, I think, made a slight allusion to her intention of having



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On 29th June 1888 the Sheriff-substitute pronounced an interlocutor, finding that the deceased had died domiciled in England, sus-

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a room kept for her, or fitted up for her more properly, on one of her farms; she always spoke very much of going to see the monument to her husband's memory, that she had never seen yet—that she never did see. (Q.) She talked of having a room fitted up on one of the farms, is that what I understand? (A.) That is what I imagine she would have done if she had lived a little longer; of course she did not like the idea of going to stay at Castlesempole; that would have been very painful to her. (Q.) She had been the mistress at Castlesempole? (A.) Of course for many years, I forget how many. (Q.) Do you believe that she had any intention in her mind as to where she would live when she was in London? (A.) I am quite sure of her mind so far, that she was determined she never would, you might say, 'live' anywhere. One cannot tell what might have happened, but I am quite sure it would not have been London or England—any part of England; but I do not believe she ever would have settled, I do not believe so. . . . (Q.) Did she ever say anything to you as to why she sold the George Square furniture? (A.) Oh, she told me she sold the things because she did not want them any more, and never could want them again. I have heard her say that very often. (Q.) Did she say why she would not want them again? (A.) Because she said she never could be happy in this world, and she never would attempt to make a home for herself again; she said that to me in different words, but implying that. That was the only thing in fact, I think, that she had clear in her mind. . . . Cross.—(Q.) I believe that Lady Elizabeth and yourself lived upon very close terms of intimacy and affection? (A.) Oh, she was the kindest daughter possible to me! (Q.) And doubtless the fact that you lived in London was a great attraction to her to live here? (A.) Oh, she never would have come to London,—I am sure she would not,—but for me, because she disliked the place and the climate. (Q.) While you lived here, do you think she would have left London? (A.) If I had left London I think she would have left; certainly, she offered to me to go and live with me in the country. (Q.) And so long as you remained in London she would have remained too. (A.) Oh, yes; she would come the greater part of the year, I should think always. (Q.) Did she ever have any settled intention of living anywhere else except London? (A.) Oh, she had no settled intentions whatever so far as I know. (Q.) And what you said about her saying she never would have a home was in the sense of a happy home, like she had before her husband was dead? (A.) I think she never supposed herself capable of being again happy. I believe that was the meaning of it. (Q.) Now, do you remember when it was that she spoke about having a room fitted up at one of her farm houses? Was it when she was putting up a memorial to her husband at Lochwinnoch? (A.) I really cannot exactly say—I do not know. I did not give much attention to it, but really I remember it now, and I think more than once she spoke of it in that way when she was talking. (Q.) Had she a very strong desire to do everything in her power to keep her husband's memory fresh down at Lochwinnoch? (A.) Oh, I may say it was the one, the leading, idea of her life. In all her charities and gifts, and all her arrangements, she was always thinking of something or another to do that. He was very much beloved, and she was always wishing to keep that alive. (Q.) I think she used to go abroad in summer to some watering-place for her health? (A.) I think she was usually three or four months abroad. (Q.) She went to spas and watering-places, did she not, for her health? (A.) Yes; she went to several watering-places I think, chiefly because she liked careering about, she liked travelling in railways, which I thought a very odd taste."

Mrs Garrett Anderson, M.D., who had attended the deceased professionally, deponed,—“(Q.) What was the deceased's condition so far as you observed it as to being satisfied as to being in one place or moving about? (A.) She was rather restless, she was fond of little changes, fond of going abroad and so on, and very wanting in anything like mental energy of any kind. (Q.) Did she speak to you as to her intentions at any time? (A.) As to staying do you

taining the first plea in law for the respondent, and dismissing the No. 117. petition.\*

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mean? (Q.) Yes. (A.) The only thing that I can remember bearing upon it at all was that once or twice I tried to interest her in different things in London, and she always said, Oh, it was not worth while taking up things in London. I tried to get her interested in various good works that, for her own sake, I thought would be good for her, but she always said, 'Oh, it is not worth while taking up things in London, I am here only passing, I am here as it were for the time.' I remember her saying that, and I think that is all. (Q.) Did she speak about Lady Buchan? (A.) Yes, I think it was in reference to that, she said she was here really on the Buchans' account. (Q.) You know, I think, that she did live in different houses at the time. (A.) Oh, yes, I saw her in four (I think) different houses in Cadogan Gardens. (Q.) Did she speak to you about her Scotch property at all, about her charities and things there? (A.) Yes, she several times said that all her interests were in Scotland, and that she had a great deal to do. I occasionally suggested to her being a little more active in London, and she would say, 'Well, I have a great deal of business in connection with Scotland.' I remember her saying that several times. (Q.) I think she was very fond of Lady Buchan? (A.) Oh, very. (Q.) And manifested it in every way? (A.) Oh, I think so. I think she was extremely attached to her. (Q.) What age person was she, do you know? (A.) I cannot be quite exact, but she was somewhere about fifty-seven or fifty-eight or thereabouts. Cross.—(Q.) I think you said that shewed itself in want of energy? (A.) Yes. (Q.) Was it difficult to get her to move to go abroad for her health? (A.) It was difficult to get her to do anything, to stick to any plan from day to day or week to week. (Q.) When you tried to interest her in work in London, did she tell you that she had a great many calls upon her in connection with her old friends in Scotland? (A.) Yes. (Q.) And was that the chief reason why she did not take up your suggestion? (A.) Yes; I thought it was. She rather put it for one thing on the score of money that she had so many claims upon her in Scotland. (Q.) That is exactly what I wished to ask. (A.) That she was engrossed rather with her Scotch duties. (Q.) Was it then that she said she was in London on Lady Buchan's account? Was it in connection with your suggesting that she should interest herself in London work? (A.) Yes; I think it was. (Q.) Did she ever suggest going to live in a permanent way in any other place except London? (A.) She spoke occasionally that she would be very pleased to live abroad, that she would like living abroad; she liked the climate and the surroundings abroad very much. (Q.) But she never talked of any particular place where she had an idea of taking up her

\* "NOTE.—It is not disputed that the late Lady Elizabeth Lee Harvey, who was the daughter of a Scotch Earl, and the wife of a Scotch landed proprietor, had her domicile in Scotland down to her husband's death in 1883. The question is whether she afterwards acquired a domicile in England, which she retained until her death in January last. After careful consideration the Sheriff-substitute has come to be of opinion that the question must be answered in the affirmative. Shortly stated, the import of the evidence seems to him to be:—That when Lady Elizabeth left Scotland after her husband's death she had no intention of returning, that she voluntarily fixed upon London as the place where she would live in future, and that the character and circumstances of her residence there, which lasted practically without interruption from the time of her leaving Scotland until her death, shewed a present intention to make London her home or permanent place of abode.

"The Sheriff-substitute, in dismissing the petition, is not to be held as deciding that the petitioner is not entitled to be decerned executor to the deceased. It is not denied that by the law of England he has right to a share of the estate, and he may have right also to a share in its administration, but this question will be better considered on a new application than on any amendment of the present petition."

No. 117. Francis Erskine Vincent and his guardian appealed to the Court of Session, and argued;—There could be no question that the deceased was

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residence? (A.) No; I do not think she did. (Q.) Did she ever talk of going back to Scotland to live there, or did she ever mention that? (A.) I do not remember her mentioning it."

Mr Ligertwood, the factor at Castlesemple, who was Lady Elizabeth's confidential adviser, and managed her affairs until her death, deponed,—“(Q.) Did Lady Elizabeth say anything when you saw her . . . as to where she was going to live? (A.) Not much; she thought it would end by her living abroad, as she thought the climate suited her better. (Q.) Did she ever make use of any expression that gave you to understand that she had any intention of residing permanently at any particular place? (A.) No, but I thought when she spoke about living abroad it would be Carlsbad, as she was very fond of it. (Q.) Did she use any expression to make you think that she thought of living in London or any other place? (A.) No; I don't think so.”

For the respondent there were examined, *inter alios*, the following witnesses:—

Edwin Reed, coachman to Lady Elizabeth, deponed,—“(Q.) Do you remember Lady Elizabeth engaging you to stay with her after her husband's death? (A.) Yes. (Q.) Where did she do that? (A.) She did it in Bath Street, Glasgow, at the hotel where she was staying. . . . (Q.) Can you tell us what she said to you when she engaged you? (A.) Yes, she said ‘Would you like to live with me in London, because I am going to stay in London altogether?’ and I said ‘Yes.’ She paid my wife's fare up to London, my furniture, and my own. (Q.) Did she use to treat you with considerable confidence? (A.) Yes. (Q.) And when she sent you upon your orders did she use to talk to you freely? (A.) Yes. (Q.) Did she ever afterwards say anything to you as to her intentions as to where she would reside? (A.) In London . . . (Q.) Was it your impression from your conversations with her that she really wanted to take a house in London? (A.) Yes. (Q.) That was the place where she intended to make her principal residence? (A.) To reside—that is my agreement—when we came from Scotland. She told me we should live in London. She would travel abroad for three or four months in the year. (Q.) And she never went back upon that? (A.) No. (Q.) When she went abroad she left her servants in her house when she had the houses in Cadogan Place? (A.) Yes, well she used to give them a holiday, they were always on wages. (Q.) She kept them on? (A.) She kept them on.”

Mrs Reed, the wife of the last witness, deponed,—“(Q.) Do you remember, just after you came up to London with your husband in 1883, having a conversation with Lady Elizabeth at the St George Square house? (A.) Yes. She asked me if it was against my wish to come and live with her in London, and I said ‘No.’ She said that her residence would be in London now, and I should be all the year round in London, and she hoped that London would agree with me, as I had not been used with it. (Q.) Your own people, I suppose, are all in Scotland? (A.) Yes. (Q.) Did she say anything about her reasons for living in London? (A.) She said all her friends were in London, and it was Mr Harvey's wish that she should reside at No. 113 St George's Square, but she thought she really could not do that. (Q.) Why? (A.) Because she did not care about the stairs, and it was rather too much, and the house was rather large for her; but she was going to sell the house, or going to try to. (Q.) Now in your subsequent conversations with her, in any talks you had with her after that, did she ever shew any change of mind as to her idea that she would live in London? (A.) No. (Q.) Was she looking for a house down to the last do you know? (A.) Yes. . . . (Q.) Did she use to talk to you about selling her farms in Scotland? (A.) Yes. (Q.) Had she quite made up her mind? (A.) Yes, she said she was going to keep them on no account. (Q.) Had she any idea of going back to Scotland? (A.) Never expressed such a wish to me. (Q.) Did she rather avoid anything that brought up old associations with her husband or child? (A.) No, latterly she talked very freely of them.”

a domiciled Scotswoman at the date of her husband's death in 1883. No. 117. Two questions then arose,—(1) Did she conceive and carry out an intention to cease to have a domicile in Scotland? and (2) Did she *facto et animo* carry out that intention? and on this latter point it was to be kept in view that a change of domicile involved a great deal more than a change of residence. But, in the first place, the Sheriffs had gone wrong in placing the *onus* upon the petitioner. The *onus* lay upon the respondent, who was attempting to set up an acquired domicile in place of the domicile of origin, and the domicile of origin must be displaced.<sup>1</sup> It was not enough to point to evidence that the deceased did not mean to go back to Scotland. Such evidence did not amount to proof of an *animus* to give up the Scottish domicile. The deceased might have moved about from place to place for years and never returned to Scotland, but that was not sufficient.<sup>2</sup> Upon the facts in the present case, no doubt the deceased had lived a good deal in London after her husband's death, but this merely supported the view that she had no fixed purpose of making a home anywhere. The evidence was thoroughly colourless as supporting the respondent's contention. The two witnesses who were chiefly relied upon on the other side were the coachman, Reid, and his wife, but it was to be remarked that they were influenced by their own wish that the deceased should take up her abode in London. There was this further observation to be made, that in the case of persons in the position of the deceased—left by the death of her husband without a home in Scotland, and previously accustomed to live part of the year in London—it was not unusual for them to take up their abode there. Accordingly, in a question of change of domicile, less weight was to be attached to the fact of a residence established in London (assuming there was such a residence, which there was not here) than to a residence established under similar circumstances in any other part of England or elsewhere out of Scotland.

Argued for the respondent;—It was admitted that there was a heavy *onus* on the respondent to shew that the domicile of origin had been lost, and that the change was established *facto et animo*. What had chiefly to be kept in view were the circumstances from which the *animus* was to be inferred. There was no need of a conscious *animus*, nor did it require to be expressed. All that was necessary was that the surroundings must be such as to involve it. If the consequences could be inferred from the act of change that was enough, although they were never present to the mind of the person making the change. In the first place, it was to be noticed that there was no family estate here, as there was in the case of *Udny*.<sup>3</sup> The two cases were therefore distinguishable in that very important respect. No doubt two farms—the only unentailed part of the property—had been left to Lady Elizabeth Harvey by her husband, but the evidence shewed that her wish always was to sell these. Further, upon the facts of the case, whatever was to be inferred as to Lady Elizabeth's *animus* in the matter, it was clear that *de facto* she had made up her mind never to have her home in Scotland again. And more than that, she had

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<sup>1</sup> Steel v. Steel, July 12, 1888, 15 R. 896; Moorhouse v. Lord, March 1863, 10 Clark's H. of L. Reps. 272; Donaldson v. McClure, Dec. 18, 1857, 20 D. 307 (Lord Curriehill at p. 321), 30 Scot. Jur. 165, affd. March 7, 1860, 3 Macq. 852; Bell v. Kennedy, May 14, 1868, 6 Macph. (H. L.) 69, 40 Scot. Jur. 476; Arnott v. Groom, Nov. 24, 1846, 9 D. 142, 19 Scot. Jur. 43.

<sup>2</sup> Munro v. Munro, August 10, 1840, 1 Rob. Apps. 492; Fraser on Husband and Wife, 1265; Patience v. Main, March 7, 1885, L. R., 29 Chanc. Div. 976; *Udny* v. *Udny*, Dec. 14, 1866, 5 Macph. 164, 39 Scot. Jur. 163, June 3, 1869, 7 Macph. (H. L.) 89.

<sup>3</sup> *Udny* v. *Udny*, 5 Macph. 164, and 7 Macph. (H. L.) 89.

**No. 117.** made up her mind to have her home for the rest of her life in London. No doubt both these conditions must be present, for it was conceded that in order to the retention of a domicile of origin a home in the country of the domicile was not necessary. But it was submitted that both conditions were satisfied on the facts of this case. Besides, this was the case of a widow whose home was broken up by the death of her husband. That was all in favour of the respondent's contention, and differentiated the case from that, for instance, of a young Scotsman who might be absent from Scotland in London or in foreign parts for a period of years upon business. Here this lady's domestic life was wrecked by her husband's death. She had no jointure house, and all the remaining ties she had were in London. She was in bad health and under medical care, and when, accordingly, she settled in London, it was to be presumed that she chose, and chose finally, to take up her abode there. The evidence of Reed, the coachman, and his wife was very explicit as to her intentions. Any relations that she had with Scotland after her husband's death were due to the devotion which she paid to her husband's memory. The only two short visits she paid to Scotland arose from this desire. The real evidence was thus all the one way, and was sufficient to put the *onus* upon the appellants to shew that the deceased had not acquired an English domicile. The length of the residence was not of so much importance as its character, and the inferences which were to be deduced from the merely casual recollections of the most of the witnesses who had been examined were of no weight.

At advising,—

**LORD ADAM.**—Lady Elizabeth Lee Harvey died intestate and without issue on the 13th January 1888.

Thereafter the petitioner, Francis Erskine Vincent, who is a minor, presented a petition to the Commissary of Edinburgh praying to be decerned executorial *qua* next of kin to her along with his father as his curator.

The petition is presented on the footing that Lady Elizabeth Lee Harvey was at the time of her death domiciled in Scotland.

It is not disputed that the petitioner is the only child of Lady Margaret Erskine or Vincent, and that she and Lady Elizabeth Lee Harvey were the only children of the second marriage of the Earl of Buchan, and that, therefore, the petitioner is the deceased's sole next of kin by the law of Scotland.

The petition, however, is opposed by the Earl of Buchan, who is the eldest brother consanguinean of Lady Elizabeth Lee Harvey. He alleges that he is one of her next of kin according to the law of England, and that by that law brothers and sisters consanguinean are entitled, in cases of intestacy, to participate in the division of the deceased's estate equally with the brothers and sisters german; and he farther alleges that Lady Elizabeth Lee Harvey was at the time of her death domiciled in England.

The question at issue between the parties, and the only one that was argued to us, is whether Lady Elizabeth Lee Harvey was at the time of her death domiciled in Scotland or in England.

The Sheriff-commissary, on considering the proof, pronounced, on 29th June 1888, an interlocutor by which he found that the deceased died domiciled in England, and dismissed the petition.

It is against this interlocutor that the present appeal is brought.

Lady Elizabeth Lee Harvey was the daughter of the Earl of Buchan, who was a Scotch Peer and a domiciled Scotman. She was born in Edinburgh, and

was married in 1855 to Mr Lee Harvey of Castlesemple, who was also a domiciled Scotsman and the proprietor of that estate in Scotland, where she principally resided with him until his death in May 1883.

There can be no doubt or question, therefore, that Lady Elizabeth Lee Harvey was from her birth down to this date a domiciled Scotchwoman.

It is at this date, accordingly, that the respondent alleges that Lady Elizabeth Lee Harvey changed her domicile.

That being so, the *onus* undoubtedly lies upon him of proving the change, and I may remark in passing, although it is not perhaps very material now, that the interlocutors of the Sheriff-substitute and Sheriff, of dates 16th and 31st March 1888 respectively, were erroneous, in respect that by ordering the petitioner to lead in the proof they failed to recognise the *onus* thus lying on the respondent.

What that *onus* is, and what the respondent must prove in order to establish a change in the domicile of origin, is, I think, quite settled in law, and I need only refer to the recent case of *Steel v. Steel*, 15 R. 896, and to the authorities there cited.

These cases settle that the respondent must prove not only that Lady Elizabeth Lee Harvey intended to abandon her Scotch domicile after the death of her husband, but also that she had actually acquired, *animo et facto*, a domicile in England. The domicile of origin cannot be lost until another is acquired. Merely to prove, therefore, that Lady Elizabeth Lee Harvey when she went to England did not intend to return to Scotland to reside there, would, *per se*, avail the respondent nothing.

I think that it is equally well settled in law and in reason that an intention to abandon the domicile of origin is not easily to be presumed. It is not easily to be presumed that a person intends to abandon those civil rights which he has hitherto enjoyed, and which have hitherto regulated his life, and to subject himself to foreign laws. But this no doubt is a question of degree, and it may more easily be presumed, for example, that a Scotchman may have intended to subject himself to the laws of England than to those of a purely foreign country.

From a careful consideration of the evidence I am satisfied that when Lady Elizabeth Lee Harvey upon the death of her husband in 1883, having no longer a residence in Scotland, went to reside in London, she had no intention of abandoning her Scotch domicile. I think she had no settled intention of residing in London or elsewhere in England. I think the state of her mind was that she had resolved to have no permanent home anywhere, but to reside either in England or abroad from time to time as best suited her health and convenience at the time; and I think that this continued to be the condition of her mind until her death.

If this be the right view of the evidence, then the respondent's case must fail, because, in that case, Lady Elizabeth Lee Harvey never had the *animus* necessary for the acquisition of a new domicile.

That Lady Elizabeth Lee Harvey should not have desired to form a permanent residence at any particular place was, I think, in her circumstances, very natural. There had been only one child of the marriage between her and her husband—a daughter, but she had died, and Lady Elizabeth, after her husband's death, was left very much alone in the world. She seems to have had few ties left, and no particular reason for selecting one place rather than another for a permanent residence. As regards Scotland, Castlesemple was entailed, and had passed into the hands of comparative strangers, so that she had no

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No. 117. longer any residence there. She seems to have had few or no friends in England, except her Scotch relatives, and of these she seems to have been most attached to her stepmother, Lady Buchan, who had brought her up; but Lady Buchan was an aged lady.

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There is, however, evidence as to what Lady Elizabeth Lee Harvey's intentions were as regards her future life.

Lady Buchan, who I think is more likely than anyone else to have known her intentions in this respect, says,—“Her first idea I believe in the world was that she never would have a home again after losing her husband and child. Then she came to London, and she always disliked London excessively, and came, I believe, only because she knew I was so much attached to her. (Q.) Did she ever speak to you about living abroad? (A.) No. She always said she never would live anywhere, but she meant to go abroad. I daresay it would have ended in her living chiefly abroad, and only coming to England and Scotland occasionally.” And again Lady Buchan says, in answer to the question,—“Do you believe that she had any intention in her mind as to where she would live when she was in London? (A.) I am quite sure of her mind so far that she was determined she never would, you might say, ‘live’ anywhere. One cannot tell what might have happened, but I am quite sure it would not have been London or England—any part of England. But I do not believe she ever would have settled—I do not believe so.” Then again Lady Buchan says, with reference to Lady Elizabeth Lee Harvey having sold her furniture,—“Oh, she” (Lady Elizabeth Lee Harvey) “told me she sold the things because she did not want them any more and never could want them again. I have heard her say that very often. (Q.) Did she say why she would not want them again? (A.) Because she said she never could be happy in this world, and she never would attempt to make a home for herself again. She said that to me in different words, but implying that. That was the only thing in fact, I think, that she had clear in her mind.”

Mrs Doctor Garret Anderson, who attended Lady Elizabeth professionally for a number of years, says on this subject, in answer to the question,—“Did she speak to you as to her intentions at any time? (A.) As to staying do you mean? (Q.) Yes. (A.) The only thing that I can remember bearing upon it at all was, that once or twice I tried to interest her in different things in London, and she always said,—‘ . . . Oh, it is not worth while taking up things in London. I am here only passing, I am here as it were for the time.’ I remember her saying that, and I think that is all.”

Mr Ligertwood, who is a very reliable witness, speaking to a conversation which took place in 1886, is asked,—“Did she say anything on that occasion as to where she was going to live? (A.) Not much; she thought it would end by her living abroad, as she thought the climate suited her better. (Q.) Did she ever make use of any expression that gave you to understand that she had any intention of residing permanently at any particular place? (A.) No; but I thought, when she spoke of living abroad, it would be Carlsbad, as she was very fond of it. (Q.) Did she use any expression to make you think that she thought of living in London or any other place? (A.) No, I don't think so.” And Dr Campbell, who is a witness for the respondent, and who had been her medical attendant for several years, says on this subject,—“(Q.) In the course of your conversations with her, did she ever say anything which shewed her intention as to the place of her residence? (A.) Not the slightest.



med to have no wish at all. She seemed to be absolutely indifferent as No. 117.

re she was."

is also a voluminous correspondence produced containing many of Lady Vincent v. Mar. 19, 1889.  
th's letters, principally upon business matters, but it does not throw Earl of  
of any, light on her intentions in this respect. I may, however, refer to Buchan.

date 25th August 1883, addressed to Mr Ligertwood, in which she  
—"Of course I shall be more in London now than anywhere else." That  
ly what she was during the few future years of her life; but that is a  
ifferent thing from being settled permanently there.

regards the evidence of the servants, I do not think it is of any weight.  
Elizabeth seems to have said to them one thing to-day and another to-  
—that she was going to live in London, in Germany, or in Paris, just as  
pened to be pleased with her surroundings at the time.

do the circumstances of her residence in London, after her husband's  
afford any presumption that she intended to reside there permanently.

husband had left her by disposition and settlement everything in his  
—and among other subjects a house in George Square, London, in which  
d resided for a part of the year, and in which she was residing when he  
But she broke up her establishment there—sold the most part of the  
e, and ultimately the house also. Too much weight must not, however,  
hed to the sale of the house, because she thought it too large for her,  
not like the situation. After breaking up her establishment in George  
she lived for some time in lodgings, and then successively in three  
d houses in Cadogan Place, which situation she liked, and she ultimately  
ere in lodgings, or furnished apartments. Every year, except one when  
elled in England, she resided for some months abroad.

mode of life does not appear to me to suggest any element of permanency  
ence, but rather a desire on her ladyship's part to be able to move about  
d where she pleased.

he other hand, as regards Scotland, it is true that she had no residence  
ad only visited it twice after her husband's death. She had two farms  
rewshire, which her husband had left her, and although, when bad times  
d she had trouble with her tenants, she wished to sell these farms, they  
been sold at the time of her death. Her husband had also left her be-  
£14,000 and £15,000 of moveable property. This was all invested in  
d, and her whole business matters were managed by her agents in Scot-  
d she continued to contribute, through the instrumentality of Mr Ligert-  
o numerous local charities there.

facts might have been of little avail, if the question had been whether  
re sufficient to maintain a domicile of choice, but they are sufficient to  
at Lady Elizabeth had never severed her connection with Scotland.

nk the error into which the learned Sheriff-substitute has fallen lies in  
at he has failed to appreciate the difference between a domicile of origin  
omicile of choice, and on the whole matter I am of opinion that the re-  
nt has failed to prove that Lady Elizabeth took up her residence in  
d with the intention of permanently residing there, that consequently she  
ost her Scottish domicile, and that the interlocutor appealed against  
o be reversed.

D. PRESIDENT.—I am of the same opinion, and I think the case is so very



No. 117. clear that the Sheriff-substitute could not have reached the conclusion he did if it had not been for the mistake he made in placing the *onus* upon the petitioner. Because the deceased happened to have been resident in London, he seems to have thought that the *onus* lay upon the petitioner to prove that the Scotch domicile was retained. But that is not the question which arises. The question is whether the Scotch domicile was lost, and it cannot be lost without the acquisition of a new one. There is a very heavy *onus* upon the person who undertakes to shew that a domicile was lost, where that domicile is the domicile of origin.

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LORD FRASER delivered no opinion, as he had not been present when the case was argued.

The LORD PRESIDENT intimated that LORD MURE, who was absent from illness, concurred in the judgment.

THE COURT recalled the Sheriff-substitute's interlocutor of 29th June 1888, repelled the pleas in law for the respondent, and sustained the pleas in law for the appellants, and remitted to the Sheriff-commissary to proceed accordingly.

DUNDAS & WILSON, C.S.—J. K. & W. P. LINDSAY, W.S.—Agents.

No. 118. JAMES BEEDIE, Petitioner.—*Balfour—M'Lennan.*  
MRS BARBARA BEEDIE, Respondent.—*D.-F. Mackintosh—G. R. Gillespie.*  
Mar. 20, 1889.  
Beedie v.  
Beedie.

*Parent and Child—Custody—Conjugal Rights (Scotland) Act, 1861 (24 and 25 Vict. cap. 86), sec. 9—Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27), sec. 5.*—The Guardianship of Infants Act, 1886, sec. 5, enacts that the Court may on the application of the mother of a pupil make an order regarding its custody, "having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as the father, and may alter, vary, or discharge such order on the application of either parent."

*Held* that where in an action of separation a father has been deprived of the custody of his child, it is competent for him to present a petition under this section.

In an action raised by a wife against her husband, concluding for separation and aliment and for the custody of children, the husband did not lodge defences, and after proof the Lord Ordinary gave decree of separation and found the pursuer entitled to the custody of a child of the marriage. Soon after the interlocutor had become final the husband presented a petition to the Court, founding upon the 5th section of the Guardianship of Infants Act, 1886, praying to have the order relating to its custody varied. *Held* that the interlocutor could not be altered, but that the question of the custody of the child was always open to the Court, and that the petition was competent in so far as it raised this question.

*Observed* that in a petition under sec. 5 the Court could give effect to considerations which could not be regarded in determining an action of separation and aliment.

1ST DIVISION.  
C.

IN June 1888 Mrs Barbara Beedie raised an action against her husband, James Beedie, for separation and aliment on the ground of cruelty. The summons also concluded for the custody of two pupil children born of the marriage, viz., Ann Bartlet Beedie and Alexander Bartlet Beedie, the latter of whom was four years old.

At the date of the action the marriage had subsisted during sixteen years, and there were six children of the marriage living.

The husband did not lodge defences in the action, and was not represented at the proof which was subsequently led. No. 118.

On 10th November 1888 the Lord Ordinary (Trayner) pronounced an interlocutor granting decree of separation, awarding aliment for the pursuer and for the youngest child Alexander Bartlet Beedie, and finding the pursuer entitled to the custody of that child. He further interdicted the defender "from interfering with the said child, or the pursuer as his custodier." Mar. 20, 1889.  
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That interlocutor was not reclaimed against, and therefore became final.

On 11th January 1889 the Lord Ordinary issued an order on the defender to deliver up the child to his mother within fourteen days.

On 23d January 1889 James Beedie presented a petition to the First Division, in which he prayed the Court "to discharge the order pronounced by the Honourable Lord Trayner on 10th November 1888, finding the said Mrs Barbara Paterson or Beedie entitled to the custody and keeping of the said pupil child, Alexander Bartlet Beedie, and interdicting, prohibiting, and discharging the petitioner from interfering with the said child or the said Mrs Barbara Paterson or Beedie as his custodier; to find the petitioner entitled to the custody and keeping of the said child; and, if need be, to order the said Mrs Barbara Paterson or Beedie to deliver to the petitioner the person of the said child, to remain with him, subject to the further orders of your Lordships; or otherwise to alter and vary the said order of the said Lord Trayner, to the effect of giving the petitioner access to his said child at all reasonable times, and of providing that the said child shall during stated periods be in the petitioner's custody; and meanwhile to discharge the said order *ad interim*, and to direct that the said child shall remain in the petitioner's custody, pending the proceedings to follow hereon."

The petitioner founded on sec. 5 of the Guardianship of Infants Act, 1886,\* and averred that he had instructed agents to defend the action, but that they had not lodged defences, and had resigned the agency a few days before the proof; that the defender was unable timeously to make other arrangements; and that he did not hear the result of the action until 30th December 1888, when the Lord Ordinary's interlocutor had become final. "The petitioner therefore feels much aggrieved by the said judgment, and particularly in so far as it deprives him of the custody of his pupil son.

While prepared to raise an action of reduction, he has been advised that, so far as regards the Lord Ordinary's order as to custody and aliment, he can obtain from your Lordships under the present petition the redress to which he humbly submits that he is entitled without resorting to such an action. This petition is accordingly presented."

Mrs Beedie lodged answers, in which she averred, *inter alia*,—"The respondent submits, in the first place, that this petition is incompetent, and should not be entertained by your Lordships, in respect that it is an attempt to bring under review or set aside a judgment of the Lord Ordinary, which can only be reviewed by way of reclaiming note, or set aside in a process of reduction. The section of the Guardianship of Infants Act, 1886 (49

\* The Guardianship of Infants Act, 1886, sec. 5, provides,—“The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent.”

No. 118. and 50 Vict. cap. 27), referred to is not applicable to the case of a regular action of separation and aliment, and there has been no application to the Court in virtue of that Act under which the prayer of the present petition could competently be granted.”

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She further averred that there had been no change of circumstances since the interlocutor of the Lord Ordinary was pronounced.

Argued for the petitioner;—Though the interlocutor of the Lord Ordinary might be final on the question of separation and aliment, it did not affect the petitioner as guardian of his child. The Court was always open to a parent on such questions, and in the exercise of its *nobile officium* would at any time pronounce such an order as it thought fit with regard to that matter. What the Lord Ordinary had done under the 9th section of the Conjugal Rights Act, 1861, was equivalent to an order in an application under the Guardianship of Infants Act, 1886. If not, then the discretion which was vested in the Court in a matter of this kind would fall to be exercised on different principles according as the case came before the Lord Ordinary or before the Division. The two Acts must be looked at together. If, then, the terms of the Act of 1886 could not be left out of sight by the Lord Ordinary in making an order of the kind, then the order was one of a kind which the Inner-House might have made under that Act. It was impossible now to go back to the Lord Ordinary, because his interlocutor was final, and the only way of attacking his judgment was by a reduction. But a petition to the Inner-House was quite competent—the matter being one in which under the statutes there was no finality. Further, the petition was quite competently brought at the father's instance. In many cases of this kind the Court had taken the view that although a man might make a bad husband he was not necessarily a bad father. Further, the Court were always anxious, if possible, not to break up a family, which would be the result of the Lord Ordinary's interlocutor regarding the custody.<sup>1</sup> In a petition of this kind, in order to justify the Court in interfering, it was not necessary to aver a change of circumstances.<sup>2</sup>

Argued for the respondent;—This question was really *res judicata*. The pursuer had been duly cited in a competent action, and he did not lodge defences. The Lord Ordinary's judgment might have been open to reduction, but no reduction had been brought. Further, no change of circumstances was alleged to have taken place since the Lord Ordinary's interlocutor. All that was said was that a decree in absence did not constitute *res judicata*. The Lord Ordinary had not proceeded, and had not professed to proceed, in any sense upon the Guardianship of Infants Act, 1886, and in making the order regarding the custody of the child he had not paid any regard to the interests of the mother. It was to the interests of the child only that he was entitled to look under the Conjugal Rights Act, 1861, and unless he saw that the child's moral welfare was to be interfered with if allowed to remain with its father, he would not take away the custody. Under that Act he could have no regard to the wishes of the mother. The Lord Ordinary's judgment must stand until it was competently reviewed, or a reduction was brought. The present petition was therefore incompetent.

LORD PRESIDENT.—The prayer of this petition is, I think, somewhat un-

<sup>1</sup> Lang v. Lang, Jan. 30, 1869, 7 Macph. 445, 41 Scot. Jur. 159; Stuart v. Stuart, June 3, 1870, 8 Macph. 821, 42 Scot. Jur. 480; Lilley v. Lilley, Jan. 31, 1877, 4 R. 397; Bloo v. Bloo, June 6, 1882, 9 R. 894; Beattie v. Beattie, Nov. 10, 1883, 11 R. 85.

<sup>2</sup> Macdonald v. Macdonald, July 19, 1881, 8 R. 985; MacLachlan v. Campbell, May 25, 1809, F. C.; Stewart v. Stewart, Dec. 3, 1887, 15 R. 113.

happily expressed, as it asks us to discharge or to vary the interlocutor of the Lord Ordinary. That is language which would be perfectly applicable if the petitioner were entitled to bring the judgment in question under review, but I hold that he cannot do so, as the interlocutor is final, and cannot now be reviewed.

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I am not, however, disposed to stand on the mere language of the prayer as raising a plea of incompetency, for what the petitioner in substance asks is that we should consider the question of the custody of his pupil child.

Whether it is competent to do that, without any change of circumstances having supervened, it is needless to determine, for one thing, I think, is clear, that it is competent for any parent in the position of the petitioner to come at any time and ask the Court to interfere with a view to regulating the custody of his child. This Court is always open to applications of that kind, notwithstanding any proceedings that have taken place in the Outer-House.

The question then comes to be, what can we do in this petition? We cannot alter the Lord Ordinary's interlocutor, or find, in effect, that it should never have been pronounced; on the contrary, we must take it as having been properly pronounced. It is, however, open to our consideration whether the present condition of the custody of this child is the most beneficial in itself, and most in accordance with the equitable rules, or the statutory declaration of those rules, which must regulate the proceedings of this Court.

If the judgment had been the other way, and the custody had been given to the father of the child, I cannot imagine it being contended that the mother could not have presented a petition under the 5th section of the Guardianship of Infants Act, for then she could have asked the Court to consider things which would have been altogether irrelevant before the Lord Ordinary's judgment, and which he had no power to take into consideration. That section provides,—“The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent.”

Now, by that section this Court is authorised, in such cases as the present, to take into consideration and have regard to several things which it could not competently have regarded before the passing of that Act. I do not think that it makes any difference that here the father is the petitioner, and not the mother, for if we entertain the petition as competent at all, it occurs to me that it would be our duty in determining on the merits of the question to have regard to all the considerations mentioned in the section I have quoted. That section contemplates an application at the instance of the mother, and though this petition is not presented at her instance, it would, in my opinion, be anomalous if, in all such cases between a father and a mother, we did not have regard to the same considerations, whether the petition is presented by the one or the other; in short, I think, we are called on to exercise precisely the same discretion whether the petition is at the instance of the father or of the mother.

Now, that circumstance—that we are entitled to have regard to all the considerations mentioned in section 5—puts this petitioner in a different position from that which he would have occupied before the passing of the statute. Then it might have been contended with great plausibility, and possibly with

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success, that there being no change of circumstances since the judgment of the Lord Ordinary (except that the child is two or three months older), there was no sufficient ground to entitle us to alter it. But, as I have said, the recent Act puts us in a wholly different position from that of the Lord Ordinary; he has no jurisdiction to give any weight to these new considerations; his jurisdiction is derived solely from the Conjugal Rights Act; but we have jurisdiction under the Act of 1886, and on a consideration of those circumstances which the Court is ordered to entertain by that Act we may arrive at a different conclusion from the Lord Ordinary. I therefore think that this petition is competent.

There remains, however, the question on the merits, and I must say that nothing that I have heard leads me to think that the present arrangement is in any way improper; on the contrary, I see enough in the petition and answers to satisfy me that it is more expedient for the child, and altogether most reasonable and proper, that for the present it should remain in the custody of its mother.

LORD ADAM.—I have no doubt that it is always competent for a parent to petition this Court with a view to the regulation of the custody of his child, and as this petition has been presented to us, we must look at the grounds on which it proceeds. It is said that there has been no change of circumstances since the Lord Ordinary's interlocutor, but that is not the question before us. No doubt if a petition were presented to us to-day, and another next week, without any change of circumstances, we should know how to deal with it. Still I do not think that the second petition would be in any way incompetent.

Here we have to consider what is to be done with regard to the custody of this child, and in doing so we must remember that the mother is entitled to defend the custody which she has now got by reference to all relevant considerations, including the considerations suggested in section 5 of the Act of 1886. It may be that the Lord Ordinary could not take those things into consideration, but could only proceed upon the law as it stood before the Act, but if we, in a petition at the instance of the father, were not entitled to do so, there would be this anomalous result, that we should have to go upon the rules of the old law and grant the prayer of the petition, while the next day the mother might present a petition under the Act, when we might take those matters into consideration, and possibly arrive at a different conclusion. I think it is impossible to say that our jurisdiction is so restricted, and therefore, in my opinion, when such a petition as this is presented by a father, the mother may defend the custody by every means, including those given to her by the statute.

Taking that view of the case, I agree that in this case the mother ought to be allowed to retain the custody of this child.

LORD LEE concurred.

The case was heard and advised on 9th March, but no interlocutor was pronounced until 20th March. The arrangement as to access embodied in the following interlocutor was made by the parties extrajudicially. The following was the interlocutor:—

“SUSTAIN the competency of the petition in so far as regards the custody of Alexander Bartlet Beedie, the youngest child of the petitioner and respondent: Refuse the prayer, but subject to the following provisions in regard to access by the petitioner to his

said youngest child being carried out and given effect to, viz. :— **No. 118.**  
 That the petitioner shall have access to the said Alexander Bartlet Beedie on the first Saturday of every month for an hour on each occasion, between 9 A.M. and 6 P.M., as the petitioner shall fix, and that within the Fife Arms Hotel, Banff, so long as the respondent shall reside in Banff, and in such other place as shall be convenient in the event of the respondent changing her residence; and also that the respondent shall, if desired, send the said Alexander Bartlet Beedie to live with the petitioner during the month of August of each year, the petitioner to be at the expenses of such visits: Find the respondent entitled to expenses," &c. **Mar. 20, 1889.**  
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J. D. MACAULAY, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

**AUGUSTUS WILLIAM RIXON, Pursuer (Reclaimor).—H. Johnston—G. W. Burnet. No. 119.**

**EDINBURGH NORTHERN TRAMWAYS COMPANY, Defenders (Respondents).—Murray—Sir Ludovic Grant. Mar. 20, 1889.**

**Rixon v. Edinburgh Northern Tramways Co.**

*Company—Title to sue—Reduction—Shareholder.*—A shareholder in a public company brought an action against the company concluding for reduction of an agreement between the company and certain other parties thereto, on the allegation that the agreement which had been concluded by the directors without consulting the company was to the prejudice of himself and the other independent shareholders, that it was entered into "fraudulently and collusively," and that it would have the effect of seriously and unjustly depreciating the company's shares. There were further allegations that the agreement was *ultra vires* of the company. The Court (*reversing* judgment of Lord Kinnear) held that a plea of no title to sue fell to be repelled as an objection to satisfying the production, but that the pursuer was bound to call as defenders the whole parties to the agreement, and sisted the cause to allow of that being done.

THE EDINBURGH NORTHERN TRAMWAYS COMPANY was incorporated by the Edinburgh Northern Tramways Act, 1884, which authorised the construction of certain tramways in Edinburgh and Leith. By agreements between the Town-councils of Edinburgh and Leith and the promoters of the Act it was provided that all the works to be executed by the company should form the subject of competition and contract. **1st Division.**  
**Lord Kinnear.**  
**M.**

After advertisement, a tender from the Patent Cable Tramways Corporation, Limited, for the construction of certain specified tramways was accepted by the Tramways Company, and the terms were embodied in an agreement between the parties, dated 24th October 1884. Objections having been taken by the shareholders of the Cable Corporation to the conditions of this agreement, a second and amended agreement was concluded between the parties on 22d July 1886, and the work of construction of one of the lines contemplated by the Act of 1884 was then proceeded with. This work was executed on behalf of the contractors by their sub-contractors, Messrs Dick, Kerr, & Company, but in consequence of delays, through litigation and otherwise, the tramway line so begun was not opened for traffic until January 1888.

In July 1886 the Cable Corporation had mortgaged their whole undertaking to the Debenture Corporation, Limited, in security of certain debentures for £40,000 issued to them by the corporation. This security was subsequently assigned by the Debenture Corporation to the Assets Realisation Company, Limited.

In payment of the work of construction of the tramway line, the Tramways Company issued shares of their company and mortgages to certain

No. 119. nominees of the Cable Corporation (who were the contractors), and at their request, so that out of 4500 £10 shares and £10,170 mortgages of the Tramways Company, 3190 shares and £6270 mortgages were held by certain persons, including the directors of the Tramways Company, for behoof of the Assets Realisation Company.

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On 14th January 1888 the Cable Corporation was appointed to be wound-up under the Companies Acts, and Mr John Annan was appointed official liquidator.

Subsequently in February 1888 the Assets Realisation Company, on the representation that they held a majority of the shares and debentures of the Tramways Company, called upon the directors of that company to resign, and persons nominated by the Assets Company, and qualified by the transfer of shares belonging to the latter company, were thereupon appointed to be directors in their stead.

On 15th June 1888 an agreement was entered into between the Cable Corporation of the first part, Mr Annan (their liquidator) of the second part, the Tramways Company of the third part, and Dick, Kerr, & Company of the fourth part, whereby it was, *inter alia*, agreed that Dick, Kerr, & Company should proceed to construct certain other lines of tramway, which were authorised by the Act of Parliament; that they should advance certain sums of money to satisfy certain creditors of the Tramways Company; and that the contract price to be paid to Dick, Kerr, & Company for these new lines should be £75,000.

Mr Augustus William Rixon, a debenture and shareholder of the Tramways Company, now brought an action against the Tramways Company in which he concluded for reduction of the agreement of 15th June 1888.

He averred, *inter alia*;—(Cond. 17) "The said agreement of the 15th June 1888 has been entered into between the said parties wholly irrespective of the interests of the company, and to the prejudice of the pursuer and the other independent holders of shares and debentures. It was entered into by the defenders fraudulently and collusively, with the design of obtaining for Messrs Dick, Kerr, & Company a contract on exorbitant terms free from competition, and such contract, should it be carried out, would have the effect of seriously and unjustly depreciating the shares and debentures held by the other independent mortgagees and shareholders of the company. The directors of the defenders were in fact acting in the transaction only as the agents of Messrs Dick, Kerr, & Company, and of the Assets Realisation Company, as mortgagees of the Patent Cable Tramways Corporation, Limited, and not solely, as should have been the case, as the representatives of the defenders' company, which was not independently advised or represented in the preparation or execution of the said agreement. The sum proposed to be paid for the work, even if satisfied by shares and debentures of the company, is wholly disproportionate to the value of the work to be done, that value amounting to no more than the sum of £22,000 . . .

(Cond. 18) "The said agreement of 15th June 1888 is *ultra vires* of the defenders' company, the works thereby contracted for not having been made the subject of competition, as provided by the company's Act of incorporation. Further, it is not, as it represents itself to be, a supplemental agreement or contract to the previous agreements, but is in fact a new contract between new parties on entirely different terms from, and of a far more onerous character, so far as the defenders are concerned, than the previous agreements entered into between them and the Patent Cable Tramways Corporation, Limited. It constitutes in fact an entirely new and different contract for the construction of separate portions of the company's undertaking, and as such is *ultra vires* of the company, not

having been made the subject of competition and contract, as provided by the company's Act of incorporation." (Cond. 19) "The said agreement of the 15th of June 1888 has not been submitted to the shareholders of the defenders, nor have any accounts been submitted to them for the half year to 30th June 1888. By section 69 of the Companies Clauses Act of 1845, incorporated with the company's Act of incorporation, it is provided that where no period is prescribed by the special Act, as is the case here, general meetings of the shareholders shall be held in the months of February and August in each year. No meeting was held in August 1888, and it is believed that the meeting of shareholders was not called with the object of concealing from the shareholders the excellent earnings of the company and its certainty of success in the future, and with the design of preventing objection being taken to the extravagant and unnecessary outlays for salaries and defective cables, and specially with a view to get the existence of the said pretended agreement of 15th June 1888 kept from the knowledge of the independent shareholders of the company, and thus prevent them timeously calling it in question."

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The defenders denied these averments.

The pursuer pleaded;—(1) The agreement libelled having been entered into in contravention of the Edinburgh Northern Tramways Company's Act of 1884, is illegal and reducible at the pursuer's instance. (2) The said agreement not having been entered into in conformity with the said Act of Parliament, was *ultra vires* of the company, and ought to be reduced, in terms of the conclusions of the summons. (3) The said agreement having been entered into fraudulently and collusively, as condescended on, and being to the prejudice of the pursuer, decree should be pronounced in his favour, as concluded for.

The defenders pleaded, *inter alia*;—(1) No title to sue. (2) All parties not called. The other parties to the agreement sought to be reduced ought to be called.

The Lord Ordinary (Kinnear), on 10th January 1889, sustained the defenders' first plea in law, and dismissed the action.\*

\* "OPINION.—The pursuer is a shareholder of the Edinburgh Northern Tramways Company, incorporated by Act of Parliament, and he brings this action for the purpose of reducing an agreement between the company and certain contractors for the construction and maintenance of a line of tramway. It is not disputed that the line which it is proposed to construct is within the limits of the company's undertaking, but it is said to be *ultra vires* in other respects.

"It is well-settled law that a single shareholder can have no title to sue such an action, except on the ground that the contract which he challenges is *ultra vires* not of the directors only, but of the company as such, or on the ground of fraud upon himself. But the only ground on which it is alleged that the contract in question is *ultra vires* is that it is inconsistent with the terms of two previous contracts between the promoters and the Town-councils of Edinburgh and Leith, which have been confirmed by the incorporating Act so as to make them binding upon the company. By these contracts it was agreed, *inter alia*, that the works to be executed by the company should 'form the subject of competition and contract,' and the pursuer's ground of reduction is that the works which are contemplated by the contract which he challenges have not been made the subject of a previous competition. I do not think it necessary or proper to inquire whether, in the circumstances set forth on record, this would be a valid objection at the instance of the town-council, because it is an objection which the parties to the contracts confirmed by the Act of Parliament are clearly entitled to waive if they think fit. If the parties to these contracts should be of opinion that the stipulation in question has been substantially observed, or that in certain circumstances it would be prejudicial to the interests



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The pursuer reclaimed, and argued;—The action was quite competently brought at the instance of a single shareholder. It was averred that the contract had been entered into through fraudulent and collusive dealing on the part of the defenders, and upon exorbitant terms. Where the majority of a company proposed to benefit themselves at the expense of the minority, the Court would interfere to protect the minority, and a single shareholder was entitled to come forward to vindicate the rights of the minority.<sup>1</sup> It was admitted by the Lord Ordinary that in a case

with which they are charged to enforce it, or that it is undesirable or unnecessary to litigate on the subject, they are at liberty to sanction or acquiesce in an agreement to which they might otherwise have objected. It follows that a failure to comply with the stipulation involves no inherent invalidity in the agreement, and therefore that if it is open to any objection on the ground alleged, it is an objection which no one can have a title to enforce excepting the persons who are entitled to sue upon the contracts which are alleged to have been violated.

“A second ground of reduction is that the terms of the agreement are prejudicial to the company, and that the directors have acted in breach of their duty, against the interests of their shareholders, and in the interest of the other contracting parties. If this be so, it is a wrong done to the company, and not to the pursuer as an individual. If the pursuer thinks the agreement objectionable on the ground alleged, his proper course is to bring the matter before his fellow-shareholders. He cannot appeal to the Court to set it aside until the views of the shareholders have been ascertained, because if it is not in itself illegal, it may be supported by the majority. The case of *Orr v. The Glasgow and Monklands Railway Company*, 3 Macq. 799, is directly in point. The ground of action in that case was that the directors were also directors of a rival company, and that they had acted in the interests of this latter company to the prejudice of the shareholders of the first. The action was dismissed on the ground that although the transaction complained of was beyond the powers of the directors, it was competent for the shareholders to sanction it, and therefore that a single shareholder, or a minority, had no title to sue. Again, it is said that the agreement has not been submitted to the shareholders, and that certain of the directors are disqualified. Neither of these grounds will support an action of reduction. They are not objections to the legality of the agreement in itself, but to the manner in which it has been concluded. I do not inquire whether the directors ought to have laid the agreement before the company, or whether it was not in their power to make contracts for the execution of works without consulting the shareholders, because I think it clear that the company may sanction and adopt what has been done, assuming that they would not be bound by the action of the managing body alone. The rule is fixed that the Court will not interfere in such circumstances at the instance of a single shareholder. The principle is stated by Lord Justice Mellish in *M'Dougall v. Gairdner*, L. R., 1 C. D. 13,—‘If something has been done irregularly which the majority could do regularly, or if something has been done illegally which the majority could do legally, the majority are the only persons who can complain.’ There are many cases to the same effect. I am of opinion, therefore, that the plea to title must be sustained, and that renders it unnecessary to consider the other pleas stated in defence. But I must add that even if the pursuer had had a good title to sue, the action could not have been entertained in the absence of the contractors. They have a material interest in the agreement challenged, and it is manifestly impossible to set aside a contract made by the directors on behalf of the company without calling into Court the persons with whom they have contracted.”

<sup>1</sup> *Menier v. Hooper's Telegraph Works*, Feb. 24, 1874, L. R., 9 Chanc. App. 350; *Mason v. Harris*, March 1879, L. R., 11 Chanc. Div. 97; *Atwood v. Merryweather*, reported in a note to *Clerich v. Financial Corporation*, 1868, L. R., 5 Equity, 464.

of fraud the pursuer would have had a good title. His Lordship must have overlooked the averments, which quite came up to such a case. The defenders' plea should be repelled as an objection to satisfying the production. No. 119.  
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The reclaimers asked to be allowed to raise a supplementary action, calling the other parties to the agreement sought to be reduced.

Argued for the respondents;—The question of the pursuer's title to sue must be considered in the view of the ground of action, which was that the directors had exceeded their powers. But the meaning of a plea of *ultra vires* in this connection was that the company having been constituted for a particular object its directors had appropriated its funds to another and a different purpose, and that they were engaged in doing something which they were impliedly forbidden to do.<sup>1</sup> There was no such case here. There was no real case of fraud averred, although the language of the averments might be said to amount to an apparent case of that kind. The Lord Ordinary had done right in treating the case as one of *ultra vires*. In any view, that ground of action was insufficient, unless all the parties to the agreement sought to be reduced were called.

At advising,—

LORD PRESIDENT.—There are two preliminary defences to this action, “no title to sue,” and “all parties not called.” The Lord Ordinary has sustained the first of these, but to that course I am not prepared to assent. There is a distinct and intelligible ground of reduction stated here, namely, fraud, in respect of which it cannot be said that one or more of the shareholders cannot sue though the company can do so. I think, therefore, that the Lord Ordinary is wrong. It is probably the fact that the pursuer relied too much on the ground of *ultra vires* in the discussion before the Lord Ordinary, and did not sufficiently attend to the question of fraud.

But, on the other hand, there are other parties to the agreement under reduction who must be called. The pursuer is prepared to call these persons, and the best form of order for us to pronounce would be to repel the first preliminary defence, reserving its effect on the merits, and in respect that the pursuer undertakes to call the other parties to the agreement, to repel the second preliminary defence. I think it premature to go into any examination in detail of the averments, or as to what their effect will be when the case comes to be tried on the merits, particularly if the pursuer amends his record, as he says he intends doing.

LORD ADAM and LORD LEE concurred.

THE COURT pronounced this interlocutor on 2d March:—“Recall *in hoc statu* the interlocutor reclaimed against, and sist the process till 12th March current to enable the pursuer to call as defenders the other parties to the agreement of 15th June 1888 sought to be reduced, viz., the Patent Cable Corporation and the liquidator of that company, and Messrs Dick, Kerr, & Company.”

On 20th March they pronounced this further interlocutor:—“Having resumed consideration of the cause, in respect a supplementary action has now been raised calling the Patent Cable Corporation and its liquidator, and Dick, Kerr, & Company, repel the second plea in law for the defenders; repel also the first plea in law for

<sup>1</sup> Ott and Others v. Glasgow, Airdrie, and Monklands Junction Railway Co., Dec. 18, 1857, 20 D. 327, affd. April 24, 1860, 3 Macq. 799, Paters. App. 959.

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the defenders as an objection to satisfy the production, reserving its effects on its merits, and remit to the Lord Ordinary to proceed with the cause . . . .”

A. & G. V. MANN, S.S.C.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

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Gardiner v.  
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& Co.

FREDERICK CROMBIE GARDINER AND OTHERS (Owners of a “Lismore”),  
Pursuers (Respondents).—*Asher—C. S. Dickson.*  
MACFARLANE, M'CRINDELL, & COMPANY, Defenders (Reclaimers).—  
*Balfour—Ure.*

*Ship—Charter-party—Cesser and lien clauses—Demurrage.*—A charter-party provided “charterers’ responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead-freight, and demurrage. To be loaded as customary at Sydney. To be discharged as customary at . . . and at the rate of not less than 100 tons of coals per working-day, . . . and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day.”

In an action brought by the owners against the charterers for damages for detention at the port of loading, the defenders founded on the cesser and lien clauses as freeing them from responsibility. *Held* that the word “demurrage” in the lien clause did not cover undue detention at the port of loading, and therefore that the charterers were not exempted by the cesser clause from liability for damages for such detention.

1st Division.  
Lord Trayner.  
C.

ON 15th November 1888 Frederick Crombie Gardiner and others, Glasgow, owners of the ship “Lismore,” raised an action against Messrs Macfarlane, M'Crindell, & Company, merchants, Liverpool, charterers of the vessel, concluding for payment of £5000 for undue detention of the ship at Sydney, New South Wales. It was noted on the margin of the charter-party that the charterers were agents for J. D. Spreckels and Brothers, San Francisco.

By charter-party entered into between the parties on 12th March 1888 it was agreed that the “Lismore,” then at Hull, should proceed to Sydney, and there receive “from the factors or agents of the said charterers a full and complete cargo of coals, . . . and being so loaded, shall therewith proceed to San Diego and deliver the same as directed by consignees, being paid freight at the rate of twenty-six shillings and ninepence . . . per ton of 20 cwts. . . . The act of God, . . . strikes, lock-outs, or accidents at the colliery directed, . . . always excepted. . . . Payment of freight to be made as follows:—On right and true delivery of cargo in gold coin at the exchange of \$4.80 per £ sterling, charterers’ responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead-freight, and demurrage. . . . To be loaded as customary at Sydney, N.S.W. To be discharged as customary, in such customary berth or place as consignees shall direct, ship being always afloat, and at the rate of not less than 100 tons of coals per working-day, to commence when the ship is in berth and ready to discharge, and notice thereof has been given by the master in writing, and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day.”

The “Lismore” arrived at Sydney on 15th August 1888, and on 27th August was ready to take in coal as stiffening.

The pursuers averred;—(Cond. 4) “According to the customary rate of loading at Sydney the defenders ought to have loaded the cargo of the ‘Lismore’ within twenty working-days after the stiffening was com-

pleted, or at latest, by the 4th October 1888; but they failed to furnish any cargo whatever to the vessel, except the stiffening, until the end of November, after this summons was served, and kept her lying at Sydney waiting for cargo until the 2d December 1888. The whole of the delay in loading a cargo after 4th October 1888 could easily have been saved by the defenders if they had so pleased, and was caused by their fault and negligence. With reference to the statement in answer, it is admitted that the vessel sailed from Sydney on 2d December 1888 with a cargo worth the amount of the freight at the port of discharge."

The defenders averred that the delay had arisen primarily from a strike at the collieries from which the cargo was to be supplied, and that subsequent negotiations between the parties caused further delay. In answer to cond. 4 they averred;—"The 'Lismore' was loaded in regular colliery turn, as customary at Sydney. On 2d December 1888 she sailed from Sydney with a full cargo of coals, worth much more than the amount of the freight at the port of discharge. Any delay that took place in loading the ship at Sydney was due entirely to causes for which in terms of the charter-party the charterers are not responsible."

The pursuers further averred;—(Cond. 5) "In consequence of her lengthened detention at Sydney, waiting to load a cargo under said charter, the bottom of the vessel has become foul, and the pursuers have been obliged to place her in dock to be cleaned. If the defenders had loaded the vessel with reasonable and customary despatch, in terms of said charter-party, it would not have been necessary to have the vessel docked, and this expense has been caused entirely through their fault."

The defenders denied that averment.

The pursuers further averred;—(Cond. 6) "By the defenders' failure to provide cargo, in terms of the said charter-party, and the consequent detention of the vessel, the pursuers have suffered, and will suffer, loss and damage to the extent, including the cost of docking, of at least £3000, for which the defenders are liable, and to which sum the conclusions of the summons are hereby restricted."

The pursuers pleaded;—(1) The defenders having failed to supply a cargo, in terms of said charter-party, they are liable for the extra cost and loss thereby incurred and sustained by the pursuers. (2) The pursuers having, through the defenders' breach of contract, *et separatim*, by the defender's fault or negligence, suffered loss and damage to the extent of £3000, they are entitled to decree for that amount. (3) The terms of the charter-party not being such as to free the defenders from liability for detention at the port of loading, the defences should be repelled.

The defenders pleaded;—(1) The pursuers' statements are irrelevant and insufficient to support their pleas. (2) The ship having loaded a cargo worth the freight at the port of discharge, the defenders are, in terms of the charter-party, freed from all responsibility to the pursuers for the damages claimed. (3) The ship having been loaded as customary, in terms of charter, the defenders ought to be assoilzied. (4) *Separatim*, The alleged detention of the ship having been due to causes excepted in the charter-party, the defenders are not responsible therefor.

On 28th February 1889 the Lord Ordinary (Trayner) pronounced this interlocutor:—"The Lord Ordinary having considered the cause and heard parties, repels the first and second pleas in law for the defenders: Allows the parties a proof of their averments respectively, to be held on a day to be afterwards fixed."\*

\* "OPINION.—The charter-party founded on in this case provides that the 'Lismore' shall proceed to Sydney and there load a complete cargo of coals,

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No. 120. The defenders reclaimed, and argued ;—The cesser and lien clauses in the charter-party freed them from liability for damages for detention at

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with which she shall proceed to San Diego. The 'Lismore' arrived at Sydney about the 15th August last, but she was not loaded with her cargo, and did not sail for San Diego until the 2d December. The present action is brought to recover damages from the charterers, on the ground that the 'Lismore' had been unduly detained by them at Sydney ; and the defence urged in *limine* (and the only defence I have now to consider) is that, in respect of the cesser and lien clauses in the charter-party, the defenders are not liable in the damages claimed. These clauses are expressed thus : 'Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead-freight, and demurrage.'

"Clauses of similar import have already been the subject of judicial consideration in one or two cases in Scotland, and in a considerable number of cases in England. I cannot say that the decisions in the cases I have referred to are conflicting, but there are dicta in one or two of the later cases in England which are of a tendency to throw doubt upon the decisions formerly given. It is not necessary for me to go over all the cases to which reference was made in the argument, but I may refer to a very useful digest of them given by Mr Scrutton in his work on Charter-Parties and Bills of Lading, page 103 *et seq.* One rule or principle recognised in all the cases is this, that the cesser and lien clauses must be co-extensive, and that any particular liability enforceable against the charterer will not be held extinguished by the cesser clause unless the lien clause enables the shipowner to enforce that liability against the cargo or its owners or consignees. In short, the personal liability of the charterer is not extinguished unless a lien over the cargo is substituted for it. The application of this principle seems to me to afford a solution of the question now raised.

"The charter-party in this case confers a right of lien in favour of the ship-owners over cargo for 'demurrage'; and if the pursuers' claim was for demurrage, incurred either at the port of loading or the port of discharge, I think it must be taken to be settled by authority that the defenders would be entitled to absolver in respect of the cesser clause. But the claim now made is not for demurrage, but for damages for undue detention at the port of loading. Does the lien for demurrage cover such a claim? The defenders say that it does, because the word demurrage is popularly used among mercantile men to mean not only demurrage proper, but also detention beyond the demurrage days, as well as detention where no demurrage has been stipulated for. There can be no doubt that the word is popularly used as the defenders represent ; and that popular use and meaning has been recognised by some of the English Judges in their opinions. In Scotland, however, so far as I know, the two things—demurrage and improper detention—have always been kept distinct, and in my opinion properly so. They are quite distinct in character and in origin. A claim for demurrage arises from contract ; it is a payment fixed and determined by the contracting parties, in respect of which the charterer may detain the ship for a period longer or shorter beyond the lay-days. The claim for undue detention arises from fault—not contract, and the liability of the charterer is for the whole damage which his fault may have occasioned to the shipowner, whether greater or less than the sum which would in ordinary circumstances be stipulated for as demurrage for the same vessel.

"This distinction is as well known to merchants as to lawyers ; and the disregard of that distinction appears to me to have led to the differences of opinion which are to be found in some of the cases on demurrage questions. Regarding the two things as entirely distinct, I am of opinion that the lien conferred in the present case for demurrage does not cover a claim for damages on account of undue detention ; and that the lien clause not being therefore co-extensive with the charterers' personal liability, the cesser clause does not absolve them from the claim now made.

"Assuming, however, that the word 'demurrage' in the lien clause would

Sydney, assuming that damages were otherwise due. Under the lien clause the pursuers had a claim against the cargo for detention at Sydney, which

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cover not only demurrage proper but also damages for detention beyond the demurrage days stipulated for, I am of opinion that the cesser clause in question does not free the defenders from the present claim. If the charter-party stipulates for demurrage only at the port of discharge, the lien clause for 'demurrage' will only be enforceable for that, and will not cover undue detention at the port of loading. Accordingly, upon the principle I have already stated, the charterers' personal liability in such a case for undue detention at the port of loading will not be affected by the cesser clause. And that is the case here. The provision in this charter-party regarding the loading of the cargo is thus expressed,—'To be loaded as customary at Sydney.' This provides only for the mode of loading and has no reference whatever to the time in which it shall be done—(*Lawson v. Burness*, 1 H. & C. 400; *Tapscott v. Balfour*, L. R., 8 C. P. 52-3; *Lamb v. Kasselack, &c.*, 9 R. 482). There being no time for loading stipulated, directly or indirectly,—that is, no lay-days,—there could be no stipulation for demurrage. With regard to the discharge, however, there is a stipulation. It is provided that the cargo shall be discharged 'at the rate of not less than 100 tons of coals per working day, to commence when the ship is in berth and ready to discharge . . . and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day.' The time allowed for discharging (that is, the lay-days) is thus fixed and limited; and the demurrage-days over and above the lay-days and the rate of demurrage are also fixed. For such demurrage, if incurred, the owners have a lien over the cargo. The lien clause, however, for 'demurrage' cannot be extended beyond the 'demurrage' stipulated for; the same word in the same charter must be held to refer to the same thing. In such a charter the lien for demurrage cannot, in my opinion, be extended to cover claims not stipulated for, although they may be of the same nature.

"The case of *Lockhart v. Falk* (L. R., 10 Exch. 132) is quite in point. In that case the charter-party provided that the charterer should load the cargo 'in the customary manner,' that the cargo should be discharged in ten working-days, with demurrage at '£2 per 100 tons register per day,' that the ship should have an absolute lien on cargo for freight and demurrage, 'the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship.' It was held that undue detention at the port of loading was not demurrage, and that the charterer was liable for such detention notwithstanding the cesser clause. That decision has never been overruled. But the defenders say that its authority has been doubted or questioned in later cases, where opinions have been delivered inconsistent with its ruling. Even if this had been so, I would have been prepared, for my own part, to maintain its authority. But I think its authority is not even questioned.

"The first case cited as impugning the authority of *Lockhart's* case was *Kish v. Cory* (L. R., 10 Q. B. 553). There the charter-party provided that the cargo was to be loaded 'in thirteen working-days,' and to be discharged at not less than thirty-five tons per working-day. 'Ten days' demurrage for all like days above the said days to be paid at the rate of 4d. per registered ton per day,' and 'charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage.'

"The vessel was detained in loading five days beyond the thirteen provided lay-days, and the charterer was held not liable, because the claim was for demurrage, and that therefore the cesser clause applied. The difference between the cases of *Lockhart* and *Kish* is obvious, and they are in no way conflicting. In *Lockhart's* case there were no lay-days for loading, and no demurrage or lien for demurrage stipulated in reference to the loading. In *Kish's* case there were lay-days for loading and a provision for demurrage in reference thereto. Consequently the lien clause for demurrage, which included demurrage at the port of loading, having been substituted for the charterer's liability, the cesser clause took effect. But in *Kish's* case it was not suggested that *Lockhart's* case (re-

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ferred to in argument) had not been rightly decided. On the contrary, the three Judges who decided *Lockhart's* case took part in the decision of *Kish's* case, and made no reference whatever to their former judgment. The essential difference between the cases, which I have pointed out, fully accounts for this.

"I was, however, specially referred to the following expression of opinion by Mr Justice Brett in *Kish's* case, as throwing doubt upon the authority of *Lockhart's* case. 'I feel certain that when the occasion arises it will be held upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that "demurrage" includes not only demurrage proper, but also that which is in the nature of demurrage—viz., detention at the port of loading.' I have some difficulty in understanding this observation, and certainly cannot read it as indicating any dissent from the decision in *Lockhart's* case. If Mr Justice Brett meant to say that in cases where lay-days had been stipulated in regard to loading, followed by a general clause as to demurrage, that 'demurrage' would be construed as including 'that which is in the nature of demurrage—viz., detention at the port of loading' (that is, detention after the demurrage-days had expired), then the observation has no application whatever to the case where lay-days are not stipulated with regard to loading, and consequently has no bearing upon *Lockhart's* case or the present case. But if the observation I have quoted meant that a stipulation as to demurrage at the port of discharge would be construed, when the occasion arose, so as to cover a claim for improper detention at the port of loading, I can only say that the occasion had arisen before the decision in *Kish v. Cory*, and that the demurrage clause was not so construed. The reverse was decided in *Gray v. Carr* (L. R., 6 Q. B. 522), Justice Brett concurring in the judgment, and (on page 537, while throwing doubt on the decision in *Rannister v. Breslau*, 1867, L. R., 2 C. P. 497) stating without objection the very proposition on which *Lockhart's* case was decided.

"I was also referred to the case of *Sanguinetti* (L. R., 2 Q. B. Div. 238). In that case the charter-party provided that the ship should be loaded and discharged at so many tons per day, 'demurrage to be paid for each day beyond the said days allowed for loading and discharging, at the rate of 3d. per registered ton per day.' The cesser and lien clauses were in the usual terms. The only peculiarity in the case is, that the number of demurrage days is not limited, but every day beyond the days allowed for loading and discharging is treated as a demurrage day. The ship was detained in loading beyond the lay-days, and was therefore on demurrage during the whole detention. The Court held that the charterer was not liable, because the claim was for demurrage, and a lien had been given over cargo for demurrage. No question was raised, nor could have been raised, as to the charterer's liability for damages for undue detention, as distinguished from demurrage. The case of *Lockhart* (although referred to in argument) was not referred to in the decision, much less questioned or doubted.

"Another case referred to is that of *Harris v. Jacobs* (L. R., 15 Q. B. Div. 247). In that case the ship was to be discharged 'as fast as steamer can deliver.' A day was lost by the consignee not having a ready berth for the vessel, and the claim made upon that account was held to be covered by the clause which gave a lien for demurrage. Some observations were made as to the term 'demurrage' being elastic, and sufficient to cover this claim, which it was said was not 'strictly demurrage.' It appears to me to have been demurrage and nothing else. 'The ship was to be discharged as fast as she could deliver,' and 'demurrage to be at the rate of £30 per running-day'—that is, £30 a-day for each day the cargo was not discharged as fast as the ship could deliver. The day the vessel was detained from want of a berth (which it was the consignee's duty to provide), was just a day on which cargo was not taken delivery of at all, and was the same (so far as demurrage was concerned) as if the ship being in a berth no cargo had been taken by the consignee. If the steamer had got into

clause, which included damages for delay by undue detention at the port of loading. When the word demurrage was used in its strict sense it was necessary that the rate at which it was to be charged, and the number of days for which it was to run, should be fixed in the charter-party. It was true that here, as regarded the port of loading, there were no lay-days expressly stipulated, but the words "as customary" applied both to time and manner of loading, and therefore it was only necessary to prove the custom at Sydney, and the number of lay-days would be ascertained. When the number of lay-days was mentioned (as they practically were here), then at common law demurrage was held to be used in the sense of covering not only demurrage proper but detention at the port of loading.<sup>1</sup> That was the construction given to the word not only in England but in Scotland. Though the question was not actually argued in *Salvesen & Company's* case, the judgment gave effect to that con-

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her berth when she arrived, her discharge would have been completed a day sooner than it was. That day was a day beyond her lay-days, and was therefore a day on demurrage. However this may be, *Harris v. Jacobs* does not directly or by implication question the authority of *Lockhart v. Falk*.

"The last case to be noticed is that of *Salvesen v. Guy* (13 R. 85), in which the charter-party stipulated for twenty working-days in loading, and sixteen days for discharging, 'with ten days on demurrage over and above the said laying-days.' Twelve days beyond the lay-days were occupied in loading, and demurrage for these twelve days was claimed from the charterers. The charterers pleaded the cesser and lien clauses in defence, and their defence was sustained. Now, here undoubtedly the Court in effect held that the demurrage clause covered two days for which demurrage proper could not be claimed. But the distinction between demurrage and damages for detention does not appear to have been adverted to even in the argument. The point raised and decided was the general one, that where a lien is given over cargo for demurrage, the charterer is by the corresponding cesser clause freed from personal liability for demurrage, and that irrespective of whether the demurrage has been incurred at the port of loading or port of discharge. It is obvious that the question raised and decided in *Lockhart v. Falk* was not before the Court. The case does not appear to have been cited. *Gray v. Carr* seems to have been cited either to shew that Baron Bramwell doubted the decision in *Bannister v. Breslau*, or in support of the view that the cesser clause could not be pleaded because the cargo had not been 'shipped in terms of the charter-party.' The law laid down in *Lockhart* and *Gray* was not discussed, nor the decision in either case doubted.

"But even if the Court had intentionally decided (in agreement with the dictum of Mr Justice Brett in *Sanguinetti's* case) that a clause providing for demurrage at the port of loading should be construed so as to cover damages for detention at that port beyond the stipulated demurrage-days, that would in no way conflict with *Lockhart v. Falk*, or with the judgment I am now pronouncing. In *Lockhart*, as here, there is no demurrage stipulated for at the port of loading at all. The demurrage clause has reference to the lay-days, and the lay-days have only reference to the port of discharge. Whatever therefore the Court might consider covered by a demurrage clause actually existing and forming part of the charter, and however much they might extend the limits of such a clause, it is clear that they could neither construe, extend, or limit, a clause which did not exist.

"I agree with the view expressed by the Lord Chief Justice (Coleridge) in *Kish v. Cory*, and by Lord Kinnear in *Salvesen v. Guy*, that as mercantile contracts are expressed with reference to decided cases in which the language used in such contracts has been judicially construed 'it is important *stare decisis*.' I therefore follow the direct authority of *Lockhart v. Falk*, which I humbly think to be a sound decision, and the authority of which has not been impaired by any subsequent decision."

<sup>1</sup> Bell's Prin. sec. 431; Bell's Comm. p. 622, 7th edit.; *Salvesen & Co. v. Guy & Co.*, Oct. 28, 1885, 13 R. 85.



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struction. The Lord Ordinary decided the case on the principle that to relieve the charterers the cesser and lien clauses must be exact counterparts, but the parties could not have intended to enter into such a contract here, as the cargo was to be worth the freight, but the lien was to be for freight, dead-freight, and demurrage. The case of *Bannister v. Breslau*<sup>1</sup> was precisely in point, and in the defenders' favour, the only distinction between that case and this being that in the present case demurrage was used in its strict sense in a later part of the contract. With regard to *Lockhart v. Falk*<sup>2</sup> the cesser clause was there very limited, being only applicable to "liability to any clauses in this charter," and altogether the case was very special. Further, there the ship was to be loaded "in customary manner"; here the word "manner" was left out, and therefore the element of time was included in the contract. With regard to *Gray v. Carr*,<sup>3</sup> it was to be observed that Justice Brett's views in that case, that such a lien as there was here could not cover an illiquid claim for damages, were not given effect to in later cases, and that question was decided adversely to Justice Brett's view in *Maclean & Hope v. Fleming*,<sup>4</sup> in the House of Lords. In the report of *Maclean & Hope* in the Law Reports it did not appear that the House of Lords had settled that question, and Justice Brett probably had the report from which the Law Reports were afterwards printed before him. From the opinions, however, as given in 9 Macph., it appeared that the question was decided. In *Kish's* case, and other subsequent cases,<sup>5</sup> there were judicial opinions in the clearest terms that "demurrage" included damages for delay at the port of loading. The case of *Lockhart v. Falk*, on which the Lord Ordinary mainly rested his judgment, could not stand beside these later authorities. The pursuers' case depended entirely on an inferential limitation of the cesser and lien clauses, founded on the latter part of the charter-party, where "demurrage" was admittedly used in its strict sense, but there was no authority for saying that where such was the case plain words in another part of the contract could not be read in a wider sense, if they could bear it.

Argued for the respondents;—The case of *Gray v. Carr* (6 Q. B. 522) was precisely in point, and this case ought to be decided in conformity with that decision and the case of *Lamb v. Kaselack*,<sup>6</sup> where it was held that such a lien as there was here did not cover an unliquidated claim of damages for detention. The argument that *Gray v. Carr* was overruled by *Maclean & Hope v. Fleming* could not stand, because that case was specially considered in *Gray v. Carr*, and what *Gray v. Carr* settled was that the lien there did not cover the case of damages for breach of contract, which was really the nature of a claim for demurrage when used in its wider sense. *Maclean & Hope's* case dealt with dead-freight, and not with demurrage. The distinction between the strict and the wider meaning of demurrage was well known to our law.<sup>7</sup> Detention could be

<sup>1</sup> *Bannister v. Breslau*, 1867, L. R., 2 C. P. 497.

<sup>2</sup> *Lockhart v. Falk*, 1875, L. R., 10 Exch. 132.

<sup>3</sup> *Gray v. Carr*, 1871, L. R., 6 Q. B. 522.

<sup>4</sup> *Maclean & Hope v. Fleming*, March 27, 1871, 9 Macph. (H. L.) 39, L. R., 2 H. L. Sc. 128.

<sup>5</sup> *Kish v. Cory*, 1875, L. R., 10 Q. B. 553; *Sanguinetti v. Pacific Steam Navigation Co.*, 1877, L. R., 2 Q. B. D. 238; *Harris & Dixon v. Jacobs*, 1885, L. R., 15 Q. B. D. 247; *Scrutton on Charter-Parties*, pp. 103-113; *Christoffersen v. Hansen*, 1872, L. R., 7 Q. B. 509.

<sup>6</sup> *Lamb v. Kaselack, Alsen, & Co.*, Jan. 31, 1882, 9 R. 482, see Lord Craighill, p. 490.

<sup>7</sup> Bell's Comm. i. pp. 588-622, and ii. 95, 7th edit.

claimed for, not on the contract, but as damages, while demurrage in the strict sense was a contract that the ship might be hired for an extra number of days at a certain rate. The words "as customary" did not regulate the rate of delivery of the cargo (*Lamb v. Kaselack, Alsen, & Co.*, 9 R. 482), and it was not necessary that the precise number of days should be fixed by the contract to enable the Court to read "demurrage" in its strict sense.<sup>1</sup> But, in point of fact, there was no "demurrage" proper stipulated for in this contract at the port of loading, and what was claimed by the pursuers was not "demurrage," but damages for undue detention. It was a fair consideration for the Court that in the latter part of this charter-party demurrage was clearly used in its strict sense, and the lien clause was intended to cover that part of the contract, and had nothing to do with detention at the port of loading.

At advising,—

LORD RUTHERFURD CLARK.—This action is instituted by the owners of the "Lismore," and is directed against a firm who chartered the vessel for a voyage to Sydney, and thence to San Diego. The purpose of the action is to recover damages on the ground that the vessel was unduly detained at the port of loading, that is to say, at Sydney. The defenders maintain that the pursuers' claim is excluded by the terms of the charter-party. The Lord Ordinary has repelled that defence, and the question for us to determine is whether his interlocutor is well founded.

By the charter-party the vessel was to proceed to Sydney, and there to load a cargo to be carried to San Diego. It is stipulated that the vessel was to be loaded "as customary at Sydney," and with reference to the port of discharge, it is further stipulated that she was to be discharged at a certain rate "not less than 100 tons . . . per working-day, to commence when the ship is in berth and ready to discharge, and notice thereof has been given by the master in writing, and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day."

I observe that with respect to the port of loading there is no stipulation as to lay-days or demurrage, the only stipulation with regard to the loading being that it shall be "as customary at Sydney." It is not, I think, material to inquire whether the words "as customary" refer to the manner of loading only, or whether they include time, because if they refer to time, the only difference would be that instead of stipulating for a reasonable time there would be a stipulation for usual time. That difference is not I think material, the important fact being that with reference to the port of loading there is no agreement that the ship shall remain there for any time on demurrage, whereas when she comes to the port of discharge there is a stipulation for a certain number of lay-days and ten days on demurrage.

The pursuers say that when the vessel was at Sydney she was unduly detained for a certain time, that is to say, she was detained so many days beyond a reasonable time, or it may be—there is no reason to decide that question—beyond the usual time in that port. In consequence of that delay, the pursuers say that they suffered damage.

The defenders, while assuming that such detention occurred, say that they

<sup>1</sup> *Holman & Sons v. Peruvian Nitrate Co.*, Feb. 8, 1878, 5 R. 657; *Whites v. Steamship Winchester Co.*, Feb. 5, 1886, 13 R. 524, see Lord Shand, 535; *Ford v. Cotesworth*, 1868, L. R., 4 Q. B. 127.

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are discharged from liability on that account by reason of the following clause in the charter-party. "Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead-freight, and demurrage." The defenders say that they did put on board a full cargo, or a cargo sufficient, at all events, to satisfy their obligation, and that when they did so all obligations or liabilities which they had incurred ceased, or were discharged by reason of the stipulation I have read.

We have one important case among the many which were cited to us, which decided an important point with respect to a clause of the kind we have to interpret here, and that case is all the more important because, I think, neither party has disputed its authority. I refer to the case of *Christoffersen* (L. R., 7 Q. B. 509). The decision in that case was that this clause, or one in very similar terms, applied only to liability arising after loading, unless the liability which had been previously incurred for illegal detention was transferred to cargo. I think that view was assumed to be just by all parties, and accordingly the defenders maintain that the pursuers are not entitled to recover from them the loss caused by due detention, in respect that that loss has been charged on cargo over which a lien has been given for it. We have, therefore, to construe the phrase, "Owners to have lien on cargo for freight, dead-freight, and demurrage," and to determine what is included in the word "demurrage." Does it include what I have called loss for "undue detention," or in other words, damages for detention in breach of contract, or is it limited to demurrage proper? The question turns on the terms of the charter-party, and I do not know that we can gain any material aid from the cases which have been laid before us. We must determine what is the fair meaning of the word "demurrage" in this charter-party.

If the view of the defenders is right, it would mean that a lien has been constituted over the cargo for an entirely illiquid debt. I do not say that that cannot be done if the parties so contract, but I think it is reasonable to hold that if the parties intend that such lien shall be created, their intention must be expressed in very plain words.

In the case of *Maclean & Hope* (9 Macph. (H. L.) 39), it was decided by the House of Lords that such a lien was admissible if it was clearly contracted for, and in that case there was no doubt about the meaning of the charter-party. For the lien which was claimed was a lien for dead-freight, and that had been made a matter of express stipulation.

The present case is entirely different. There is no lien stipulated for except a lien for demurrage. But we are asked to hold that this lien covers an illiquid claim of damages arising from the undue detention of the ship. I cannot so hold. Demurrage in the proper sense of the word is stipulated for at the port of discharge, and if such demurrage had been incurred, it would no doubt have formed a lien over cargo. So far, therefore, the stipulation for a lien for demurrage is satisfied. If we were to sustain the argument of the defenders, we should be assigning two different meanings to the same word in the same contract. This, in my opinion, we cannot do. We must give the word demurrage the same meaning in the two places in which it occurs, and therefore we cannot hold that it includes damages for illegal detention. I am therefore of opinion that the interlocutor of the Lord Ordinary is right.

It is not necessary to examine the cases cited to us, for, as I have said, we

have to examine the words of the contract before us, but at the same time, I No. 120.  
 think the conclusion I have arrived at is strongly fortified by the decisions in  
 the cases of *Lockhart v. Falk* (L. R., 10 Exch. 132), and *Gray v. Carr* (L. R., Mar. 20, 1889.  
 6 Q. B. 522). *Gardiner v. Macfarlane, M'Crindell, & Co.*

LORD ADAM.—I concur. This is an action against the charterers of a vessel for damages in respect of undue detention at Sydney, the port of loading. The loading it is alleged ought to have been completed on 4th October, but the vessel was detained until 2d December.

If that be so, I do not understand that it is disputed that the charterers are liable unless they can shew that their liability was transferred to the cargo of the vessel in the shape of a lien constituted over it.

That question depends on the construction of a clause in the charter-party. If "demurrage" in that clause is used in its strict legal sense, then the lien over the cargo does not cover damages for the detention at Sydney, but if it is held to have the wider signification sought to be put upon it, so as to include damages for detention, then there would be such a lien over the cargo in this case.

The whole question therefore, I think, turns on the construction of the word "demurrage" in the clause "Owners to have lien on cargo for freight, dead-freight, and demurrage." My opinion is that, apart from the fact that the word "demurrage" is used in its strict sense in another part of the contract, "demurrage" should be read in that strict sense unless there is something in the charter-party to shew that it is intended to have the wider signification. There is nothing to shew that here, and the very fact that in another part of the same contract it is used clearly in its strict sense goes far to shew that in the clause I have quoted it should be construed strictly.

LORD PRESIDENT.—The portion of the charter-party which requires construction may be represented as consisting either of one clause or of two. The Lord Ordinary has dealt with it as two separate clauses, which he terms the cesser and lien clauses respectively. If it is dealt with as two separate clauses, then the one may be taken as the counterpart of the other, in short, the one clause provides for a cesser of the charterers' liability in consideration of the lien over the cargo given in the other.

I have no doubt that the whole question turns on the use of the word "demurrage." *Prima facie* that word means a stipulation for payment in the contract of charter-party, but it is said that it may be used in another and wider sense, and that it is so used here.

Now, if no demurrage in the strict sense were stipulated for in this contract that might be a pretty strong reason for supposing that the word must be intended to mean detention at either port beyond the demurrage or lay-days, but we have here demurrage stipulated for as matter of contract at the port of discharge, and that is quite sufficient to account for the lien for demurrage over the cargo.

In construing a lien of that kind it is not out of course to consider what would be the natural effect of the one construction of the word demurrage and of the other. When we look at the claim which is said here to be transferred from the charterers to the cargo, we find a statement, in the first place, in article 4 of the condescendence, to this effect,—“According to the customary rate of loading at Sydney, the defenders ought to have loaded the cargo of the ‘Lia-

No. 120. more' within twenty working-days after the stiffening was completed, or, at latest, by the 4th October 1888; but they failed to furnish any cargo whatever to the vessel, except the stiffening, until the end of November, after this summons was served, and kept her lying at Sydney waiting for cargo until the 2d December 1888. The whole of the delay in loading a cargo after 4th October 1888 could easily have been saved by the defenders if they had so pleased, and was caused by their fault and negligence." Again, the following claim is set out in article 5:—"In consequence of her lengthened detention at Sydney, waiting to load a cargo under said charter, the bottom of the vessel has become foul, and the pursuers have been obliged to place her in dock to be cleaned. If the defenders had loaded the vessel with reasonable and customary despatch, in terms of said charter-party, it would not have been necessary to have the vessel docked, and this expense has been caused entirely through their fault." Now, that suggests what would be the nature of the settlement of the claim, supposing it to fall under the lien clause, on the arrival of the vessel at the port of discharge. There would have to be an inquiry whether the vessel's bottom was fouled owing to the detention at Sydney, what was the extent of that fouling, and what was the expense incurred owing to the vessel having to be docked. All those questions would have had to have been tried while the cargo was lying undelivered, being subject to a lien. The inconvenience of that is very apparent, and that very inconvenience is, I think, an element to be taken into consideration in construing the word "demurrage," for it furnishes a strong argument against construing the word in any but its strict sense.

No doubt any inconvenience is to be disregarded if the words of the contract are perfectly clear and distinct; that was so decided in *Maclean & Hope* (9 Macph. (H. L.) 39), where it was held that inconvenience could not be taken into account, because the parties to the contract had contracted in simple and clear terms, and should have thought about any inconvenience that might arise before they entered into it.

But, here, if anything is clear, it is that "demurrage" does not comprehend what the defenders say it does, but, if there is any doubt in the matter, then the inconvenience which would arise from construing the word in the sense they contend for comes in strongly as an element in construing it.

I am therefore strongly of opinion that the use of the word here only covers demurrage in its ordinary sense, as embracing the demurrage-days actually stipulated for in the contract, the payment for which is also liquidated.

LORD MURE and LORD SHAND were absent.

THE COURT adhered, and remitted to the Lord Ordinary to proceed  
WEBSTER, WILL, & RITCHIE, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

No. 121. THOMAS LEITCH AND OTHERS (Kippen's Trustees), First Parties.—  
C. J. Guthrie—Gunn.  
Mar. 20, 1889. THOMAS LEITCH AND ANOTHER (Mrs Kippen's Executors).—  
Kippen's Trustees. C. J. Guthrie—Gunn.  
JOHN WILSON (James M'Intosh's Factor), Third Party.—  
D.-F. Mackintosh—A. J. Young.  
PETER CRERAR AND OTHERS, Fourth Parties.—C. J. Guthrie—Gunn.  
Succession—Heritable or Moveable—Conversion.—A testator conveyed his heritable and moveable estates to trustees with directions to pay to his wife, in

case she survived him, a liferent of the trust-estate, and "to pay" to her "for her own use and disposal, out of the capital of the trust-estate any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He further directed his trustees, at the first term which should happen six months after her death, "to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half" of the residue. The other half was to be divided into six shares and paid to certain relatives. For accomplishing the purposes of the trust he gave his trustees power to sell his whole estate, heritable and moveable.

The widow received the liferent, but never applied for or received any payment from the capital. She died, leaving a will conveying her "moveable estate."

In a question between her heir-at-law and the executors under her will as to whether her right to one-half of the price realised from heritage belonging to the trust-estate, and unsold at her death, was heritable or moveable, *held* that it was moveable, and was carried by her will.

DUNCAN KIPPEN, spirit-merchant, Edinburgh, died on 24th April 1879. 2D DIVISION.  
M. He was survived by his wife. He had no child. He left a settlement, whereby he conveyed his whole estate, heritable and moveable, to trustees, for certain purposes therein specified.

By the fifth purpose he directed the trustees to pay to his widow during her life, if she survived, the income of the residue of his estate. By the sixth purpose he directed the trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire, but declaring that in case any such payments are made to her, the liferent above provided to her shall be restricted to the liferent of the remainder of the residue."

By the seventh purpose he provided,—“I hereby direct and appoint my trustees, at the first term of Whitsunday or Martinmas which shall happen six months after the death of my wife, in case she shall survive me, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of the capital which may have been made to her by my trustees under the sixth purpose of the trust, and which are to be imputed towards payment of said half; and further, in the event of my said wife predeceasing me, I hereby direct my trustees, at the first term of Whitsunday or Martinmas which shall happen six months after my death, to pay and assign to her heirs, executors, and assignees the said one equal half of the free residue and remainder of the trust-estate.”

Lastly, with regard to the other half of the residue he directed his trustees at the first term after his death to divide it into six equal shares, and to pay and assign these among certain of his own relatives. The provisions to his wife were declared to be in full of her legal rights.

The deed contained the following power of sale:—"For accomplishing the purposes of this trust, I hereby specially authorise and empower my said trustees and their fofoes to sell and dispose of my whole estate, heritable and moveable, real and personal, hereby conveyed, and to convert it into money, and that either by public sale or private bargain."

Mrs Kippen enjoyed the liferent of the residue till her death on 12th January 1888. She did not request, and did not receive, any payments out of the capital of the trust-estate as contemplated under the sixth purpose of the trust. She left a testament by which, on the narrative

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No. 120. more' within twenty working-days after the stiffening was completed, or, at latest, by the 4th October 1888; but they failed to furnish any cargo whatever to the vessel, except the stiffening, until the end of November, after this summons was served, and kept her lying at Sydney waiting for cargo until the 2d December 1888. The whole of the delay in loading a cargo after 4th October 1888 could easily have been saved by the defenders if they had so pleased, and was caused by their fault and negligence." Again, the following claim is set out in article 5:—"In consequence of her lengthened detention at Sydney, waiting to load a cargo under said charter, the bottom of the vessel has become foul, and the pursuers have been obliged to place her in dock to be cleaned. If the defenders had loaded the vessel with reasonable and customary despatch, in terms of said charter-party, it would not have been necessary to have the vessel docked, and this expense has been caused entirely through their fault." Now, that suggests what would be the nature of the settlement of the claim, supposing it to fall under the lien clause, on the arrival of the vessel at the port of discharge. There would have to be an inquiry whether the vessel's bottom was fouled owing to the detention at Sydney, what was the extent of that fouling, and what was the expense incurred owing to the vessel having to be docked. All those questions would have had to have been tried while the cargo was lying undelivered, being subject to a lien. The inconvenience of that is very apparent, and that very inconvenience is, I think, an element to be taken into consideration in construing the word "demurrage," for it furnishes a strong argument against construing the word in any but its strict sense.

No doubt any inconvenience is to be disregarded if the words of the contract are perfectly clear and distinct; that was so decided in *Maclean & Hope* (9 Macph. (H. L.) 39), where it was held that inconvenience could not be taken into account, because the parties to the contract had contracted in simple and clear terms, and should have thought about any inconvenience that might arise before they entered into it.

But, here, if anything is clear, it is that "demurrage" does not comprehend what the defenders say it does, but, if there is any doubt in the matter, then the inconvenience which would arise from construing the word in the sense they contend for comes in strongly as an element in construing it.

I am therefore strongly of opinion that the use of the word here only covers demurrage in its ordinary sense, as embracing the demurrage-days actually stipulated for in the contract, the payment for which is also liquidated.

LORD MURE and LORD SHAND were absent.

THE COURT adhered, and remitted to the Lord Ordinary to proceed.  
WEBSTER, WILL, & RITCHIE, S.S.C.—HAMILTON, KINNAR, & BEATSON, W.S.—Agents.

No. 121. THOMAS LEITCH AND OTHERS (Kippen's Trustees), First Parties.—  
C. J. Guthrie—Gunn.  
Mar. 20, 1889. THOMAS LEITCH AND ANOTHER (Mrs Kippen's Executors).—  
Kippen's Trustees. C. J. Guthrie—Gunn.  
JOHN WILSON (James M'Intosh's Factor), Third Party.—  
D.-F. Mackintosh—A. J. Young.  
PETER CRERAR AND OTHERS, Fourth Parties.—C. J. Guthrie—Gunn.

*Succession—Heritable or Moveable—Conversion.*—A testator conveyed his heritable and moveable estates to trustees with directions to pay to his wife, in

case she survived him, a liferent of the trust-estate, and "to pay" to her "for No. 121.

her own use and disposal, out of the capital of the trust-estate any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He further directed his trustees, at the first term which should happen six months after her death, "to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half" of the residue. The other half was to be divided into six shares and paid to certain relatives. For accomplishing the purposes of the trust he gave his trustees power to sell his whole estate, heritable and moveable. Mar. 20, 1889.  
Kippen's  
Trustees.

The widow received the liferent, but never applied for or received any payment from the capital. She died, leaving a will conveying her "moveable estate."

In a question between her heir-at-law and the executors under her will as to whether her right to one-half of the price realised from heritage belonging to the trust-estate, and unsold at her death, was heritable or moveable, *held* that it was moveable, and was carried by her will.

DUNCAN KIPPEN, spirit-merchant, Edinburgh, died on 24th April 1879. 2D DIVISION. He was survived by his wife. He had no child. He left a settlement, whereby he conveyed his whole estate, heritable and moveable, to trustees, for certain purposes therein specified. M.

By the fifth purpose he directed the trustees to pay to his widow during her life, if she survived, the income of the residue of his estate. By the sixth purpose he directed the trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire, but declaring that in case any such payments are made to her, the liferent above provided to her shall be restricted to the liferent of the remainder of the residue."

By the seventh purpose he provided,—“I hereby direct and appoint my trustees, at the first term of Whitsunday or Martinmas which shall happen six months after the death of my wife, in case she shall survive me, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of the capital which may have been made to her by my trustees under the sixth purpose of the trust, and which are to be imputed towards payment of said half; and further, in the event of my said wife predeceasing me, I hereby direct my trustees, at the first term of Whitsunday or Martinmas which shall happen six months after my death, to pay and assign to her heirs, executors, and assignees the said one equal half of the free residue and remainder of the trust-estate.”

Lastly, with regard to the other half of the residue he directed his trustees at the first term after his death to divide it into six equal shares, and to pay and assign these among certain of his own relatives. The provisions to his wife were declared to be in full of her legal rights.

The deed contained the following power of sale:—“For accomplishing the purposes of this trust, I hereby specially authorise and empower my said trustees and their fofoes to sell and dispose of my whole estate, heritable and moveable, real and personal, hereby conveyed, and to convert it into money, and that either by public sale or private bargain.”

Mrs Kippen enjoyed the liferent of the residue till her death on 12th January 1888. She did not request, and did not receive, any payments out of the capital of the trust-estate as contemplated under the sixth purpose of the trust. She left a testament by which, on the narrative



No. 121. that she desired to provide for the succession to her moveable estate, she appointed certain persons her executors, with power to intromit with her whole moveable estate and effects of every description.”

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The residue of the trust-estate of Mr Kippen included about £2000 of moveable property, and also house property in Buccleuch Place and Gladstone Place, Edinburgh. These subjects remained unsold till February 1888, when the trustees sold them for £954. One half of this sum fell to be divided into six shares in terms of the last purpose of the trust.

A question arose as to whether the other half—£477—was “to be regarded as moveable or heritable,” and as to the person to whom it fell to be paid. A special case was adjusted in order to the decision of this question. Mr Kippen's trustees were first parties. The sum was claimed by Mrs Kippen's executors (second parties) on the ground that on a sound construction of the seventh purpose of Mr Kippen's settlement the subject of the bequest was moveable.

On the other hand the third party, John Wilson, factor for James M'Intosh, Mrs Kippen's heir-at-law, contended that the bequest conferred on her a heritable *jus crediti*, which passed to her heir-at-law.

On the suggestion of the Court, after hearing argument, a minute was lodged for the next of kin of Mrs Kippen, sisting them as fourth parties.

Argued for the second and fourth parties;—The question was one of intention, and intention to convert was to be gathered from the settlement as a whole. The direction “to pay and assign” imported an intention to convert, as these words were more applicable to moveable than to heritable succession. Again half the residue was to go in six shares, which as events proved would be divisible among twenty beneficiaries. Further, there was ample power of sale if the trustees had chosen to exercise it.<sup>1</sup> Lastly, the provisions for the widow in the sixth purpose implied conversion. She was given a right, if she had chosen to exercise it, to demand of the trustees money to the amount of half the residue. It was a power to draw a sum of money.

Argued for the third party;—There was no direction to convert. A mere power in the trustees to convert would not operate conversion. Conversion, if not directed by the testator, must not only be permissible under his will, but also indispensable to its execution before it could be held to be operated by implication. Here it was not necessary, and no better proof of that could be given than that the purpose of the trust had been fulfilled without recourse to it. The beneficiaries were not nearly so numerous as in the case of *Duncan's Trustees*, and *pro indiviso* conveyance of the heritage was the appropriate course.<sup>2</sup> No doubt the thing to be paid or conveyed at the winding up of the trust was a “balance,” which *prima facie* meant a balance of money. But there was no need to produce a “balance.” The widow never required the money, and it was therefore not necessary to alter the condition of the succession.

At advising,—

LORD JUSTICE-CLERK.—Duncan Kippen, who died on 24th April 1879, left a

<sup>1</sup> *Authorities cited*.—*Buchanan v. Angus*, May 15, 1862, 4 Macq. 379; *Advocate-General v. Blackburne's Trustees*, Nov. 27, 1847, 10 D. 166; *Advocate-General v. Williamson*, Jan. 23, 1840, 13 D. 436, aff. March 16, 1843, 2 Bell's Appa. 89; *Weir v. Lord Advocate*, June 22, 1865, 3 Macph. 1011, 37 Scot. Jur. 522; *Auld v. Anderson*, Dec. 8, 1876, 4 R. 211; *Duncan's Trustees v. Thomas*, March 16, 1882, 9 R. 731; *Baird v. Watson*, Dec. 8, 1880, 8 R. 233.

<sup>2</sup> *Auld v. Anderson*, *supra*.

trust-disposition and settlement dealing with his whole estate. The only purposes of that settlement with which we are at present concerned are the sixth and seventh. By the sixth, he directs his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire. . . ."

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By the seventh, he directed his trustees at the first term after his wife's death, if she survived him, to pay and assign to her heirs, executors, and assignees, the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees under the sixth purpose of the trust.

The trustees were, "for accomplishing the purposes of this trust," empowered to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money.

Mrs Kippen survived her husband, and died in 1888, having never applied for or received payments out of the capital, as provided in the sixth purpose of the trust.

The residue of the trust-estate consisted, *inter alia*, of certain house property in Edinburgh, which has been sold since Mrs Kippen died. One half of the price is £477, and in this special case we are asked to decide whether it is heritable or moveable. On the one hand, her heir claims it as heritable, on the other, her executors under her will, which conveyed her whole moveable estate, claim it as carried thereby to them.

I have come to be of opinion that the contention of the heir cannot receive effect. The trustees were directed under the husband's trust to allow the widow to draw out of the capital sums to the extent of one half thereof, to find for her sums of money up to half that value. She did not indeed exercise the right, being satisfied with what the income of her husband's estate, given her under the fifth purpose of his settlement, afforded her, but she had such a right, to which the trustees had no answer. All they could ask was reasonable time to convert estate into money, and pay it to her. I think that shews that her right was moveable, and if it was moveable it fell within her testamentary conveyance of her whole moveable estate.

LORD YOUNG.—I concur.

LORD LEK.—The leading purposes of the testator's settlement are, first, to give his wife a liferent of the whole trust-estate, and second, to pay to her in case she survive him, "for her own use and disposal," any sum or sums not exceeding a half of the residue, it being provided that her liferent shall be restricted to the remainder, but that if she does not personally receive the half, the balance unpaid shall be paid to her heirs, executors, and successors. It was also provided thirdly, that if she predeceased the testator, "the said half of residue shall be paid to her heirs, executors, and assignees," and in the fourth place, that the trustees were to divide the other half of the residue at the first term after the death of the longest liver into six parts, which were to be given among the testator's own relatives.

If the wife had predeceased the testator, or if her share of residue did not vest

No. 121. in her, I think that conversion would not take place under the deed in the circumstances stated.

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But my opinion is that a vested right to the extent of one half of the residue was conferred on the wife herself by the terms of the deed.

I think she had a power of disposal to that extent, either by assignation or testament, and that this is made clear by the terms of the first portion of the seventh purpose, which directs that in so far as she shall not have personally received the amount, it shall be paid—as unpaid balance belonging to her—to her heirs, executors, and assignees.

It appears to me that the case of *Clark's Executors v. Paterson*, 14 D. 141, which has always been regarded as authoritative, proceeds on a principle entirely applicable to the present case. That principle is stated by Lord Fullerton as follows (p. 145):—"There may be cases in which a destination to heirs and assignees and a power of testing are not conclusive in favour of vesting, but these must be cases in which the words of the deed cannot be reconciled to vesting. . . . But postponed payment is as consistent with vesting as with not vesting. I apprehend that when a legacy is so granted that the legatee has the power of testing upon it, or assigning it, to all intents and purposes that legacy vests unless there is the strongest evidence of intention that it shall not vest."

Accordingly that case has been treated by the writers on the law of testamentary succession as a leading authority for the proposition that a destination to heirs and assignees of the legatee implies that the legacy is to vest immediately. It in no way conflicts with the decision in *Bell v. Cheape*, May 21, 1845, 7 D. 614. For in *Bell v. Cheape* it was clear, and was conceded (as appears from the opinion of Lord Mackenzie), that there could be no vesting, the legatee having predeceased the period of vesting.

Such being my opinion on the effect of the deed, I think that the legacy stood vested in the person of Mrs Kippen as moveable estate belonging to her at the time of her death, being merely a claim to the sum which she might have demanded during her life. The amount and position of the estate, as explained to us, were such as permitted of the sum being paid without selling the heritable subjects, and I think that her right to it is carried by her testament as a part of her moveable estate.

I think it contrary to the meaning of the trust-settlement to recognise a right in her heir-at-law to dispute her power of testing upon the amount bequeathed to her under the description of "a sum or sums of money not exceeding one-half of the residue and remainder of the trust-estate."

LORD RUTHERFURD CLARK was absent.

THIS interlocutor was pronounced:—"The Lords . . . are of opinion that the sum of £477 mentioned in the question therein stated is moveable, and falls to the party of the second part, and find and declare accordingly, and decern."

WHIGHAM & COWAN, S.S.C.—JOHN BAIRD, L.A.—Agents.

## SUMMER SESSION.

ADAM DICKSON, Pursuer (Appellant).—*M<sup>r</sup> Lennan.*WILLIAM BRYAN, Defender (Respondent).—*Crole.*

No. 122.

May 14, 1889.

Dickson v.

Bryan.

*Process—Sheriff—Appeal—Value of cause—Competency—Sheriff Court Act, 1853 (16 and 17 Vict. cap. 80), sec. 22—Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), sec. 30.*—A Sheriff Court action concluded for warrant to commit the defender to prison “until he restore” certain pointed goods, “or until he pay to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of said articles, all as provided for in the Act 1 and 2 Vict. cap. 114, sec. 30.” *Held* that as the prayer of the petition shewed that the value of the cause did not exceed £25, an appeal to the Court of Session against an interlocutor of the Sheriff dismissing the action was incompetent.

In January 1889 Adam Dickson, horse-dealer, Edinburgh, raised an action in the Sheriff Court there against William Bryan, 4 Lauriston Street, Edinburgh, in which he prayed the Court “to grant warrant to officers of Court to commit to prison the person of the said defender, therein to remain until he restore the following effects pointed on 27th August 1888 at 4 Lauriston Street, Edinburgh, in virtue of a Small-Debt decree dated the 8th day of August in said year, at the pursuer’s instance, viz.: . . . or until he pay to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of said articles, all as provided for in the Act 1 and 2 Vict. cap. 114, sec. 30.”\*

1st DIVISION.  
Sheriff of the  
Lothians.  
M.

The Sheriff-substitute (Rutherford), on 19th February 1889, dismissed the action.

On appeal the Sheriff (Crichton) adhered.

The pursuer appealed to the Court of Session.

The defender objected to the competency of the appeal. He maintained that the value of the action was less than £25, and that it was therefore not competent to bring any interlocutor therein under the review of the Court.† The value here was fixed by the pursuer at £9, 8s. 8d. The value of the cause therefore appeared on the face of the prayer of the petition, which was the proper test.<sup>1</sup> The pursuer could not go on with the action if the defender paid that sum.

The pursuer maintained that the prayer of the petition was really one *ad factum præstandum*, viz., for warrant of imprisonment. The appeal was against a refusal of that warrant, and was analogous to an appeal against a refusal of interdict where the value of the cause was less than £25.<sup>2</sup>

**LORD PRESIDENT.**—This case commenced with a petition presented in the

\* Section 30 of the Personal Diligence Act, 1838, enacts “that if any person shall unlawfully intromit with or carry off the pointed effects, he shall be liable, on summary complaint to the Sheriff of the county where the effects were pointed, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value.”

† Section 22 of the Sheriff Courts Act, 1853, enacts,—“It shall not be competent . . . to remove from a Sheriff Court, or to bring under review of the Court of Session . . . any cause not exceeding the value of twenty-five pounds sterling, or any interlocutor, judgment, or decree pronounced or which shall be pronounced in such cause by the Sheriff.”

<sup>1</sup> *Singer Manufacturing Co. v. Jessiman*, May 14, 1881, 8 R. 695.

<sup>2</sup> *Purves v. Brock*, July 9, 1867, 5 Macph. 1003, 39 Scot. Jur. 558; *Shotts Iron Co. v. Kerr*, Dec. 6, 1871, 10 Macph. 195, 44 Scot. Jur. 117; *Aberdeen v. Wilson*, July 16, 1872, 10 Macph. 971, 44 Scot. Jur. 540; *Henry v. Morrison*, March 19, 1881, 8 R. 692.

**No. 122.** Sheriff Court under the Personal Diligence Act. The prayer of the petition is for a warrant to commit the defender to prison until certain poided goods should be restored, or otherwise until he should "pay to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of said articles." It is quite plain on the face of that petition that if the defender pays that sum of £9, 8s. 8d. he will be free of the warrant for imprisonment, and will completely implement the prayer of the petition. The prayer is not like the alternative prayer of a summons where the pursuer asks specific implement or damages in the event of failure, for in such a summons the option lies with the pursuer; here, on the other hand, the option is entirely in the hands of the defender; he can, if he chooses, pay the sum and put an end to the process.

May 14, 1889.  
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Bryan.

Now, the objection to the competency of this appeal is that the value of the cause is distinctly ascertainable from the terms of the prayer of the petition, and that that value is less than £25. I do not very well see how that can be disputed, because double the appraised value of these articles is just £9, 8s. 8d. That being so, it is I think very difficult to dispute that the cause is one which falls within the rule of the 22d section of the Sheriff Court Act of 1853, which provides that it shall be incompetent to bring under review of this Court any decree in a cause the value of which is less than £25. No doubt the Sheriff has dismissed the whole action as incompetent, but he has pronounced a decree in a cause the value of which is under £25.

Some cases were cited to us. I do not think it necessary to go over them all, but the point is well brought out in the two cases cited to us from 8 R., viz., *Henry v. Morrison* and *Singer Manufacturing Co. v. Jessiman*. In the former of those cases the demand was for delivery of certain I O U's, and it was ascertained by inspection of the documents that the whole sum involved was just over £16. Now, that was not, I think, the proper way in which to arrive at the value of the cause; the only proper way of doing so is to look at the conclusions of the summons or the prayer of the petition, and the summons in that case did not disclose the value of the cause. If the total value of the I O U's had been stated in the summons as under £25, then the case would have been incompetent, but just because there was no such statement the Court refused to sustain the objection to the competency. The ground of judgment was well stated by the Judges, who pointed out that the I O U's might have been required by the pursuer, not for the sake of their pecuniary value only, but for some totally collateral purpose, e.g. to vindicate the character of the pursuer or to prove that they were forgeries.

In the case of the *Singer Company*, there were alternative conclusions either for an order for delivery of a machine, or failing that for payment of £6, 10s. as the value of the machine. There were means for ascertaining the value of the cause from the conclusions themselves, and as it appeared that the value was under £25 the Court sustained an objection to the competency. It appears to me that this is just such a case as *Singer's* was, the conclusions being either for imprisonment or for payment of a sum as the value of the poided articles, and that sum appearing on the face of the summons or petition to be under £25, I think we should dismiss the appeal as incompetent.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

THE COURT dismissed the appeal as incompetent.

ROBERT BROATCH, L.A.—E. NISH, Solicitor—Agents.

JOHN DUFF, Pursuer (Reclaiming).—*J. C. Thomson—G. W. Burnet.*  
NATIONAL TELEPHONE COMPANY, LIMITED, Defendants (Respondents).—  
*Jameson—W. Campbell.*

No. 123.

May 14, 1889.  
Duff v.  
National  
Telephone Co.,  
Limited.

*Reparation—Precautions for safety of public—Wheelbarrow left in lane—Child.*—The owner of a two-wheeled barrow left it in a lane in a town. Two children began to play on the barrow, and while doing so brought it down on and fatally injured a child of three years who was playing with them. In an action of damages at the instance of the father of the child against the owner of the barrow the pursuer averred that the barrow had been left unguarded in the open lane, and that no precaution had been taken against such an accident as had occurred. The Court *dismissed* the action as irrelevant.

IN November 1888 John Duff, Edinburgh, raised an action against the National Telephone Company, Limited, concluding for damages to the extent of £250 in respect of the death of his child, William Henry Duff.

1st DIVISION.  
Lord Fraser.  
C.

The pursuer averred;—"On Sunday, the 26th August 1888, about twelve o'clock noon, a child of the pursuer, named William Henry Duff, three years of age, was playing with some other children in a lane leading from Gayfield Street to Broughton Court. Some of the said children were playing with a two-wheeled hurley belonging to the defenders, which had been left in the lane by the defenders' workmen. The hurley was entirely unprotected, and two of the children had got on to it and were swinging on it, when they slid to the back of it and brought it suddenly and violently down on the head of the said William Henry Duff. It struck the said William Henry Duff, causing a deep wound on the front part of the head. The pursuer's wife, hearing a cry, went out of the house, and found the child bleeding profusely from said wound. The child was at once taken to a druggist's shop, where the wound was dressed."

He further averred that the child died from the effects of the injury.

He further averred;—(Cond. 3) "The defenders have a small enclosure or other place in said lane into which the hurley could have been put, and had this been done the accident would not have occurred. The said hurley was left in the open lane, where it ought not to have been left, and where the defenders had no right to leave it. Neither of its wheels was locked, and no precaution whatever was taken against such an accident as has occurred. The pursuer had no reason to apprehend that his child would suffer any injury from such a cause through being allowed to play in the said lane. The pursuer has suffered greatly in his feelings through the death of the said child. In these circumstances the defenders are liable to the pursuer in damages and *solatium*."

The pursuer pleaded;—The pursuer's said child having been deprived of life through the fault of the defenders, they are liable to make payment to the pursuer, in name of damages and as *solatium*, of the sum sued for, with interest and expenses.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons.

On 27th February 1889 the Lord Ordinary (Fraser) dismissed the action as irrelevant.

The pursuer reclaimed.<sup>1</sup>

The cause was debated before the Lord Probationer (afterwards Lord Kyllachy).

<sup>1</sup> *Authorities cited.*—Macgregor v. Ross & Marshall, March 2, 1883, 10 R. 725; Campbell v. Ord & Maddison, Nov. 5, 1873, 1 R. 149; Findlay v. Angus, Jan. 14, 1887, 14 R. 312.

**No. 123.** **LORD PROBATIONER.**—In this case I take the same view as the Lord Ordinary, viz., that there is no relevant averment of fault on the part of the defenders, and that there is no good reason for sending the case to a jury. It can hardly be said that a hurley is a dangerous thing in itself, or that there was anything out of the way in leaving one unprotected in the lane in question. No doubt it supplied a means by which this child hurt itself, but I do not think that the defenders were bound to anticipate that a child three years old would be allowed to go about without being looked after to some extent, and therefore I think that the true cause of the accident was not fault on the part of the defenders but failure of duty on the part of the child's parents. I therefore think that the interlocutor of the Lord Ordinary should be affirmed, and the defenders assoilzied.

May 14, 1889.  
Duff v.  
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Limited.

Thereafter,—

**LORD PRESIDENT.**—I agree in the view of this case which the Lord Probationer has taken. The pursuer avers that his child, William Henry Duff, along with some other children, were playing in a lane "with a two-wheeled hurley belonging to the defenders. The hurley was entirely unprotected, and two of the children had got on to it, and were swinging on it, when they slid to the back of it, and brought it suddenly and violently down on the head of the said William Henry Duff." It is then averred that the child was thereby fatally injured, and subsequently died, and that the accident occurred through the fault of the defenders, inasmuch as they had "left the hurley in the open lane, where it ought not to have been left, and where the defenders had no right to leave it." I do not intend to say that people are justified in leaving wheelbarrows in the public streets, but that was not the case here. The barrow was left in a narrow lane.

I am clearly of opinion that the averments of the pursuer here are quite irrelevant, and if I were to conjecture as to the real cause of the accident I should say that the fault was that of the parents in leaving a child of three to run about without anyone to take any charge of it. There is really nothing else in the case, and I think, therefore, that we ought to adhere.

**LORD SHAND.**—I agree with an observation made by Mr Campbell that if we were to sustain the relevancy of this action there would be no possibility of saying where responsibility in such matters would end. In all the cases which have previously occurred the complaint has been that an article dangerous in itself has been left unguarded in an exposed position. It is not perhaps easy to define what the word "dangerous" precisely means when used in cases of this kind, but I think that the cases we were referred to explain themselves, and define the term. In the cases of *Macgregor* and *Campbell* the articles so left were machines which would be dangerous if set in motion, which they might easily be. In *Findlay's* case the article was a heavy shutter, which was quite harmless if untouched, but which was so placed that a very slight movement of a pin would bring it down. Again, a horse left in the street without anyone to take care of it might be most dangerous, but I think it is extravagant to say that an ordinary wheelbarrow is a dangerous article in any sense, and I do not think that in leaving it in the lane the defenders did anything which can afford ground for an action of damages. The wheelbarrow might be an obstruction in the street or lane, but I think the statements made here on record are quite irrelevant to found a claim for damages on the ground of fault.

LORD ADAM.—I concur.

LORD MURE was absent.

THE COURT adhered.

THOMAS CARMICHAEL, S.S.C.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

No. 123.

May 14, 1889.  
Duff v.  
National  
Telephone Co.,  
Limited.

MRS JANE WRIGHT AND OTHERS (Wright's Trustees), First Parties.—  
*Wallace—Sym.*

No. 124.

Rev. MAXWELL JAMES WRIGHT, Second Party.—*Sir Charles Pearson—Guy.*

ALICE WRIGHT AND OTHERS, Third Parties.—*Sir Charles Pearson—Guy.*

JAMES WRIGHT AND OTHERS, Fourth Parties.—*Wallace—Sym.*

May 14, 1889.  
Wright's  
Trustees v.  
Wright.

*Succession—Legacy—Implied Revocation.*—A testator by his settlement bequeathed to certain nephews, including A and B, legacies of £1000 each. Thereafter he executed a codicil to this effect,—“I recall the legacy of £1000 to my nephew B . . . and I give said sum to my nephew A . . . to be paid to him at the same time with the like legacy of £1000 already given to him.” Two days later he executed this other codicil:—“I . . . renew the legacy of £1000 to my nephew B, to be paid to him as at the time of the original legacy . . .” *Held* that the additional legacy of £1000 to A had not been revoked.

JOHN WRIGHT, Writer to the Signet, residing in Edinburgh, died on 2d November 1888. He left a trust-disposition and settlement prepared by himself, and to which were appended nine codicils, also written at various dates by himself. 2D DIVISION.  
M.

By the settlement Mr Wright bequeathed a legacy of £1000 to each of his nephews and nieces by name. Among the nephews were the Rev. Maxwell James Wright and Mr Charles Ferney Tod.

The residue of the estate was left to the testator's brother in liferent, and his children in fee.

On 19th May 1888, Mr Wright executed a codicil in the following terms,—“I, John Wright, Writer to the Signet, recall the legacy of £1000 to my nephew Charles Ferney Tod, and I give said sum to my nephew the Rev. Maxwell J. Wright, now minister of Dornock, in the presbytery of Annan, to be paid to him at the same time with the like legacy of one thousand pounds already given to him.”

Two days later, 21st May 1888, he executed this codicil,—“I, John Wright, Writer to the Signet, renew the legacy of one thousand pounds to my nephew Charles Ferney Tod, to be paid to him as at the time of the original legacy.”

The personal estate of Mr Wright at his death amounted to £57,000. A question having arisen as to whether Rev. Maxwell James Wright was entitled to two legacies of £1000, a special case was presented to the Court by Mr Wright's trustees, first parties, by the Rev. Maxwell J. Wright, second party, and by the residuary legatees, fourth parties, for determination of the question,—“Is the second party entitled to the legacy of £1000 bequeathed to him by the codicil of 19th May 1888 in addition to the legacy of £1000 left to him by the settlement?”

The third parties were not interested in this question.

LORD JUSTICE-CLERK.—By his trust-disposition and settlement dated 25th August 1883, the late Mr John Wright left certain legacies, and among them a legacy of £1000 to his nephew Maxwell James Wright, and another of the same amount to his nephew Charles Ferney Tod. On 19th May 1888, for some reason which we do not know, he wrote a codicil which runs as follows,



**No. 124.** May 14, 1889. *Wright's Trustees v. Wright.* "I recall the legacy of £1000 to my nephew Charles Ferney Tod, and I give said sum to my nephew the Rev. Maxwell J. Wright . . ." Two days afterwards, on 21st May, having repented of the recall of the legacy to Charles Ferney Tod, the testator executed another codicil, in which he says, "I renew the legacy of £1000 to my nephew Charles Ferney Tod . . ."

The question for decision is whether the renewal of the legacy to Tod implies, and necessarily implies, that the gift of the second thousand pounds to Maxwell Wright was recalled, for unless that is necessarily implied I think the gift to Mr Wright must stand. Now, it is not easy to decide this question, but there are, I think, two grounds for holding that that implication is not necessary, and if it be not necessary it cannot be made. In the first place, as Lord Lee suggested during the debate, if the object of the codicil of 21st May 1888 was to restore matters to the condition in which they had been two days previously, there was no necessity for giving it the form of a new codicil at all. All the testator had to do was to revoke the codicil of 19th May. In the second place, it by no means follows from the testator's repenting of the act by which he deprived Charles of £1000 that he repented also of giving to Maxwell £2000. He had for reasons satisfactory to himself given £2000 to Maxwell (instead of £1000) on 19th May, and there is nothing to indicate that in the following two days he had repented of that. The giving to Charles again his legacy of £1000 was quite consistent with the legacy to Maxwell of the £2000 remaining valid.

Therefore I think that the codicil of 19th May must receive effect in so far as it gives to Mr Maxwell Wright £2000.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

THE COURT answered the question in the affirmative.

D. TURNBULL, W.S.—TRAQUAIR, DICKSON, & M'LAREN, W.S.—Agents.

**No. 125.** May 21, 1889. *M'Murphy v. MacLulich.* DONALD M'MURPHY, Pursuer (Reclaiming).—*Party.* J. C. MACLULLICH, Defender (Respondent).—*M'Kechnie—Forsyth.*  
*Expenses—Amendment—Condition of payment of expenses in previous actions.*  
—In an action of damages for slander, the defender was assoltized from the conclusions of the summons on the ground that the record contained no relevant statement of malice, and the pursuer was found liable in expenses.  
In a second action founded on the same alleged slander, but containing averments of malice, *held* that the pursuer could not be allowed to proceed until he had paid the expenses in the former action.

2D DIVISION.  
Ld. Wellwood.  
M.

(*VIDE M'Murphy v. Campbell and MacLulich*, May 21, 1887, 14 R. 725.)  
On 12th January 1887, Donald M'Murphy, formerly a sergeant of police at Oban, raised an action of damages for alleged slander against Peter Campbell, formerly inspector of police there, and J. C. MacLulich, procurator-fiscal of Argyllshire at Inveraray.

On 25th March 1887, the Lord Ordinary (Lee) pronounced this interlocutor:—"Finds that the pursuer's allegations are not relevant and sufficient to support the action; therefore assoltizes the defenders from the conclusions of the summons: Finds the pursuer liable to the defenders in the expenses of the process."

The pursuer having reclaimed, the Second Division adhered, with additional expenses. The ground of judgment was that an averment of malice was essential to the relevancy of the action, and that none had been made.

On 5th July 1888, M'Murphy raised a new action of damages in respect of the same alleged slander against Maclullich. The averments as to the alleged slander were substantially the same as those in the former action. The pursuer made certain additional averments setting forth the grounds on which malice might be inferred, and stated that these averments were not made in the former action owing to the fault of his agent, to whom he communicated them, but who neglected to set them out on record. The defender objected to the pursuer being allowed to proceed with the action until he paid the defender the expenses decerned for in the previous action.

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On 23d November 1888, the Lord Ordinary (Wellwood) pronounced this interlocutor :—" In respect the pursuer has not paid the taxed expenses found due to the defenders in the action against them, the summons of which was signeted on 12th January 1887, refuses *in hoc statu* the pursuer's motion for issues, and continues the cause till the first sederunt-day in January next."

On 9th January 1889 his Lordship pronounced this interlocutor :—" In respect that the pursuer has not yet paid the taxed expenses found due to the defender, and referred to in the preceding interlocutor, dismisses the action, and decerns : Finds the defender entitled to expenses."

The pursuer reclaimed.

Argued for the pursuer ;—In the former action his agent had failed to carry out his instructions, and had thus made up the record without stating specific allegations of malice. It was on that ground that the action had been dismissed. It would be oppressive to make him suffer for the omission on the part of his agent.

Argued for the defender ;—The pursuer, had he so chosen, might have moved the Court under the 29th section of the Court of Session Act, 1868, for leave to amend his record in the previous action by the addition of those averments of malice the absence of which had been held fatal to him. Leave would undoubtedly have only been granted to him to do so on condition of his paying the expenses up to the date of the amendment. This was just an attempt to evade this penalty, and he ought to be made to pay the expenses found due by him in the previous action before being allowed to proceed with the new action.<sup>1</sup>

LORD JUSTICE-CLERK.—The pursuer in this case formerly brought an action against the same person who is defender here, and that action was dismissed owing apparently to the failure of the pursuer's agent to put in certain statements of malice, and the pursuer was found liable in expenses. The present action is of exactly the same kind, and is raised on the same grounds as the former action, and only differs from it in this, that it contains the averments as to malice which were wanting in the former action. The question which presents itself under these circumstances is whether, having brought a new action such as I have described, with a new averment, which he might have added to his previous record by amendment, he is to be allowed to pursue the new action, except on the condition of paying his opponent's expenses in the previous action. No case has been cited to us which is exactly on all-fours with the present, but I cannot distinguish this case from those in which when a pursuer has proposed to amend his record in order to make it relevant in a substantial part, he has almost invariably been found liable, as the condition precedent, to pay the previous expenses or part of them. In bringing this new action, the

<sup>1</sup> Struthers v. Dykes, June 16, 1846, 8 D. 875, 18 Scot. Jur. 446 ; Irvine v. Kinloch, Nov. 7, 1885, 13 R. 172 ; Wallace v. Henderson, Dec. 22, 1876, 4 R. 264.

No. 125. pursuer is endeavouring to do what he might have done in the former case. If he had asked the Court in the Inner-House to allow him to make the amendment, he would only have been allowed to do so on condition of paying the expenses. The claim of the defender here to have his expenses paid in the former case is even stronger than if the request had been made on such an application, because it is very plain that he has been necessarily subjected to a much larger outlay than he would have been in the other case. I am therefore of opinion that we ought to adhere.

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LORD YOUNG.—I am of the same opinion, and I cannot say that I regret the result, because I think it will be most beneficial to both parties. I ventured to point out in the course of the argument that, in my opinion, a party is not hindered from pursuing an action against another merely because he is in the latter's debt. A man may be debtor of the person against whom he has a claim of damages, for injury it may be, and he will not be precluded from suing an action to enforce the claim because of that debt. I do not think that it would in the least signify that the nature of the debt was a sum of expenses awarded against him in another and a different action.

The real question therefore on the merits of the point here argued is, whether those expenses in the former action ought not really to be regarded as expenses in the present action, as they were in *Irvine v. Kinloch* (13 R. 172). I think the solution of the question is in the conclusion suggested by your Lordship, that the record in the former action might have been converted into this action by amendment. The pursuer is seeking remedy for exactly the same grievance in this action as he did in the former one. In the former action, he did not represent the grievance relevantly to entitle him to the relief which he asked, because his record contained no averments of malice. But then, at any time before judgment was pronounced, he might have added these averments by way of amendment; and if the pursuer had stated facts which would have authorised him to make them, he might have moved the Court to allow him to so amend, and the Court would have been bound under the 29th section of the Court of Session Act, 1868, to have granted his motion. It would probably have been the only mode by which the true matter in dispute might have been tried in the then existing action. Then, it is quite familiar that an amendment which tends to make all the difference between relevancy and irrelevancy in a record is only allowed on the condition of expenses being paid. That is the general rule. I shall venture to put the matter thus: I assume that Lord Lee was right in assoilzieing the defender, because there was no relevant ground of action stated against him on record, and that before judgment was pronounced in the Inner-House affirming Lord Lee's interlocutor, he proposed to amend his record by adopting the statements made in the present action. I am personally of opinion that we should have listened to that proposal, but only on the condition of his reimbursing the defender in all the preceding existing expenses which, in that view, had been thrown away. Supposing we had done so, and the pursuer then said, "I can't pay, but I will reach the result I want in another way which will not subject me to the condition imposed upon me by the Court. I will allow decree of absolvitor to go out, and I will bring an entirely new action with all my amendments in it." I think the Court would have frustrated such an attempt. It may be very true that the irrelevancy for which the first action was dismissed did not arise from his fault. He may have given his agent in-

structions which were not properly carried out, but his adversary must none the less be reimbursed in the expenses which have been thrown away in defending the action according to that view. I am therefore of opinion that the condition of being permitted to proceed with this amended action is, that the pursuer should pay the expenses of the former action, which he might have amended at the time and in the manner I have suggested.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—I think that it is a nice question whether in an action for clearing character such as this is the Court would in its discretion have made payment of expenses a condition of the pursuer's amending his record. I concur, however, with Lord Young that, as the case now stands, the pursuer must pay the expenses of the former action before he proceeds further with this, and that even though the expenses in the former action were thrown away not through his own but through his agent's fault.

THE COURT recalled the Lord Ordinary's interlocutor of 9th January 1889, and adhered to the interlocutor of 23d November 1888.

The pursuer having thereafter paid the expenses in the previous action, the Court allowed him a proof before answer.

PARTY—THOMAS CARMICHAEL, S.S.C.—Agents.

THOMAS YOUNG AND OTHERS (Lord Dalhousie's Trustees), First Parties.—*C. K. Mackenzie.* No. 126.

THOMAS YOUNG AND OTHERS (Lady Christian Maule's Trustees) AND ANOTHER, Second Parties.—*C. J. Guthrie.*

THOMAS YOUNG AND OTHERS (Lady Christian Maule's Trustees) AND OTHERS, Third Parties.—*Balfour—G. R. Gillespie.*

ARTHUR RAMSAY MACDONALD AND DUDLEY WARD MACDONALD, Fourth Parties.—*Sir Charles Pearson—A. Stuart.*

CHARLES ELLIOT AND ANOTHER, Fifth Parties.—*Sir Charles Pearson—Begg.*

*Succession—Conditional institution—Vesting subject to defeasance.*—A testator directed his trustees to pay the income of the residue of his estate to his sister during her life, and at her death to pay £6000 to each of his nephews whom he named. The deed then provided that "if any of my said nephews . . . die before my sister" leaving issue, the issue should take the parent's share, "and if any of my said nephews, . . . other than my said nephew E. B. R., die without issue, the share of such decessor or decessors shall fall to their surviving brothers and sisters, equally among them, . . . the issue of any deceased brother or sister taking the share which would have fallen to their parent, . . . and with regard to the £6000" directed to be apportioned to E. B. R., "I desire that, in the event of his predeceasing me without issue, the same shall go" as directed in the deed. H. M., one of the nephews, predeceased the testator without issue, but survived by brothers and a sister. E. B. R. survived the testator, but died leaving no issue. The liferentrix survived both these nephews.

In a special case presented to the Court after the death of the liferentrix, *held* (1) that the surviving brothers and the issue of a predeceasing brother of H. M. were entitled as conditional institutes to equal shares of the £6000 bequeathed to him, (2) that the £6000 bequeathed to E. B. R. vested in him at the testator's death, subject to defeasance in the event of his predeceasing the liferentrix leaving issue, and that, as he left no issue, it fell to the executor under his will.

*Observations* (per Lord Shand) on *Murray v. Gregory's Trustees*, Jan. 21, 1887, 14 R. 368, reversed on appeal to the House of Lords, and *Wannop and Others (Haldane's Trustees) v. Murphy*, Dec. 15, 1881, 9 R. 269.

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*M'Murphy v. Macdulloch.*

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1ST DIVISION.  
C.

ON 6th July 1874 the Right Honourable Fox Earl of Dalhousie died, leaving a trust-disposition and settlement, dated 9th December 1872, whereby he conveyed his whole estate to Major Thomas Young of Lincluden and others in trust for purposes therein mentioned.

The trust-disposition contained, *inter alia*, the following clause:—  
“Lastly, I direct that so soon as possible after my death the whole residue and remainder of my means and estate, heritable and moveable, real and personal, shall all be realised (with the exception of such investments as my trustees may deem it expedient to continue), and the whole free annual interest and proceeds of the whole of said residue and remainder shall be paid over as the same arises to my sister, the said Lady Christian Maule, during her life; and upon her decease the whole of such residue and remainder shall be realised and divided and apportioned by my said trustees as follows: that is to say, the same, to the extent after mentioned, shall be divided and apportioned among my nephews and nieces after named, children of my deceased brother and sisters (with the exception of my niece Miss Maule of Fearn, the eldest daughter of my late brother, the Honourable William Maule Maule, who is otherwise provided for), viz., Major Thomas Young, Captain George Young, Edward Bannerman Ramsay, George Dalhousie Ramsay, Captain Marmaduke Ramsay, Captain Henry Macdonald, John Crawford Macdonald, Arthur Ramsay Macdonald, and Dudley Ward Macdonald, my nine nephews, and Mary Maule, Clara Maule, Alice Maule, Patricia Ramsay or Agnew, Christina Ramsay or Elliot, Georgina Harvey Ramsay or Hay, and Mary Macdonald, my seven nieces, to the effect of paying as at the date of the decease of my said sister, Lady Christian Maule, the sum of £6000 to each of my said nine nephews and the sum of £4000 to each of said seven nieces: Provided always and declaring that if any of my said nephews or nieces die before my sister, the said Lady Christian, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceiver or deceasers shall fall to their surviving brothers and sisters equally among them, if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one: And with regard to the £6000 hereinbefore directed to be apportioned to my said nephew Edward Bannerman Ramsay, I desire that in the event of his predeceasing me, without issue, the same shall go one half to the said Christina Ramsay or Elliot, whom failing, to her issue equally among them, and the other half to the said Georgina Harvey Ramsay or Hay, whom failing, her issue, equally among them.”

Lady Christian Maule was appointed residuary legatee.

The truster was survived by the nephews mentioned in the deed, with the exception of Captain Henry Macdonald, who died in 1873, without issue, survived by three brothers, John, Arthur, and Dudley, by a sister, Miss Mary Macdonald, who died unmarried on 31st December 1887, and by H. L. S. Macdonald, the only child of William Macdonald, a brother who predeceased.

Major-General Edward Bannerman Ramsay, one of the nephews mentioned in the deed, died on 25th December 1883, without issue, leaving a will, by which he appointed Colonel Charles Elliot his sole executor.

Lady Christian Maule, the sister of the truster, died on 21st March 1888. By her will she appointed her nephew, Major Thomas Young, and others her trustees, and provided that in the event of the legacy of £6000 bequeathed by Lord Dalhousie to Edward Bannerman Ramsay being held to have lapsed and to belong to her as her brother's residuary legatee, a legacy of £6000 should be divided between Edward Bannerman Ramsay's brothers and sisters.

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Questions having arisen with regard to the sums of £6000 bequeathed by Lord Dalhousie (1) to Captain Henry Macdonald, and (2) to Major-General Edward Bannerman Ramsay respectively, this special case was presented for the opinion and judgment of the Court. The trustees of Lord Dalhousie were the first parties thereto.

With regard to the £6000 bequeathed to Captain Henry Macdonald, Major Thomas Young and others, Lady Christian Maule's trustees, and Major Young as her residuary legatee, who were the second parties to the case, maintained that the bequest had lapsed in consequence of Henry Macdonald having predeceased Lord Dalhousie, and that, therefore, the legacy fell to be paid to Lady Christian Maule as residuary legatee of her brother. Arthur Ramsay and Dudley Ward Macdonald, brothers of the deceased, and fourth parties to the case, maintained that they were entitled thereto, as conditional institutes, along with their brother, John C. Macdonald, and H. L. S. Macdonald, the only child of a deceased brother, in virtue of the survivorship clause in Lord Dalhousie's settlement.<sup>1</sup>

With regard to the legacy of £6000 to Major-General Edward Bannerman Ramsay, Lady Christian Maule's trustees and others, the conditional legatees under her will, the third parties to the case, maintained that in consequence of the legatee having predeceased Lady Christian Maule he never took any vested interest in the bequest; that it accordingly lapsed and fell to Lady Christian Maule as residuary legatee to her brother, and was now payable to her trustees and executors.<sup>2</sup> Colonel Charles Elliot, Edward Bannerman Ramsay's executor, and Miss Lily Elliot, his residuary legatee, who were fifth parties to the case, maintained that the legacy vested in Edward Bannerman Ramsay on the death of the testator, or, at all events, vested in him at that date subject to defeasance only in the event of his predeceasing Lady Christian Maule and leaving issue, and that it thus fell to be paid to Colonel Elliot, as executor under his will.<sup>3</sup>

The following questions were submitted to the Court:—“(1) Whether the bequest of £6000 by the Earl of Dalhousie to Captain Henry Macdonald falls to the fourth parties, and the said John Crawford Macdonald and H. L. S. Macdonald, equally among them, in virtue of the survivorship clause contained in the trust-disposition and settlement; or whether the said bequest lapsed in consequence of Captain

<sup>1</sup> *Authorities*.—Ersk. Inst. iii. 9, 9; Findlay v. Mackenzie, July 9, 1875, 2 R. 909; Denholm, 1726, M. 6346; Dunlop v. Crawford, June 2, 1812, Fac. Coll.; Inglis v. Miller, 1760, M. 8084; Moray v. Stuart, 1782, M. 8103.

<sup>2</sup> *Authorities*.—Young v. Robertson, Feb. 14, 1862, 4 Macq. 314; Laing v. Barclay, July 20, 1865, 3 Macph. 1143, 38 Scot. Jur. 95; Snell's Trustees v. Morrison, March 20, 1877, 4 R. 709; Waters' Trustees v. Waters, Dec. 6, 1884, 12 R. 253; Haldane's Trustees v. Murphy, Dec. 15, 1881, 9 R. 269.

<sup>3</sup> *Authorities*.—Maxwell v. Wylie, May 25, 1835, 15 S. 1005, 9 Scot. Jur. 460; Taylor v. Gilbert's Trustees, July 12, 1878, 5 R. (H. L.) 217; Wilson's Trustees v. Quick, Feb. 28, 1878, 5 R. 697; Fraser v. Fraser's Trustee, Nov. 27, 1883, 11 R. 196; Ross' Trustees, Dec. 18, 1884, 12 R. 378; Finlay's Trustees v. Finlay, July 6, 1886, 13 R. 1052; Byar's Trustees v. Hay, July 19, 1887, 14 R. 1034.

No. 126. Macdonald predeceasing the testator? (2) Whether the bequest of £6000 by the Earl of Dalhousie to Major-General Edward Bannerman Ramsay vested in him *a morte testatoris*; or whether the said bequest lapsed in consequence of his predeceasing the liferentrix?"

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At advising,—

LORD PRESIDENT.—The question stated for the opinion and judgment of the Court depends upon that part of Lord Dalhousie's settlement which deals with residue. There are some things in the case about which there can be no doubt, and amongst others there is this, that Lady Christian Maule was liferentrix of the entire residue of the estate, and that on her decease the estate was to be realised and divided and apportioned in the way directed by the will.

The testator had at the date of the settlement nine nephews and seven nieces. The residue to a certain extent was to be divided amongst them, each nephew was to have £6000 and each niece £4000.

The two nephews about whose shares the present dispute has arisen are Captain Henry Macdonald and General Edward Bannerman Ramsay, but their shares stand in different positions.

Captain Henry Macdonald predeceased the testator, and, of course, as Lady Christian survived her brother, the liferentrix also. In these circumstances the question has arisen whether Captain Macdonald's legacy lapsed, or whether the fourth parties are entitled as conditional institutes to his share of the residue. Now, the words of the settlement stand thus. After saying that each nephew shall take £6000, there follow certain provisions. The first part of the provision is as follows:—"Provided always and declaring that if any of my said nephews or nieces die before my sister, the said Lady Christian, leaving a child or children, such child or children shall be entitled to their parent's share." That provision simply comes to this that if a nephew or niece predecease Lady Christian leaving issue, the child or children shall come into the parent's place. But the next part goes on to say,—“And if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceiver or deceivers shall fall to their surviving brothers and sisters, equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister, and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one.” The provision therefore is, that in the case of one of the nephews leaving children, and dying “before my sister,” the children shall take the parent's share, but should a nephew “die without issue,” his brothers and sisters shall take his share. In this latter case the words “before my sister” are left out.

Now, I think it cannot be doubted that those words must be supplied in the second part of the proviso. The whole clause has no meaning if that was not the intention of the testator. I have no doubt whatever that the condition is to be the same in the case of a nephew or niece dying without issue, and dying with issue, viz., that they shall predecease the liferentrix. This is the clause to be construed, and it is said on the one hand that a nephew who died before the testator necessarily fulfilled the conditions, because the liferentrix survived her brother, while, on the other hand, it is contended that we must

read in the words "die after me and before my sister," or in other words, that it is necessary that the nephew should have died in the interval between the death of the testator and that of the liferentrix. I think that the latter is an unnatural construction to put on the clause, and therefore I am of opinion that it applies to the case of Henry Macdonald, who predeceased the testator, leaving no issue. I cannot doubt that there was a conditional institution of his surviving brothers and sisters, and that therefore they are entitled to take his share of the residue.

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The second question relates to the share of General Edward Bannerman Ramsay. Now, his share is in a different position. The second part of the provision does not apply to his case, because he is expressly excepted from its operation. In place of that there is the following provision,—“And with regard to the £6000 hereinbefore directed to be apportioned to my said nephew Edward Bannerman Ramsay, I desire that in the event of his predeceasing me without issue, the same shall go one half to the said Christina Ramsay or Elliot, whom failing, to her issue equally among them, and the other half to the said Georgina Harvey Ramsay or Hay, whom failing, her issue, equally among them.” That is not an event which happened, because what did occur was that he survived the testator, but predeceased the liferentrix without leaving issue. It appears to me that the condition of the residuary clause as affecting him is this. If he had survived the testator and died before the liferentrix leaving issue, his children would have taken his share. If, again, he had predeceased the testator and the liferentrix without leaving issue, then the provision in favour of Mrs Elliot and Mrs Hay would have come in, but in the event of his surviving the testator and predeceasing the liferentrix leaving no children, then there is no ulterior destination of his share. That is what actually happened, and the question is, what has become of his share, has it lapsed and fallen into residue, or did it vest in him *a morte testatoris*?

Now, the only possible reason why it should be held not so to have vested is that there is a provision that in the event of his leaving children they should take his share. That is the only thing which could prevent vesting; but my opinion is that that provision in favour of children is not sufficient to prevent vesting. The case is just one of vesting, subject to defeasance, which has several times been before us for judgment. If the class to be benefited by the provision in favour of children is quite unascertained and has no existence at all, as is the case here, nothing can interfere with vesting. If children had come into existence, no doubt they would have been entitled to succeed, but that would have been merely a case of defeasance. My opinion is therefore that this share vested in Edward Bannerman Ramsay, subject to defeasance by an event which never in point of fact occurred.

I think, therefore, we should answer the first branch of the first question in the affirmative, and the first branch of the second question also in the affirmative.

LORD SHAND.—I have no difficulty in concurring on both questions. I agree on the first question in holding that with regard to the share of Captain Henry Macdonald, who predeceased the testator without issue, we must hold that the fourth parties are entitled to it as conditional institutes under the will. The provision is that if a nephew “die before my sister” leaving a child, such child shall be entitled to the parent's share, but if any nephew shall “die without issue,” his brothers and sisters shall take his share. I agree that by implication



No. 126. we must read into the second part of the proviso the words "before my sister." May 24, 1889. The two parts of the clause must, I think, refer to the same period of distribution. We are, however, asked to read into that clause the words, "If any nephew shall survive me, but predecease my sister." I can see no ground whatever for doing so, and I see every ground for refusing to do so. I think it is impossible to read the clause except in the view that the testator meant the fund to go to the legatee himself if he survived him (the testator), but that if he predeceased that date it should go to his issue if he had any, and that if he had none it should go to his brothers and sisters. In other words, he preferred to his residuary legatee, first, the legatee, second, the legatee's children, and third, his brothers and sisters. I am therefore clearly of opinion that the first question should be answered as your Lordship has proposed.

As regards the case of Edward Bannerman Ramsay, the clause applicable is that "in the event of his predeceasing me without issue," his share shall go to Mrs Elliot and Mrs Hay. Now, this legatee did not predecease the testator, and that clause is therefore out of the deed. The question then is, as he predeceased the liferentrix without leaving issue, to whom does his legacy of £6000 go? I am clearly of opinion that it does not fall into residue and go to Lady Christian Maule or her representatives, but that it goes according to the directions in his will. The legacy vested in him *a morte testatoris*, but subject to defeasance in the event of his leaving issue, which he did not do. The case is, I think, indistinguishable from that of *Snell's Trustees* (4 R. 709), and from the recent and most authoritative judgment of the House of Lords in the case of *Murray, &c. v. Gregory's Trustees* (14 R. 368), in which the decision of this Court has been reversed. In that case the House of Lords have dealt with the case of *Wannop (Haldane's Trustees v. Murphy, 9 R. 269)*, and though their Lordships were not dealing with the case by way of appeal, they practically reversed the decision of this Court. The result of the reversal of the decision in *Gregory's Trustees* is that the House have upheld the doctrine of vesting subject to defeasance. Here the vesting in General Ramsay was subject to defeasance by an event which, as matter of fact, never occurred, and therefore his share of residue falls to his executor.

LORD ADAM.—With regard to the first question I think that there is no doubt that if the literal meaning is to be given to the clause in question Captain Macdonald's brothers and sister must succeed. It is said that what the testator intended was that no nephew should take his legacy of £6000 unless he survived him. I cannot speculate as to what was in the mind of the testator, but can only say that there is nothing in the deed to lead me to suppose that any such thing was his intention. On the contrary, I think he intended that if any nephew predeceased Lady Christian Maule, the liferentrix, without leaving issue, his brothers and sister should take his share.

On the second question I also concur in thinking that his share vested in General Edward Bannerman Ramsay *a morte testatoris*, but subject to defeasance in the event of his leaving children, which he did not do.

LORD MURE was absent.

THE COURT answered the first alternatives of the first and second questions respectively in the affirmative.

JOHN CLERK BRODIE & SONS, W.S.—TODD, MURRAY, & JAMIESON, W.S.—  
ALEXANDER CAMPBELL, S.S.C.—Agents.

MRS MARGARET CUTHBERTSON OR WILLIAMS, Pursuer (Appellant).—  
*Younger.*

No. 127.

WATT & WILSON, Defenders (Respondents).—*A. S. D. Thomson.*

May 28, 1889.  
Williams v.  
Watt & Wil-  
son.

*Process—Sheriff—Appeal—Judicature Act, 1825 (6 Geo. IV. c. 120), sec. 40—Act of Sederunt, 12th July 1828, sec. 5.—Held* that an appeal for jury trial in a Sheriff Court action must, in terms of sec. 5 of A. S., 12th July 1828, be presented within fifteen days after the date of an interlocutor allowing a proof, although the diet for proof is only fixed by an interlocutor of later date.

*Kinnes v. Fleming*, Jan. 15, 1881, 8 R. 386, and *Duff v. Steuart*, Oct. 20, 1881, 9 R. 17, *followed*.

*Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co.*, Nov. 16, 1888, 16 R. 104, *distinguished*.

MRS MARGARET CUTHBERTSON OR WILLIAMS raised an action in the Sheriff Court of Renfrew and Bute against Messrs Watt & Wilson for damages as reparation due to her for the death of her son through the alleged fault of the defenders. 2D DIVISION.  
Sheriff of Ren-  
frew and Bute.  
1.

On 8th February 1889 the Sheriff-substitute (Nicolson) allowed a proof, and fixed a diet of proof.

On 11th February the defenders appealed to the Sheriff (Sir Charles Pearson), who, on 5th April, dismissed the appeal, affirmed the interlocutor appealed against, and further, remitted the cause to the Sheriff-substitute of new to fix a diet of proof.

On 17th April the Sheriff-substitute, on the pursuer's motion, assigned the 9th May as a new diet of proof.

On 24th April the pursuer appealed to the Second Division of the Court of Session with a view to jury trial, under section 40 of the Judicature Act, in terms of section 5 of the Act of Sederunt, 12th July 1828.\*

The defenders objected to the competency of the appeal on the ground that the pursuer had failed, in terms of section 5 of the Act of Sederunt, to appeal within fifteen days of the interlocutor of the Sheriff of 5th April, which was the interlocutor affirming that of the Sheriff-substitute "allowing proof."<sup>1</sup> and contended that in any view, there was no such element of hardship here as existed in the recent case of *Boyd, Gilmour, & Co.*,<sup>2</sup> and which induced the Court to exercise its discretion in refusing to enforce the penal provisions of the Act of Sederunt.

Argued for the pursuer;—The fifteen days required by the Act of

\* Sec. 5,—“Whereas it is enacted by section 40 (of the Judicature Act) that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and declared . . . that if . . . neither party, within fifteen days in the ordinary case, and in causes before the Courts of Orkney and Shetland within thirty days after the date of such interlocutor allowing a proof, shall intimate in the inferior Court the passing of a bill of advocacy, such proof may immediately thereafter effectually proceed in the inferior Court . . . and if within these periods respectively no intimation shall be made of any such bill of advocacy the proof shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented.”

<sup>1</sup> *Duff v. Steuart*, Oct. 20, 1881, 8 R. 17; *Kinnes v. Fleming*, Jan. 15, 1881, 8 R. 386.

<sup>2</sup> *Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co.*, Nov. 16, 1888, 16 R. 104.

No. 127. Sederunt fell to be computed from the 17th April. The appeal was in this view timeously lodged. The Act of Sederunt did not contemplate an interlocutor which merely allowed proof, but rather an interlocutor fixing the diet of proof. The Sheriff's judgment of the 5th April was not operative until followed by the judgment of the Sheriff-substitute of 17th April fixing a new diet of proof. At the motion to fix the diet of proof intimation was made to the respondents that this was done with a view to a subsequent appeal for jury trial.

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LORD JUSTICE-CLERK.—In any case under the Act of Sederunt in which an omission is shewn to be to the prejudice of no one, and can be reasonably accounted for, one cannot but feel sympathy for the party who has made it, if the result of enforcing the Act of Sederunt is to shut him out altogether from proceeding further with his case. The Court looks narrowly to see that effect is not given to a merely technical objection. In the recent case of *Boyd, Gilmour, & Co. v. The Glasgow and South-Western Railway Co.*, in which the question arose through the failure of the appellants to lodge prints timeously in terms of sec. 3, subsec. 2, of the Act of Sederunt, March 10, 1870, we consulted with the Judges of the other Division, and although some of us entertained considerable doubts, we came ultimately to be of opinion that as the omission had caused no inconvenience, we were not bound to give such a strict construction to the Act of Sederunt as would shut the appellants out from proceeding further in the cause.

This, however, is a case of a very different kind. Here the pursuer, who seeks to have the appeal sustained, is not in the position of losing the cause if it should be held to be incompetent. She, no doubt, desires to have the case tried by a jury in this Court, and if the appeal is held incompetent, the case will have to be tried where she originally brought it. She cannot, however, say that she suffers any real prejudice, for her cause will be heard before the Sheriff-substitute, and then, if she chooses, by the Sheriff, and then, on appeal, by this Court. She is therefore in no sense shut out from having her case fairly disposed of. In this state of matters, then, it is not possible to view the case as one of hardship.

What is the state of the facts? The Sheriff-substitute, on 8th February 1889, allowed a proof. His interlocutor was appealed to the Sheriff, who, on 5th April, dismissed the appeal. From that date onwards the pursuer had fifteen days in which to lodge an appeal with a view to having her case tried by jury in this Court. This she did not do. But during the running of the fifteen days she went to the Sheriff-substitute and asked him to fix a diet of proof. I should hold, even if there were no authority upon the matter, that the real date was fifteen days from the interlocutor described in the very words of the Act of Sederunt itself as the one "allowing proof," because when such an interlocutor is pronounced the parties know what is before them, that unless they appeal their case will go to proof in the Sheriff Court.

The matter is however foreclosed by the authority of the two cases of *Duff v. Stewart*, 9 R. 17, and *Kinnes v. Fleming*, 8 R. 386, which are practically on all-fours with the present. In them it was expressly decided by the First Division that the time during which a party has a right to appeal after an allowance of proof in the Sheriff Court is fifteen days from the interlocutor allowing proof, failing which the interlocutor becomes final.

**LORD YOUNG.**—This is an interesting question, and that must be my excuse **No. 127.**  
for adding anything to what your Lordship has said.

The meaning of the Act of Sederunt has been determined, and we cannot go back upon the cases which have settled it. It has been decided that the fifteen days are to run from the date of the interlocutor allowing proof.

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I am, as I have always been, of opinion, that wherever considerations of justice and of good sense require it, and no hardship is done, relief may be given by us for any failure to comply with the terms of the Act of Sederunt. That I consider quite settled by the case of *Boyd, Gilmour, & Co. v. The Glasgow and South-Western Railway Co.* In that case there was a miscalculation as to the time for lodging prints in terms of sec. 3, subsec. 2, of the Act of Sederunt of March 10, 1870, and the consequence was that the judgment of the Sheriff, which was appealed against, became final. The case was a specimen one, selected from a number of others of a similar nature, in order to try an important question involving thousands of pounds. If that relief, which every consideration of good sense and justice required to be given, had not been given, the judgment of the Sheriff would have become final, with this result, that we who had passed the Act of Sederunt in question could not have given that relief which we considered was required by every consideration of justice and good sense. That would indeed have been to make Acts of Sederunt of ridiculous power. The only remedy would be by private Act of Parliament. I think that we have decided that we may grant relief against the terms of our own rules, made for our own guidance, wherever we think considerations of justice require it. We may then grant relief here, if we consider there are grounds for so doing.

I am, however, of opinion that there are none here. The Act of Sederunt, which is a rule to preserve the forms of process, and an important one, to be acted upon whenever there is no strong reason to grant indulgence, gives power to a pursuer in the Sheriff Court, on an interlocutor allowing proof, to come here and have the case tried by a jury or otherwise. The Act gives an indulgence, but it is limited to time. If the pursuer do not avail himself of it, the case proceeds in the Court of his own selection. In this case the interlocutor allowing proof was pronounced on the 8th February 1889. The defender then appealed to the Sheriff, but that is nothing to the purpose. If the pursuer had it in her mind to depart from the Sheriff Court and to come here, the opportunity was given her to do so on the 8th February, and then any question of relevancy would have been tried here. She, however, allowed the case to go on by her adversary's appeal to the Sheriff, and when the appeal was disposed of, she went back to the Sheriff-substitute for the purpose of having a diet of proof fixed, which was done on the 17th April. Then, within fifteen days after, she thinks it is better to have the proof here, and appeals accordingly. I do not think that this is a case in which we ought to grant her indulgence by departing from the Act of Sederunt, and therefore I am of opinion with your Lordship that the appeal must be dismissed.

**LORD RUTHERFURD CLARK.**—I also am of opinion that this appeal is incompetent under the Act of Sederunt, and that we are bound to follow the authorities of *Duff v. Stewart* and *Kinnes v. Fleming*.

On the question whether we have the power to give the appellant relief from the consequence of her fault, I am not disposed to express any opinion. I

No. 127. should only like to say that I think it is doubtful whether we could do so.

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son.

LORD LEE.—I concur in the judgment and in the opinion of Lord Rutherford Clark.

I only desire to add that the case of *Boyd, Gilmour, & Company*, in which dispensing powers were sustained, was different from the present case, and the question as to whether we can here exercise such powers arises in different circumstances. In the present case we are dealing with lodging an appeal within the fifteen days, while in the other case we dealt with the lodging of prints.

THE COURT pronounced the following interlocutor :—"Having heard counsel for the parties on the defenders' objection to the appeal find that it is incompetent; dismiss the same, and remit the case to the Sheriff," &c.

J. MURRAY LAWSON, S.S.C.—MILLER & MURRAY, S.S.C.—Agents.

No. 128.

SIMON RAMSAY, Pursuer.—*Rhind—Salvesen.*

ROBIN, M'MILLAN, & COMPANY, Defenders.—*Jameson—Shaw.*

May 29, 1889.  
Ramsay v.  
Robin, M'Mil-  
lan, & Co.

*Reparation—Master and Servant—Storing beer—Proper appliances.*—A brewer sent his men to deliver barrels of beer in a customer's cellar. In elevating one of the barrels into its position in an upper tier one of the men was injured.

In an action of damages brought by him against his employer on the ground that the defender had failed to supply the necessary appliances for elevating the barrel, it was proved that the defender had furnished the men with the ordinary appliances, but that the men, finding that these could not be used, owing to the narrowness of the cellar, had, without applying to their master, proceeded to lift the barrels into position. The jury having returned a verdict for the pursuer, the Court *granted* a new trial, on the ground that there was no evidence of fault.

*Opinion* (per Lord Young) that no ground of action had been set forth.

2D DIVISION.  
Lord M'Laren.  
I.

THIS was an action raised by Simon Ramsay against Robin, M'Millan, & Company, brewers, Causewayside, Edinburgh, for damages for personal injuries sustained by him while storing some barrels of beer for the defenders as their cellarman.

The defenders were under contract to supply the fish bar at the Edinburgh International Exhibition during the summer of 1886 with beer. They were in the custom of storing the beer from their brewery in a cellar in the Exhibition buildings. On 28th July 1886 the pursuer, who was thirty-six years of age, and who had been in the defenders' employment as cellarman from February 1885, was sent by the defenders to assist three other men, who were experienced in the work, in storing a number of barrels of beer, each weighing six cwt., in tiers or rows above each other in the cellar. The men were provided with "skeggs," which were appliances forming an incline plane up which the barrels were rolled to the desired height. As the cellar was too small to admit of the use of these "skeggs," the men, without complaint to the defenders, adopted the mode of hoisting the barrels on to the tiers by their shoulders, and while the pursuer was engaged in this operation a barrel canted over and crushed his head, inflicting upon him serious injury.

The pursuer averred that the defenders were in fault in the following particulars :—"The cellar in question was of very small dimensions, and there was insufficient space for the pursuer and those he was assisting to

store the barrels to move safely in lifting the barrels at the time of the accident in the manner the defenders had ordered and directed the work to be done. The floor of the cellar was uneven, and the workmen in raising the barrels as aforesaid, and the pursuer and those he was assisting, could not secure a firm footing while performing the work directed by the defenders to be done as aforesaid. There was no window in the cellar. The only light in it was from a small gas jet, which afforded insufficient light for the pursuer and those he was assisting seeing what they were doing in the place. The defenders were fully aware of these facts, and also that similar accidents had, shortly before that to the pursuer, happened to others of their men in the said cellar. It was the duty of the defenders to have had more gas-light in the cellar, as well as to have erected a small crane or hoist in it, or to have furnished what are called and known in the trade as 'skeggs,' which form an inclined plane up which the barrel can be rolled to the desired height. With a hoist or with skeggs the work of placing the barrel in position as ordered by the defenders could have been safely carried out. Skeggs are ordinarily used in the trade for raising barrels which have to be placed in tiers or rows above each other. The defenders, however, culpably and recklessly failed and neglected to have the cellar properly lighted, or to have therein the means by which it could have been sufficiently lighted for the purpose of carrying out their order and direction safely. They also culpably and recklessly failed and neglected to supply either a hoist or skeggs or ropes, or any other necessary appliances for having the work of storing the barrels performed safely at the time of the accident to the pursuer."

The defenders, in answer, stated the pursuer had been engaged in storing barrels in the same premises on previous occasions, and had never complained that the appliances were insufficient.

The pursuer obtained an issue.

The case was tried before Lord McLaren and a jury on 12th July 1888.

In addition to the facts stated in the above narrative it was proved that the cellar was small, and lighted only by a door and a single gas-jet. As regards the methods adopted of storing beer, it appeared that wherever practicable the simple appliance of "skeggs" was used. Where this was not possible, then it was the practice to raise the barrels as they were raised on the occasion in question, by hoisting on men's shoulders. There was some evidence to the effect that a block and tackle was occasionally used in exceptional circumstances. It further appeared that the defenders had put an extra roof on the premises to screen the beer from the heat of the sun. The jury returned a verdict for the pursuer.

The defenders thereupon asked and obtained a rule on the pursuer to shew cause why the verdict should not be set aside, on the ground that the verdict was contrary to the evidence.

The pursuer, in shewing cause, argued;—Tiering without mechanical appliances was a highly dangerous operation. The defenders should have had a block and tackle erected. The cellar was, if not theirs, under their control, for they had put on a roof, which was an extensive alteration. They should have had the cellar better lighted.<sup>1</sup>

**LORD JUSTICE-CLERK.**—The operation which was being performed here by the injured man and by those with him was the ordinary one of delivering hogsheads of beer from a master to his customer. It is not a case of a workman doing something for his employer in the latter's premises, when it would be a jury

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<sup>1</sup> Fraser v. Fraser, June 6, 1882, 9 R. 896; Grant v. Drysdale, July 12, 1883, 10 R. 1159; Murdoch v. Mackinnon, March 7, 1885, 12 R. 810.

No. 128. question whether the employer had or had not provided sufficient appliances for the work. A brewer who sends out beer to a customer fulfils his duty if he sends with the beer men who are accustomed to the methods of storing it, and if he also sends such appliances as are usually sent for such a job. Here the brewer sent the beer in the usual way with experienced men, the pursuer being one of them, and with the "skeggs" which are usually sent out to aid in storing it. When the workmen arrived at the premises, they found that the beer could not be stored by means of these "skeggs," because it happened that the place was not large enough to hold them. Up to that point no fault can be imputed to the master. At that point if the experienced workmen were of opinion (and they were the sole judges) that without some further appliances they could not place the beer in the premises, it was their duty to have returned to the master and to have asked him either to supply sufficient appliances or to see for himself what was to be done. Instead of doing this they upon their own responsibility adopted the mode which is frequently used, but which is the more risky mode. They proceeded to hoist the barrels up, using their own strength for the purpose.

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There is no question that it is conclusively proved by the evidence before the jury that such a mode, though not perhaps the best, is a mode perfectly well recognised when circumstances do not admit of the ordinary mode. Even if it had not been a mode of such a character, the men chose it of their own hand.

I am unable to see in the whole evidence anything to justify the jury in coming to the conclusion that the accident was due to the fault of the defenders. The jury, I understand, stated to the Judge who tried the case that they were of opinion that the employer had not provided sufficient appliances. Their view, however, is entirely inconsistent with the evidence. It is suggested for the first time that the cellar was under the control of the defenders, and belonged to them. If that were the fact it would raise an entirely different case, in this view, that if they owned the premises for the purposes of their business, and were in a position to put up permanent appliances, it would be a question for a jury whether they had or had not provided sufficient appliances. It is said that in this cellar, which did not belong to them, they should have inserted a beam into the wall in order to the hoisting of the barrels. If this was the defenders' duty, then the same would apply to all other brewers, with the result that when they sent out beer to be stored in premises belonging to their customers which were inconvenient they would have to be at the expense of supplying permanent appliances, such as a block and tackle, in order to carry out the job of storing the beer.

On the whole matter I think the verdict a bad one, and that there is no evidence to justify it. We must then, I think, set aside the verdict.

LORD YOUNG.—I am of the same opinion, and further, I think that no good case has been stated on record. I should like also to add that my opinion is formed totally irrespective of the fact as to the contract under which the beer was put into the cellar in question. I do not think the nature or terms of the contract can affect the case in any way. I suppose the pursuer and all the other men engaged in carrying the beer never dreamt of inquiring as to the nature of the contract. The case stands simply thus:—The pursuer, who had been engaged in storing beer from February 1885 to July 1886, and was perfectly qualified for the task, was engaged with others in placing the beer in a cellar which was

a store for the convenience of the Exhibition, and into which beer had been frequently put by the defenders previously. He unfortunately met with the accident complained of. What is the fault imputed on record to the employer? Want of a window; that the room was inconveniently small; that the gas was not sufficiently bright; and that no machinery for the job was supplied. I am of opinion that the record discloses no common law *culpa* at all or ground of action, and my opinion is not altered by the finding of twelve jurymen who think there might be, and ought to have been, special appliances for the purpose of storing the beer. I do not think that the question of *culpa* here is a jury question at all. If it was a jury question, then we have nothing to interfere with, for the whole facts were stated to the jury; and if it was a jury question whether there ought to have been appliances or not, then it is determined, for the jury said there ought, and we are interfering on the ground that it is not a jury question.

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I desire to say further that I distinguish cases of this class altogether from those of works provided with machinery or of mines. The operations carried on in these latter cases are to a large extent of such a character that the Legislature and the common law has interfered to protect the workmen by enlarging the duties of the masters. This is especially the case in mines, where there are dangers which people cannot judge of for themselves. But in the cases of men being put to store beer in a cellar, or to place a servant's chest on the roof of a cab, no fault can be imputed to the employer if he has employed suitable persons to perform these jobs. Therefore, I think this case is not in the same region as those to which I have referred.

I am, then, of opinion that there is no ground of action here, that none has been established by the evidence, and none alleged on record.

LORD RUTHERFURD CLARK.—I am of opinion that there should be a new trial.

LORD LEE.—I concur. I desire to say that if it had been proved that the brewer had hired these premises for his own purposes, it would, in my opinion, have been a jury question whether there was or was not failure to provide reasonable appliances. I think that the general rule of law, that an employer is bound to use all reasonable and proper precautions for the safety of persons employed by him to do his work, applies even in the case of brewers and cellar-men.

As this is not proved, however, I am of opinion that the verdict cannot stand.

LORD M'LAREN.—I desire to speak first on the question whether there is any issuable matter, which, though it was not argued and is not strictly before us, has been made matter of observation from the bench. The record sets forth that in placing the barrels in the cellar certain mechanical appliances are usual and necessary, and that the employer failed to provide them.

As it happened, the Lord Ordinary was personally entirely ignorant, both theoretically and actually, as to what was the customary mode of placing beer in cellars. It seemed to me on reading the record that very possibly the operation of hoisting barrels on men's shoulders might be dangerous, and I thought that if it should appear that the employer had omitted the usual precautions adopted in storing the barrels, it might be a jury question whether he was



No. 128. responsible for the accident. I therefore do not concur in Lord Young's observation to the effect that the case was not one for a jury; and further, I have a strong impression that if I had held that there was no issuable matter, my judgment would on appeal have been reversed, and the case would have been sent back to me for trial.

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Upon the question more particularly before us, if the beer had had to be stored in premises belonging to the brewer, I should entirely have concurred in the views of Lord Lee. In the general case, where operations are performed on the employer's own premises, he must provide the customary appliances for the safety of his workmen. If the operations are performed on premises which do not belong to him, I think it is a question of circumstances whether he shall be held bound to inform himself personally on the subject. If, for instance, the operation was the erecting of a bridge or the fitting of engines to a vessel, I do not think the employer could escape liability by staying at home, and saying that he had sent the men to the work supplied with the usual tools, and that if they were dissatisfied they should have come and lodged a complaint with him.

But these cases are entirely different from those of the delivery of such goods as beer in a cellar, and I concur in holding that if the employer here sent the ordinary appliances, it was the duty and business of the men to complain to him if they had any fault to find with the appliances. Further, it appears to me that the evidence is really to the same effect with regard to what is customary and necessary in delivering beer. Wherever practicable, the simple appliance of "skeggs" ought to be used. Where there is no room for "skeggs," then the hogsheads are usually lifted up to their tiers on the shoulders of four men. There is undoubtedly some evidence to the effect that a block and tackle is sometimes used, but that only in exceptional circumstances. It therefore appears to me, upon the weight of the evidence, that the jury were wrong in their view that other mechanical appliances ought to have been provided. I think we must order a new trial.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the pursuer, on the rule to shew cause why the verdict should not be set aside and a new trial granted, make the rule absolute: Set aside the verdict, and grant a new trial."

D. HOWARD SMITH, Solicitor—WATT & ANDERSON, S.S.C.—Agents.

No. 129. JESSIE HELEN EDWARDS (with consent of David Edwards), Pursuer  
(Respondent).—*Gloag—Glegg.*

May 31, 1889.  
Edwards v.  
Hutcheon.

WILLIAM HUTCHEON, Defender (Appellant).—*M'Lennan.*

*Reparation—Defective and dangerous machinery—Threshing-mill without a guard over the drum.*—The proprietor of a steam threshing-machine undertook to thresh the grain crop of a farmer, and as his own machines were engaged elsewhere, he sent a threshing-mill belonging to another person with the attendant in charge of it, the farmer providing the rest of the labour required for the threshing. At the top and at each side of the machine were shelves on which stood "loosers," who loosed the sheaves of corn in order to hand them to a man who stood in a feeding-box, and who in turn passed them into a funnel, at the bottom of which a drum revolved at high speed. There was no cover or guard over the drum. The engine was started at a moderate speed, and a daughter of the farmer ascended a ladder in order to take her place as a "looser." She

stumbled at the top of the ladder and fell, and her leg was wrenched off by the drum of the machine. No. 129.

In an action of damages raised by the girl, with consent of her father, against the contractor, it was proved that it was customary, and was regarded as an adequate precaution against accidents, to have a guard over the drum of such threshing-machines, and that all the machines belonging to the contractor were provided with guards.

The Court *awarded* damages, holding that the machine was defective and dangerous in respect of the want of the guard, and that the injury to the girl was attributable thereto.

ON 1st February 1888, Jessie Edwards, aged nineteen, with consent and concurrence of her father David Edwards, farmer, Rothriehill, Aberdeenshire, raised this action of damages against William Hutcheon, traction-engine proprietor, Parkhill, in respect of personal injuries sustained by her under the following circumstances.

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On 5th October 1887, David Edwards contracted with the defender, who had on several previous occasions done the threshing on his farm, to thresh out part of his grain crop. As the defender's two threshing-mills were engaged elsewhere at the time, the defender procured and sent to the farm a threshing-mill which belonged to three brothers named Taylor. At the top of the threshing-mill, and at the back end of it, was a box called the feeding-box, in which stood the "feeder." Right in front of this was a funnel, at the bottom of which revolved a "drum" sometimes at very high speed. At the sides of the feeding-box were shelves or benches on which stood the "loosers," who loosed the sheaves of corn and handed them to the "feeder," who put them into the funnel to be threshed. John Taylor was in charge of the engine of the mill, William Taylor was in charge of the feeding-box, while David Edwards took charge of the servants in the stack-yard.

John Taylor started the drum at a speed of 200 revolutions a minute, and William Taylor summoned the female pursuer to ascend on to the mill and begin her work as a "looser." As she was ascending by a ladder which had been placed over against the feeding-box she stumbled at the top of the ladder, and falling, was caught by William Taylor, who managed to push her clear of the drum. In endeavouring to raise herself, however, her foot got caught by the drum, and her leg was wrenched off below the knee.

The pursuers averred that the mill was defective in not having a cover over the drum to prevent accidents.

The defenders averred that it was not customary to have a guard over the drum, and that a guard would not have prevented the accident. They further averred that the nature of the contract with the male pursuer was that the machine owners supplied the mill, along with the three men in charge of it, and that the farmer had to supply and took the whole risk of the other hands required for the threshing.

This latter averment the pursuers denied, and they stated that the men in charge of the mill undertook the whole superintendence of and responsibility for the working of the mill, the farmer merely directing his servants at the building of the stacks.

The pursuer pleaded;—(1) The pursuer having been injured in manner above libelled through the insufficient and defective machinery in use belonging to the defender and under his charge, is entitled to compensation from the defender for said injuries. (2) The injury sustained by the pursuer, the said Jessie Helen Edwards, having been caused by the fault or negligence of the defender, or those for whom he is responsible, she is entitled to reparation.

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The defender pleaded, *inter alia*;—(1) No relevant case against defender. (2) There being no fault or negligence on the part of the defender or of those for whom he is responsible, he should be assoltized. (3) The risk of the plant used and of the employment being with the injured girl's employer, the action should have been directed against him—the pursuer David Edwards. (4) The plant was not defective.

On 23d March the Sheriff-substitute (Dove Wilson) allowed a proof, from which the above facts appeared. It was further proved that the threshing-mills owned by the defender were provided with guards to the drums of the machines; that it was usual to have such guards, and that they were generally recognised as a precaution against accidents.

As regarded the nature of the contract it was proved that it was the usual custom for the person supplying the threshing-mill to send three men with it, who took sole charge of it, while the farmer supplied the rest of the labour. The defender deponed that where he was unable to send one of his own threshing-mills to perform a job which he had undertaken, he was in the habit of sending a mill belonging to another person, to whom he handed the money he received for the job.\*

On 12th July the Sheriff-substitute pronounced this interlocutor:—  
 “Finds that the female pursuer was injured through the fault of the defender, or those for whom he was responsible, in placing her at work upon a dangerous and defective machine supplied by him for the purpose: Finds that the defender is liable in damages: Assesses the same at the sum of £150 sterling.”†

\* “I am a proprietor of threshing-mills, and have two. I have occasionally threshed for Mr Edwards. A few days before we went to the threshing at Mr Edwards' he came to see about it. On that occasion I said to Mr Edwards that I would come soon. I found that I was so busy that I could not get soon. I accordingly saw him one night and I told him that I would send a mill. I said that the Taylors had got a mill out and that I would send them. . . . I had very often been in the same circumstances. When I cannot get to a place I try to get another mill to go. On such occasions I draw the money and I pay the man that I send the same money that I get.”

† “NOTE.— . . . I have considerable doubt whether the female pursuer would be entitled to found upon the negligence of those in charge of the machine. They were fellow-servants, engaged in the same employment, and it does not appear sufficiently that the female pursuer was at the time under their orders. She seems then to have been under the orders of her father. As against the defender, the inexperience of the female pursuer forms no ground of action. She was not employed by the defender, but by her own father, and although he was much to blame in putting a young and untried girl to such work, no ground of complaint upon this score can be made against the owner of the machine or the person answerable for it. Neither, however, does the girl's inexperience absolve the defender. If the accident was due partly to the girl's inexperience and partly to the defective nature of the machine, and if it would not have happened with a properly constructed machine, the defender will be responsible for his fault, if he committed one, in supplying the machine. Where more than one person has, through his fault, materially contributed to cause an accident, each is liable in law to the injured party in the whole consequences. This brings us to the questions whether the accident was caused, or materially contributed to, by a defect in the machine, and whether the defender was to blame in supplying it. Upon the first of these questions I entertain no doubt. The machine was one which was very dangerous to those who had to do such work in connection with it as was expected from the female pursuer. She had to stand upon an elevated platform close to a funnel at the bottom of which a drum revolved at a high speed. The least mistake or slip might cause her to fall upon the drum and to be mutilated. I think it clear that such a machine ought to have a guard. In

On appeal, the Sheriff (Guthrie Smith), on 26th November, dismissed No. 129. the appeal, and affirmed the interlocutor appealed against.\*

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England a guard is requisite by statute, and I think that the common law makes so simple and obvious a precaution against a seen danger necessary in Scotland. The use of the guard is to cover the drum altogether while the machine is not threshing, and while it is threshing to contract the opening over the drum to the narrowest extent which will permit the supplying of the sheaves. As the machine was not threshing at the time of the accident the guard might have been closed and the female pursuer's accidental fall might have been attended with perfect safety. Even if the guard had been open the pursuer might have had a chance of escape, as the guard might have checked her fall before she reached the drum. It seems to me to be beyond doubt that a person who supplies such a machine is at fault if it be sent out to work without a guard. Had there been no previous experience of danger from such machines, a person might be allowed to plead that he could not be expected to think of it. But this is the third serious injury to girls from unguarded machines of this kind which has been made the subject of action in this Court within a comparatively short time. The danger, therefore, must have been notorious and patent to all persons supplying and using such machines. The last question is whether the defender is to be held responsible for supplying the defective machine. I think that he must be. The contract to supply the machine was made with him, as it was he who was to be paid for the work. For his own convenience he employed another person to do the work, and employed that other person's machine. As the contract with the defender was to supply a proper machine for the work, I think it follows that it was his duty, when he deputed the performance to another, to see that the other supplied the article which he was bound to supply. In regard to the amount of damages nothing requires to be said. I have simply followed the precedents set in former actions in this Court."

\* "NOTE.—This is the third case which, within the last few years, has been heard before this Court of accidents resulting from unguarded threshing-machines, each of them most painful in its circumstances. In England the Act 41 Vict. cap. 12, provides that the drum and mouth of every threshing-machine shall at all times during the work be securely fenced 'so far as reasonably practicable and consistent with the due and efficient working thereof'; and although, for some reason not apparent, it has not been deemed necessary to extend to Scotland and Ireland the protection which has been given to the English agricultural labourer, I think that, without any such Act, the common law implies as much. I have no difficulty in again holding—along with the Sheriff-substitute—that any machine which is not furnished with a guard suffers from a serious defect. The evidence in this case proves conclusively that it was the want of a guard which cost the pursuer the loss of the leg. In going up a ladder to take her place among the 'loosers' she tripped and fell. As the machine had just been started and had not begun to thresh, the guard would have been closed if it had been in its place, and in all probability she would have escaped uninjured. That she tripped accidentally is not contributory negligence on her part; for, in requiring machinery to be safe and efficient, the law intends to provide against such chance mistakes or mishaps. If, again, there was any fault on the part of the men in charge—of which, however, I can find no evidence—that would not prevent her from recovering; for, while a co-servant's negligence is one of the risks assumed by a workman, this always implies that the tools and appliances furnished by the master are in all respects suitable. It has been argued that the farmer who hires an expensive agricultural machine, such as the one in question, is not answerable for its deficiency, when the men who took charge of it are sent with the machine by the man who lets it out. This may be so where there is reason to conclude that the owner of the machine retains the whole control of the operation, as the common master of all engaged in the work—his own people, as well as the farmer's people, included. But in this instance I think it was the farmer who had the control; his own servants continued under him; and the machine, for the time, was part of his plant. In the words of the

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The defender appealed, and argued ;—(1) There was no relevant case against him. The pursuers had no contract with him. He was merely an intermediary between them and the Taylors. (2) Even assuming that the contract was with him, the mill did not belong to him, and he was not responsible for any defects in it of which he was unaware.<sup>1</sup> It was, moreover, by no means clear that the existence of a guard would have prevented the accident. The machine had been started when the accident happened, and even if there had been a guard over the drum, it must of necessity have been open at the time of the accident to admit of the machine being fed by the "feeder." If there was fault at all, it was fault on the part of the male pursuer, who permitted her to ascend the ladder.

Argued for the pursuers ;—(1) The pursuers' contract was with the defender alone. The evidence of the defender himself was against the idea that he was merely an intermediary. (2) He was bound to supply a safe machine.<sup>2</sup> He knew himself of the necessity of guards, for he had them on his own mills. It was indeed most clearly proved that they were recognised as proper and adequate precautions against accidents. It was not in the mouth of the defender to say that possibly the existence of a guard might not have prevented the accident.

LORD JUSTICE-CLERK.—This is certainly a somewhat difficult and narrow case. We need not, I think, pay any attention to the argument advanced by the defender, that he was not the party contracted with, but merely an intermediary. He was in the practice of providing threshing-machines for farms, and not having one of his own at the time, he undertook to get another. The whole bargain was with him, and the pursuer's father had nothing to do with the terms. If anything has occurred for which the pursuer is entitled to recover damages, it is from the person who provided the machine—that is, from the present defender—that they must be recovered.

The difficult question is, whether or not the circumstances disclosed make it plain that there was fault on the part of the provider of the machine for which he is responsible. That question seems to depend upon whether or not there should have been a guard or cover over the top of the feeding mouth of the machine.

Employers Liability Act,—'It was in use in his business,' and, this being so, the employer's liability for his workmen's safety is the same, whether he acquired it by purchase, or had borrowed it from a neighbour, or had hired it for the day. On the other hand, I think the farmer will have relief against the hirer who furnishes him with an insufficient machine ; for in the hiring of any moveable it is part of the contract that the implement to be furnished shall be such as may be safely used, at least as far as care and skill can make it. If this be so, I see no reason why a farm-servant who may be injured by a defect in the machine may not have direct action against the owner or hirer. It may seem hard that in this case the decree will issue, not against the actual owner Mr Taylor, but the defender Mr Hutcheon, with whom the pursuer's father contracted to furnish the machine. But, as the defender candidly explains, when he cannot send a mill of his own, he tries to get another mill to go, draws the money, and pays it over to the substitute. In these circumstances, it appears to me that he remains responsible, all the more so that, knowing fully the advantage of the guard (all his own machines being guarded), he allowed a deputy to send an unguarded machine as a substitute, and thereby was the primary cause of the accident."

<sup>1</sup> Macarthy v. Young, Jan. 31, 1861, 6 Hurlstone & Norman, 329.

<sup>2</sup> Edgar v. Law & Brand, Dec. 15, 1871, 10 Macph. 236, 44 Scot. Jur. 60.

Now, it is certainly proved that it is not novel in practice to have such a guard, No. 129. and the defender himself has deposed that he considers such to be a preventive against real danger. His evidence contains the following passages :—" My mills have guards on the drum. Asked,—Do you consider that necessary for safety? Yes." May 31, 1889.  
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It is quite plain, therefore, that there is a practice, which the defender is quite aware of, and is a party to, of providing guards in this manner.

But it is said that when the machine is working such guards must be open, and that in that view they would not act as a precaution in the event of a person falling as the pursuer did. I must say I am not so clear about that. Even if open and upright, the guard might have been of the greatest protection and help to the female pursuer, for she might have caught hold of it to save herself, and if she had fallen sufficiently far forward to fall over the guard, it would have prevented her foot getting down upon the drum. But further, there can be no question that if a guard had been provided, it ought to have been kept shut at the time this accident happened. Such a guard ought not to be raised until the "feeder" has actually placed the sheaves into the machine. In this case, at the time of the accident, the sheaves had not been placed in position. No doubt the machine had to be set in motion slowly to get up full speed before the threshing began, but until the "feeder" was in his place, the other workers in their positions, and the sheaves placed in the machine, the guard ought not to have been opened. The only difficulty is as to whether there is sufficient evidence to satisfy us that there should have been a guard. It is perfectly true that an owner is not bound to have the latest appliances, and that he fulfils his duty if he has those which are generally known to the trade as proper precautions against accidents. But the whole of the evidence goes to shew that the precaution of a guard is recognised and well known, and is one which men who are accustomed to use such machines say is a proper precaution. The defender must therefore be liable, because he did not take that precaution.

I am the more moved to take this view, because accidents of this sort, owing to the want of a cover to the drum, have occurred somewhat frequently.

I am, then, on the whole matter, of opinion that there is no ground for interfering with the judgment of both the Sheriffs.

LORD YOUNG.—I am of the same opinion, and I can state in a few sentences the exact views upon which I proceed.

The Sheriff-substitute and the Sheriff are both of opinion, and have so found, that this poor girl lost her foot in consequence of the defective and dangerous condition of the threshing-machine in question. I think there is reasonable evidence to support their views. That being the fact as found by them upon reasonable evidence, what is the law?

The machine was supplied by the defender, along with the services of three men to work it, under a contract by which he was to do the threshing at the farm of the pursuer's father. It was not exactly a contract of letting out the machine, but a contract to do the threshing of the farm, sending the machine and men to work it, the farmer only being bound to supply men to feed it. This is the contract as averred, and I think proved. The defender himself says in evidence,—“I am a proprietor of threshing-mills, and have two. I have occasionally threshed for Mr Edwards. A few days before we went to the threshing

No. 129. at Mr Edwards' he came to see about it. On that occasion I said to Mr Edwards  
May 31, 1889. that I would come soon. I found that I was so busy that I could not get soon.  
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Hutcheon. that the Taylors had got a mill out, and that I would send them . . . I had  
very often been in the same circumstances. When I cannot get to a place I try  
to get another mill to go. On such occasions I draw the money and I pay the  
man that I send the same money that I get." I agree with your Lordship that  
we cannot pay any attention to the view that he was not the contractor himself  
but a mere intermediary.

The next question is as to whether it was his duty to send a reasonably safe machine. I think under the contract it was. I agree with the Sheriff-substitute that "a person who supplies such a machine is at fault if it be sent out to work without a guard." The Sheriff-substitute then proceeds to tell us that: "this is the third serious injury to girls from unguarded machines of this kind which has been made the subject of action in this Court within a comparatively short time." The Sheriff, after referring to a statute which deals with this matter, and applies to England, says,—“Although, for some reason not apparent, it has not been deemed necessary to extend to Scotland and Ireland the protection which has been given to the English agricultural labourer, I think that, without any such Act, the common law implies as much.” In that opinion I agree with him. Well then, the case becomes so clear as this. Assuming the facts as found by the Sheriff, and assuming the law to be as they both think it is, is there any escape from liability on the part of the defender? The only thing which can be said for him is that the farmer was present, and seeing the state of the machine, allowed his daughter to feed it. I cannot think that this bars his daughter from suing this action. I regard it as an action by the father upon a contract which was fulfilled dangerously, with the result that his daughter, living in family with him, lost her foot. I do not enter upon the question whether either of them could have sued alone, or, rather, whether the daughter could have sued without his concurrence, she being no party to the contract. Indeed, I should be disposed to avoid deciding the point, even if it were hard to do so, and I should assume that the farmer and his daughter, as I have said living in family with him, are joint pursuers of this action. I am not able to attribute failure in duty to him or to the girl herself, who will have her remedy against the primary wrongdoer at least, for the consequences of the wrong.

I may state that I concur in the view taken by the Sheriff-substitute rather than in that of the Sheriff. The latter seems to regard the action in substance and effect as one by the girl against her father, as being her employer, for having exposed her to danger by allowing her to go upon an imperfect machine, conjoined with an action of relief at his instance against the party who supplied the dangerous machine. With this view I do not sympathise. I prefer the view adopted by the Sheriff-substitute.

I agree with your Lordship that this is a narrow case. I do not, however, feel that I should be justified in setting aside the judgments of the Sheriffs either on the facts or on the law. I am of opinion, then, that we ought to adhere.

LORD RUTHERFURD CLARK.—I have found this a difficult case, but upon the whole I agree with the result.

LORD LEE.—I concur. I should only like to say that, as regards the nature

of the claim, I agree with Lord Young in preferring to rest my judgment upon the view arrived at by the Sheriff-substitute rather than upon that of the Sheriff.

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THE COURT pronounced this interlocutor:—"Find in fact that the defender, on 5th October 1887, contracted with David Edwards, father of the pursuer, Jessie Helen Edwards, to thresh out part of the grain crop on the farm of the latter, and next day sent an engine and threshing-machine with attendants to do the work: Find the machine supplied by the defender for that purpose was defective and dangerous, in respect there was no guard to the drum, and that the injury sustained by the said pursuer when taking her place on the machine, to assist said attendants as feeder, is attributable to the want of such guard: Find in law that the defender is liable to her in damages accordingly: Therefore dismiss the appeal, and affirm the judgments of the Sheriff and Sheriff-substitute appealed against: Of new assess the damages at £150," &c.

RONALD & RITCHIE, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

DANIEL MATHESON (Matheson's *Curator Bonis*), Petitioner.—*Shaw—Walton.*

No. 130.

ANNIE JANE PATTERSON MATHESON AND OTHERS, Respondents.—*Law—Dudley Stuart.*

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*Minor and Pupil—Judicial Factor—Curator Bonis—Statement of accounts.*

—The uncle of three minor children was appointed executor-dative *qua factor* to their deceased father, and he thereafter agreed to carry on for behoof of the children a farm of which the father had been tenant. He was subsequently appointed *curator bonis* to the children on their succeeding to certain monies from a relation on their mother's side. In a petition for his discharge as *curator bonis* held that the curatorial funds must be kept separate, and that he was not entitled in his accounts to deduct the losses he had sustained as executor.

JOHN MATHESON, farmer, Garbole, Inverness-shire, died intestate on 5th November 1879 survived by three daughters, the eldest aged eleven, and the youngest aged seven years. His wife predeceased him.

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Sheriff of  
Dumfriesshire.  
M.

On 17th June 1880 Daniel Matheson, a brother of the deceased, was appointed by the Sheriff of Inverness-shire factor to the children. He thereafter gave up an inventory of the deceased's personal estate (which consisted mainly of stock, crop, and implements upon the farm, amounting to £3051, 9s. 9d., the liabilities being £2715, 2s. 5d.), and confirmation was thereafter granted in his favour as executor *qua factor*. He failed to induce the landlord of the farm to accept a renunciation of the lease, and after consideration he found himself obliged to carry it on as executor *qua factor* for the children.

In 1882 the children became entitled each to a third part of a sum of £1037, 19s., to which they had succeeded on the death of a relative of their mother. On 22d August 1882, on the petition of their maternal uncle, Daniel Matheson was appointed *curator bonis* to the children by the Sheriff of Dumfriesshire, and in the inventory which was lodged with the Accountant of Court this fund only was included. On a representation from the Accountant of Court the inventory was corrected so as to include the executry funds—no explanation as to the liabilities being added. When the curator lodged his bond of caution he lodged along



No. 130. with it a certificate by his law-agent that he was not a creditor of the wards.

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The *curator bonis*, in July 1887, presented a petition to the Sheriff of Dumfriesshire to have his appointment as *curator bonis* recalled, and for discharge. He stated that he had succeeded in obtaining the landlord's consent to a renunciation of the lease of the farm at Whitsunday 1884, and had thereafter disposed of the farm stock, implements, and crop; that owing to unfavourable seasons, the falling prices of farm stock, and chiefly to unfavourable sales when the assets of the farm were realised, the whole curatorial funds had been spent, and the balance due to the petitioner as at 31st December 1885 amounted to £363, 7s. 4d.

The three wards stated, *inter alia*, in answer;—"Explained that in the first of the accounts, extending over the period from 22d August 1882 to 31st December 1883, the pursuer debits himself with the said sum of £1037, 19s. received from the trustees of the said Edward Patterson, and on 22d August 1882 credits himself with the sum of £4042, 13s. 8d., as the balance due to him at that date on his intromissions with the executry estate of the said John Matheson; and that in that and the other accounts he includes his subsequent intromissions with the said executry estate, and in particular his intromissions in connection with the said farm of Garbole. The defenders object to this manner of stating the accounts, and claim that an account be stated separately by the pursuer with reference to the said sum of £1037, 19s., which came to them in their own right, and was not liable to the diligence of the creditors of their father. It was the duty of the pursuer, instead of carrying on the said farm at an enormous loss, to have abandoned the same and the executry estate to the landlord and the other creditors of the said John Matheson. In any case, it was the pursuer's duty to have kept the estate belonging to the defenders separate for their behoof, and he is bound to account to them for the same apart altogether from his intromissions with their father's estate. The defenders reserve their objections in detail to the pursuer's account of his intromissions with the said sum of £1037, 19s., when the same shall have been given in."

The petitioner pleaded;—(1) The pursuer having duly accounted for the curatory estate, and his intromissions therewith, and the said estate being now exhausted, he is entitled to have his appointment recalled, and to receive a judicial discharge of his intromissions, and delivery of his bond of caution. (2) The pursuer is entitled to decree against his wards for the balance due to him on his intromissions with the curatory funds, with expenses as concluded for.

The respondents pleaded, *inter alia*;—(2) The estate coming to the defenders in their own right not being liable to their father's debts, the defenders are entitled to an account of the pursuer's intromissions therewith, apart from his intromissions with their father's executry estate, and the pursuer is not entitled to his discharge until he has made payment to them of the balance ascertained to be due on such account.

The Sheriff-substitute (Hope), on 3d April 1888, pronounced an interlocutor finding that the petitioner was entitled to his discharge, reserving to the respondents to object to the audit of his accounts, and allowing them to lodge objections.\*

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\* "NOTE.— . . . To sum up, I may state my opinion to be (1) That the petitioner, as executor *qua* factor, should never have taken up the lease, and had no power to do so; (2) That the Dumfriesshire curatory should not have had

The Sheriff (Macpherson) on appeal, on 31st January 1889, recalled his Substitute's interlocutor, and refused the prayer of the petition *in hoc statu*. No. 130.

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On 12th February following the Sheriff-substitute pronounced this interlocutor:—"Finds that, in accounting for his intromissions with the estate under his charge as *curator bonis* for the respondents, the petitioner is not entitled to take into account his intromissions with the estate under his charge as factor *loco tutoris* under the appointment made by the Sheriff of Inverness-shire: Therefore sustains the second plea in law for the respondents, and decerns; and appoints the petitioner to lodge an account, framed with reference to the above finding, of his intromissions with the curatory funds within ten days."

On 20th March following the Sheriff-substitute, in respect of the petitioner's failure to lodge his accounts, refused the prayer of the petition.

The petitioner appealed to the Court of Session.

Counsel for the respondents were not called on.

**LORD PRESIDENT.**—The Sheriffs have taken a good deal of trouble about this case, and have, I think, perplexed themselves unnecessarily. The interlocutor of the Sheriff-substitute of 12th February 1889 appears to me to be quite well founded, except that the mode in which it is expressed is not quite so full or explicit as I think it ought to be, and I shall suggest a slight alteration upon its language, which, I think, will make it completely applicable to the state of the facts.

Mr Matheson, the appellant, was appointed *curator bonis* to the three pupil children of his deceased brother, the object of the appointment being that he might take charge of a legacy which had come to them in their own right. Their father had been a farmer in Inverness, and at his death his personal estate consisted merely of the stocking upon the farm of which he was tenant. Mr Matheson, the petitioner,—the same gentleman who was afterwards appointed *curator bonis*,—applied to the Commissary of Inverness-shire to be decerned executor-dative *qua* factor, for the purpose of taking over the estate of his deceased brother, and he was confirmed and entered into possession of the estate. He afterwards cultivated the farm as the executor of his deceased brother under an arrangement with the landlord, and in the course of his management he incurred considerable losses. *Prima facie*, a pupil child cannot be made liable for losses arising from proceedings taken by a guardian in his capacity as executor of a deceased brother. In the present case, if the petitioner had been in a position as factor to pay over a balance to himself in his other capacity as *curator bonis*, he might, as *curator bonis*, very properly have received that free balance, because it would have certainly belonged to his wards. But there being no such balance, there is no connection whatever

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imported into it the affairs of the Inverness-shire factory; (3) That the petition for leave to renounce the lease should not have been brought in this Court, but in that of Inverness; (4) That the whole proceedings should be overturned, if that can possibly be done, so as to disentangle the confusion which has arisen; but (5) That it is not competent for me to do so, and that partly on account of what the Accountant instructed the petitioner to do, and partly on account of the partial recognition of the petitioner's and the Accountant's actings, given *per incuriam* at the time when the petition for special powers was presented. . . ."

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between the estate in Inverness-shire which he holds as executor and the estate in Dumfriesshire which he holds as *curator bonis*. Accordingly, I quite agree with the result at which both the Sheriffs have arrived. The petitioner cannot be allowed to mix up the two estates with a view to obtain his discharge as *curator bonis*.

The second plea in law for the respondents is quite sound, and it is the plea given effect to by the Sheriff-substitute. Mr Matheson must lodge a state of his accounts as *curator bonis*, and if he attempts to set off his losses as executor in the management of the farm the objection can be taken, and the amount struck out.

LORD SHAND.—In August 1882 the petitioner was appointed *curator bonis* to the three children of his deceased brother, and he now seeks his discharge from his actings in that office. *Prima facie*, there is no question that in asking his discharge his accounts should include his transactions as *curator bonis*, and no more. But he proposes to bring into these accounts certain intromissions had by him with his wards' estate not in his character as *curator bonis*, but in the character of executor-dative of the father of the children—an office which he thought fit to undertake. In this way he proposes to recoup himself out of the curatorial estate for losses which he sustained in the management of the executry estate. I am very clearly of opinion that he cannot compensate these losses as he proposes, or bring these losses into his accounts.

It is true that if he were in possession as executor-dative of the father of funds belonging to his ward—which were free and unencumbered—it would be right that he should have had these funds made over to him as *curator bonis*, and credit them in his accounts; but if in place of there being surplus executry funds, there is a liability attaching to that fund, it can affect himself alone, and there is no ground upon which he can make that liability a charge in the curatorial accounts.

The case may be illustrated very clearly in this way. Suppose that another brother of the deceased had assumed the office of executor. There was a certain amount of moveable property upon the farm occupied by the deceased. But there were also subsisting obligations to pay rent for many years to come—and it would be a serious question which the executor had to consider whether he should meddle with the farm at all, which, if he did, would involve the estate in the business of farming. A relative might have taken certain risks for the children, but if he took upon himself the character of executor, and then entered on the farm as tenant, and the result was a loss to the estate, undoubtedly he could not throw one penny of that loss upon the children. If the responsibility which he assumed resulted in the estate being diminished, the executor, though personally liable to make it good, would have had no right to impose the loss on the curator or the children.

Everything was said by Mr Walton which could be said on behalf of the appellant. It was urged that if the executor had declined to take up the lease, that would have involved the giving up of a sum of £600, which represented the value of the stocking on the farm. But it would be better to give that up in many cases than to involve the estate in large responsibility extending over future years. There is no doubt, on the one hand, that an executor acting for young children must personally bear the risks if he undertakes to carry on an agricultural lease, and it turns out unsuccessful, and, on the other hand, it may

be that he is bound to give the benefit of any profits that may be made upon the farm to the children. It is clear that the losses resulting from farming cannot be allowed to enter the curator's accounts.

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LORD ADAM concurred.

LORD MURE was absent.

THE COURT pronounced this interlocutor:—"Vary the said interlocutor of 12th February 1889 by deleting the words 'factor loco tutoris' on the sixteenth line thereof, and substituting therefor the words 'executor-dative qua factor,' and also by inserting after the word 'Inverness-shire' on the eighteenth line of said interlocutor the words 'and confirmation following thereon': *Quoad ultra* adhere to the said interlocutor; recall the said interlocutor of 20th March 1889: *Quoad ultra* refuse the appeal, and find the respondents entitled to expenses in this Court."

THOMAS WHITE, S.S.C.—R. COLLIE GRAY, S.S.C.—Agents.

MRS HARRIOTT MARGARET HOLMES OR ROBERTSON AND OTHERS  
(Robertson's Trustees), Pursuers (Respondents).—*Mac Watt*.  
DUNCAN MACGREGOR GARDNER, Defender (Appellant).—*Dundas*.

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May 31, 1889.  
Robertson's  
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*Maills and Duties—Right in Security—Heritable creditor.*—When a heritable creditor has obtained a decree of maills and duties against the tenants on an estate in an action in which the proprietor has been called for his interest, and has not appeared, he is thereafter in possession of the estate, and has a good title to use sequestration for rent against anyone subsequently possessing as tenant, although he may not have been called in the action of maills and duties.

MRS H. M. HOLMES OR ROBERTSON AND OTHERS, the trustees of the late Robert James Robertson, W.S., were in right of a bond over the lands of Archindarroch and Lagnaha, Argyllshire, to the extent of £9550 of principal and interest.

1st Division.  
Sheriff of  
Argyllshire.  
M.

On 21st April 1888 a summons of maills and duties, at the instance of Robertson's trustees against the proprietors and tenants of the security subjects, was signeted, and on 12th May following it was called. The persons called as defenders were John Gardner, James Young Gardner, and Alexander Gardner, proprietors of the subjects in question, principal debtors, and among the tenants who were called were John Gardner, Alexander Gardner (being two of the three above-named proprietors), and George J. Alison junior, as individuals, or as trustees for the firm of J. & A. Gardner & Company, quarrymasters at Lagnaha, and J. & A. Gardner & Company for their interest.

The summons contained no conclusion against the proprietors except for payment of expenses, but concluded against the tenants on the estate, other than the Gardners and Alison, for payment of the rents due and payable by them at Whitsunday 1888 for the half year preceding, and thereafter at each half-yearly term during their possession. The conclusion against the Gardners and Alison (who alone defended the action), was for payment of sums due by them in respect of their tenancy of certain slate quarries at November 1887 and 1st May 1888, and thereafter on each 1st May and 1st November following, so long as they remained in possession.

On 25th May 1888 the Lord Ordinary (Lee) decerned in absence against the defenders, John Gardner, Alexander Gardner, and James Young Gardner, principal debtors; and against "the tenants who had not ap-

No. 131. **peared, John M'Nicol" and others, conform to the conclusions of the libel, with expenses against the principal debtors.**  
 May 31, 1889. **In their defences the compearing defenders admitted that they were**  
 Robertson's **tenants and possessors of the quarries up to 6th April 1888, but stated**  
 Trustees v. **that, as at that date, they had assigned their lease to Duncan Macgregor**  
 Gardner. **Gardner under an assignation in his favour dated 11th and 12th April**  
**1888, of which the proprietors had accepted intimation on 14th April**  
**1888, from which date the assignee became liable for the rent, &c., pay-**  
**able under their lease. They further stated that the rents, &c. payable**  
**by them up to 6th April 1888 had been paid to John Gardner as factor**  
**for the proprietors.**

On 19th July 1888 the Lord Ordinary (Lee) pronounced decree against the compearing defenders for the rents, &c. due by them at and prior to 1st May 1888, and dismissed the action so far as regarded the rents payable subsequent thereto. On a reclaiming note at the instance of the compearing defenders, the First Division, on 15th January 1889, adhered to the Lord Ordinary's interlocutor.

In January 1889 Robertson's trustees, founding upon their right of hypothec, presented in the Sheriff Court at Oban a petition for sequestration for non-payment of rent as from 1st May 1888 against Duncan Macgregor Gardner as lessee of the quarries since 6th April 1888. There was also a prayer that in the event of the subjects of the hypothec being exhausted the defender should be ordained to stock and replenish the quarries.

On 24th January following the Sheriff-substitute (MacLachlan) granted interim sequestration.

A record was subsequently made up in which the pursuers stated that the decrees in the action of maills and duties were effectual against the defender as the successor of the tenants named therein, and that he, as their assignee, had no higher rights than they.

The defender stated, *inter alia*;—"Denied that, as heritable creditors foresaid, the pursuers are in possession of that portion of the said estates which is occupied by the defender as tenant, and averred that none of the decrees of maills and duties founded on by the pursuers is directed against the defender as tenant foresaid, although he was in possession at the date when the action of maills and duties referred to was raised, and although the pursuers were informed of this so far back as 24th April 1888." He further stated that the pursuers had never placed themselves in a legal position to uplift the rents in question, and to give a valid discharge for them, but expressed his willingness to consign the rents.

The pursuers pleaded;—(1) The defender being in arrear in payment of his rent, the pursuers are entitled to obtain sequestration of his effects in security, and for payment of the rent.

The defender pleaded;—(1) The pursuers not having entered into possession of the subjects occupied by the defender as tenant foresaid, either under a decree of maills and duties or otherwise, they are not entitled to pursue this action, and the same should be dismissed, and the sequestration recalled, with expenses. (2) The pursuers not having the right of hypothec claimed by them, are not entitled to insist in this action, and the same should be dismissed, and the sequestration recalled, with expenses. (3) In any event, the pursuers were not entitled to raise this action without having made a demand on the said defender for the said rent, and the defender having been all along willing and ready to pay the said rent to any person legally entitled thereto, this action was, and is, unnecessary and oppressive, and the same ought to be dismissed, and the sequestration recalled, with expenses.

The Sheriff-substitute (MacLachlan), on 26th March 1889, pronounced

this interlocutor:—"Finds that the pursuers are heritable creditors in possession of certain lands and others, including the subjects mentioned in the petition, in virtue of decrees of mailles and duties dated 25th May 1888, and 19th July 1888, and 15th January 1889: Finds that the defender is, and has been since 6th April 1888, tenant of the said subjects, conform to a minute of lease and assignation thereof in his favour, dated 11th and 12th April 1888, and relative minute of acceptance dated 12th and 14th April 1888: Finds that the said decrees gave the pursuers, as heritable creditors foresaid, a right to pursue for and recover the rents of said subjects from all parties in possession of the same: Therefore decerns against the defender in terms of the conclusions of the petition."\*

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The defender appealed to the Court of Session, and argued;—(1) The defender became tenant in possession of the quarries on 6th April 1888, from which date the assignation by the former tenants took effect. The summons in the action of mailles and duties was signeted on 21st April 1888, and on the 24th intimation was made to the pursuers that the persons who had been called as tenants of the quarries were no longer

\* "NOTE.—This is an action of sequestration for rent raised by heritable creditors holding decrees of mailles and duties which were pronounced in an action raised by them on 21st April 1888, in which they called the proprietors of the subjects as principal debtors, and the several tenants or occupants for the respective rents due by them. The action was undefended by the proprietors and certain of the tenants, and decree was pronounced against them, conform to the conclusions of the summons, but the parties who were called in respect of their occupancy of other portions of the subjects, being those referred to in the present action, defended on the ground that before the action of mailles and duties was raised they had assigned their lease to the present defender by assignation duly intimated to and approved of by the proprietors, and they pleaded that having ceased to be tenants before the action was raised the same, so far as directed against them, was incompetent. But as they failed to shew that they had paid the rents and lordships due at and prior to 1st May 1888, or had ceased at the date of the action to be liable therefor, decree of mailles and duties was pronounced against them for these rents, and as to the rents, lordships, and others subsequent to 1st May 1888, the action was dismissed as against said defenders. The present defender pleads that as there was no conclusion against him these decrees of mailles and duties do not affect him, though he was in possession when the action was raised, and the same cannot apply to those portions of the estate which he occupied as tenant. This appears to be a plea against the competency of the proceedings in the action of mailles and duties, and cannot now be considered. In that action decree was pronounced against the proprietors, and that decree gives a right to recover and intromit with the whole rents due, so far as the security extends and is operative, as a constant title of possession against the natural possessors of the ground, and also against the proprietors or liferenters who are in the civil possession, and from whom the natural possessors derive their right—(E. iv. 1, 49). By his assignation, which was duly intimated and ratified, the defender is the tenant of and derives his right from the proprietors, against whom there is a continuing decree, and not from the previous tenants, the decree against whom was limited to the rents applicable to the period of their possession. The rents, therefore, that are due by the defender are payable directly to the pursuers, and they must be allowed the ordinary means for recovering the same. This principle was recognised in the case of *Railton v. Muirhead*, 20th June 1834, 12 S. 757, where a creditor holding a decree of mailles and duties had allowed the debtor, who was also proprietor, to enter into possession of the subjects, but was found not entitled to bring a sequestration for rent, because he failed to make out any agreement for lease with the debtor, or that the latter had entered on the subject otherwise than as a proprietor, and a pouncing of the ground is the proper remedy when the proprietor is in possession."

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tenants. There was no conclusion in the summons in the action of mails and duties against the proprietors, and there could be none, except for expenses, and the Lord Ordinary had accordingly gone wrong when he pronounced decree in absence against them on 25th May. There was thus no decree as against that part of the subjects of which the defender was now in possession. (2) Without such a decree the assignation to the rents contained in the pursuers' bond and disposition in security was of no avail. Incumbrancers like the pursuers required a decree of mails and duties in order to give them a title to uplift the rents.<sup>1</sup> The 119th section of the Titles to Land Consolidation Act of 1868 made no change upon the previously existing law. Under that section it was only "on default in payment" that the creditor was to be entitled to enter into possession. "On default in payment" meant that all proper legal process to compel payment must first be used.<sup>2</sup> But further, this point could not avail the pursuers, for they did not found in any way in their summons on the assignation to rents clause in their security title.

Argued for the respondents;—(1) The assignation to rents in their infetment put them in a position to give a good discharge for the rents. The defender knew that the pursuers had entered into possession, and that the landlords were ousted. This was proved by the letter of the 24th April written by the defender's agents to the pursuers. (2) But further, by the decree in the action of mails and duties the pursuers became not only assignees in security but absolute assignees by entering into possession as in a question with the landlord. The decree operated a judicial transference of the landlord's rights.<sup>3</sup>

LORD SHAND.—In this appeal the pursuers, who are the trustees of the late Mr R. J. Robertson, state as their title to bring this action against the defender, who is the tenant of certain quarries near Ballachulish, that they are heritable creditors in possession of the lands of Auchindarroch and Lagnaha in virtue of two decrees pronounced by the Court in an action of mails and duties at their instance against the heritable proprietors *pro indiviso* of these lands and the tenants thereof. They produce as the foundation of the action the decrees in the action of mails and duties.

The present is an action of sequestration for rent directed against Mr Duncan Macgregor Gardner, a tenant of the proprietors, from whom the petitioners obtained a bond and disposition in security. The Sheriff-substitute has found that the procedure has been regular and competent, and he has granted decree in terms of the conclusions of the petition, there having been no opposition to the terms of the prayer.

The tenant's defence is that he was not called in the original action, and that that being so, it cannot be made the foundation of an action against him of sequestration for non-payment of rent based upon the pursuers' right of hypothec.

<sup>1</sup> Scottish Heritable Security Co. v. Allan, Campbell, & Co., Jan. 14, 1876, 3 R. 333; Neils v. Lyle, Dec. 1, 1863, 2 Macph. 168 (Lord Deas, p. 172); Webster v. Donaldson, 1780, M. 2902.

<sup>2</sup> Rankine on Leases, 44, 324; Railton v. Muirhead, June 20, 1834, 12 S. 757 (Lord Corehouse's opinion, p. 759); Ball's Principles, 1243.

<sup>3</sup> Wedderburn v. Mann, 1707, M. 10,399; M'Glashan's Sheriff Court Practice, 405; Duff's Feudal Conveyancing, 274; Lord Lothian v. Vassals of Jedburgh, 1634, M. 14,087; Forsyth v. Aird, Dec. 13, 1853, 16 D. 197 (L. J.-C. Hope, 204); Budge v. Brown's Trustees, July 12, 1872, 10 Macph. 958.

It is to be kept in view that there is no opposition on the part of the proprietors of the lands who granted the bond and disposition in security. It is not said that the tenant is interpellated in any way from paying the rent to the pursuers, and it is difficult to see how the granters of the bond could interpellate him, because decree was granted in the action of mails and duties in which they were called for their interest as proprietors of the quarries. Again, it is not alleged that there is any competition for the rents, or that there is any other creditor of the landlord who has an interest to interfere. Indeed, it is difficult to see what reason the defender has for resisting the decree which is sought, unless it be to delay payment.

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The case really comes to turn upon the question whether the pursuers have made out that they are heritable creditors in possession of the lands including the quarries of Ballachulish. Looking to the terms of the decree in the action of mails and duties, I think they are heritable creditors in possession. We find that the persons called in that action were John Gardner, Alexander Gardner, and James Young Gardner, heritable proprietors *pro indiviso* of the lands of Auchindarrich or Auchindarroch, Argyllshire, and of Lagnaha, principal debtors. These were the proprietors of the lands. Further, the tenants upon the whole estates were called. Decree in absence was granted so far as the proprietors were concerned. So far as they were concerned, there was no opposition. In regard to the conclusion against the tenants, the only persons who appeared were those who were tenants of the very quarries which are now let to the defender. The defence was, admitting that they were tenants, that they had paid the rent to the landlords, who were the brothers of the present defender.

The Lord Ordinary dealt with the defence in this way. The decree bears:—"Sitting in judgment, the said Lords, of the first date hereof, having considered the cause, with the productions mentioned in the inventory, and heard counsel, found and hereby find it not instructed that the compearing defenders have paid the rents and lordships due at and prior to 1st May 1888 or had ceased at the date of raising the action to be liable therefor; therefore repelled and hereby repel the defences so far as applicable to the rents and lordships for the possession up to May 1888, and decerned and ordained, and hereby decern and ordain, the said defenders John Gardner, Alexander Gardner, and George Jamieson Alison junior, as trustees for the firm of J. & A. Gardner & Company, jointly and severally, and the said J. & A. Gardner & Company, to make payment of the rents." The result of that decree is, that the present pursuers vindicated their rights as creditors in possession of the quarries. They obtained decree in that character, and they could only obtain decree on the footing that they had taken up the landlord's rights. It is true that the decree applied only up to May 1888, and that this is the necessary result of the facts, because these tenants had then ceased to have any interest in the quarries. But the fact remains that the decree proceeds upon the footing that the heritable creditors were in possession of the landlord's rights.

What is the defence which is put forward? It is said that upon the 6th April 1888 the defender had become tenant of these subjects. But the pursuers are heritable creditors in possession of the subjects in virtue of the decree of mails and duties which embraces the whole estate. There is no ground for saying that a new proceeding must be adopted against each incoming tenant. It was perhaps to be desired that this defender should have been called, but that is not necessary. The decree did not apply to one-half or one-third of the



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estate only ; it embraced the whole. The pursuers are heritable creditors in possession, and entitled to vindicate their rents in the hands of any tenant, where, as here, there are no competing rights.

LORD ADAM.—The pursuers are heritable creditors of the proprietors of the lands of Auchindarrich and Lagnaha, and the defender is Mr Duncan Macgregor Gardner, quarrymaster, Lagnaha. It appears that the interest on their bond being in arrear, the present pursuers took means to recover these arrears, and for that purpose they brought an action of mails and duties against the proprietors and their tenants. That action resulted in a decree which was pronounced in this Court, on which a good deal of the argument has been rested. The dates of the proceedings in that action are somewhat material. The summons was signeted on 21st April 1888. On 25th May decree in absence was pronounced against the proprietors and those tenants who did not appear. Another interlocutor was pronounced on 19th July following against certain of the compearing defenders. These were John Gardner, Alexander Gardner, and George Jamieson Alison junior, as trustees for the firm of J. & A. Gardner & Company, and the said J. & A. Gardner & Company. That interlocutor was affirmed on 9th February 1889, and it was thereby found that these parties had not ceased to be liable at the date of raising the action for the rents and lordships concluded for, and they were decerned against accordingly. Upon the face of the decree, it appears that the action of mails and duties was properly raised against both the proprietors and tenants. They were the proprietors and tenants in possession down to May 1888. If that is so, they were liable for the rents at the date when the action was brought, and they were therefore the proper parties to call in the action. That being so, the defender's argument in the present case is reducible to a proposition which he was unable to face. He could not dispute that if the tenants in possession at the time the action of mails and duties was brought were called in that action, it was unnecessary to call those who might subsequently become tenants.

I think the Sheriff-substitute is right in the result at which he has arrived.

LORD PRESIDENT.—The summons of mails and duties called as defenders the proprietors of this estate, but it did not conclude for any judgment or decree against them, and it is a mistake to decern against a landlord in such a summons. The purpose of calling the proprietor in such an action is that he may have an opportunity of stating any objection which he may have to the heritable creditors entering into possession of the lands and levying the rents which the action is brought to enable them to do. If the proprietor does not appear, he thereby shews that he has no objection to the rents being so levied, and not only so, but he also indicates an assent to the course of proceeding taken by the creditors. Accordingly, if the heritable creditor calls all the tenants upon the estate who, at the date of the raising of the summons, are in possession of the different farms upon the estate which is the rent producing subject, he then enters into possession of the estate to the effect of collecting the whole rents thereof. The interlocutor pronounced by Lord Lee upon 19th July 1888 decerned against the compearing tenants as at 1st May 1888, and the parties called in the action as tenants of the quarries were then in possession and liable to pay rent as at that date. Therefore the decree was complete in all respects, except in this, that as the tenants of the quarries had parted with their lease

from and after the 15th April to another tenant, they could not be decerned to pay the rent at the terms after his entry, because they were not in possession thereafter. But that does not make the decree which the heritable creditors obtained the less available as giving them a title to enter into possession of the estate. A tenant who has assigned his lease cannot of course be made responsible for the rents to become due, but the tenant who takes his place becomes liable for the rents to the heritable creditor in possession just as much as he would have been bound to pay to the proprietor of the estate. If the tenant refuses to pay, it may be necessary for the heritable creditor to avail himself of his right of hypothec and to use sequestration. There is no defence here except that there is no decerniture against him personally in the action of mails and duties. But he is personally liable to the heritable creditor, and accordingly the possession of the heritable creditor is quite complete. I therefore agree that the objection is not well founded.

But there may be a doubt as to the latter part of the prayer of the petition, and I think the Sheriff-substitute has probably gone too far in giving effect to it, although it does not appear that his attention was directed to it.

THE COURT pronounced an interlocutor varying the interlocutor of the 26th March 1889, "to the effect of disallowing in the meantime the prayer of the petition other than that portion of it which craves for warrant to sequester and inventory: *Quoad ultra* adhere to the said interlocutor, and remit the cause to the Sheriff to proceed further therewith in terms of law."

MACRAE, FLETT, & RENNIE, W.S.—DAVID TURNBULL, W.S.—Agents.

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ROBERT TAYLOR, Petitioner.—*J. C. Lorimer.*

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UNION HERITABLE SECURITIES COMPANY, LIMITED, Respondents.—*Crole.*

June 1, 1889.  
Taylor v.  
Union Heritable  
Securities  
Co., Limited.

*Company—Bankrupt—Shareholder—Discharge on composition and reinvestiture—Liability for subsequent calls on shares.*—A shareholder in a limited company, the shares of which were only partly paid up, was sequestrated, but in 1885 was discharged, on payment of a composition "of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," and reinvested in his estate. The company did not claim in the sequestration. In 1887 the shareholder, for the first time, requested the company to remove his name from their register, on the ground that his estates had been sequestrated, but the company refused to do so, and subsequently made a call upon him in respect of his shares. In a petition at his instance to have his name removed from the register on the ground that the amount unpaid on his shares was a debt for which he was liable at the date of the sequestration, the Court refused the prayer.

*Opinions reserved* as to the respective effects of the discharge on a composition and of the reinvestiture on the liability of the shareholder for calls made subsequent to the sequestration.

On 13th March 1889 Robert Taylor, Leith, presented a petition, in 1st Division. which he prayed the Court to ordain the Union Heritable Securities Company, Limited, to remove his name from their register of members as holder of seventy-five shares (£5 each), numbered 7481-7530, and 13,214-13,238, all inclusive. M.

He stated that he had paid £1 on all the shares, and further averred;—"The company sustained heavy losses owing to the serious and long-continued depression in the value of heritable property in Scotland since 1878. Since the year 1885 the company has paid no dividend. The

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estates of the petitioner were sequestrated under the Bankruptcy (Scotland) Act, 1856, on 29th April 1885, and Mr Joseph Campbell Penney, C.A., Edinburgh, was duly appointed and confirmed trustee. The petitioner made a composition settlement of 5s. per £ with his creditors in terms of the Bankruptcy Statutes, and on 6th July 1885 the Sheriff of the Lothians and Peebles discharged him 'of all debts and obligations contracted by him or for which he was liable at the date of the sequestration (29th April 1885), and declared and hereby declares the sequestration to be at an end, and the bankrupt reinvested in his estate (reserving always the claims of the creditors for the composition against him and the cautioner),' conform to act and warrant of discharge herewith produced. The amount unpaid, viz., £4 per share, on the petitioner's seventy-five shares in the said company formed part of the debts and obligations contracted by him or for which he was liable at the date of his sequestration, and from which he was discharged in the sequestration proceedings. Accordingly, the petitioner was and is entitled to have his name removed from the register of members of the company. On 5th May 1887 he intimated to the company that he was not a shareholder. The intimation was in the following terms:—'On looking over my papers I find the enclosed report of the directors of the above company, which I suppose was sent by you, and which should have been returned at the time, but I must have overlooked it. It has been sent to me by mistake, as I am not a shareholder.' On 11th May 1887, in reply to the secretary of the company, the petitioner wrote:—'You know quite well that my estates were sequestrated, and unless my name is taken of the register I shall apply to the Court for this purpose.' The petitioner heard nothing further from the company till March 1888 when a balance-sheet of the company was sent to him, and he replied, on 3d March 1888, 'I return herewith the balance-sheet you have sent me—evidently by mistake—as I am not a shareholder, and my name ought to have been struck off the list. I refer you to minute of 5th and 11th May last year.' Thereafter, in or about the month of June 1888, the petitioner had an interview with the secretary of the company (Mr R. A. Robertson, S.S.C.), when the latter undertook that his name should be removed from the company's register; and on 27th June 1888, the petitioner's agent (Mr P. Morrison, S.S.C.) wrote to the secretary reminding him of his undertaking and of the petitioner's former letters, but no satisfactory reply has been received. The directors have power under the company's articles to accept surrenders of shares. The directors of the company recently called a meeting of the shareholders for 11th March 1889, to consider whether a call should not be made upon the shareholders."

A call was made of £1 per share at that meeting.

The respondents answered;—"It is admitted that the petitioner had acquired on his own application, and had allotted to him, the shares mentioned in the petition on or about the dates referred to therein. He has paid £1 per share on his shares. The petitioner acquired and retained the said shares under and in terms of the memorandum and articles of association of the company—a copy of which is produced and referred to. The articles of association contain provisions for the transfer as well as for the surrender of shares. The petitioner has not, however, complied with these provisions, and he has not in terms thereof either transferred or surrendered his shares. The shares have, since he acquired them, stood in the register of shareholders in the name of the petitioner. It is admitted that the petitioner's estates were sequestrated, that a trustee was appointed, and that the petitioner was discharged upon payment of a composition and reinvested in his estates. All this took place without

any intimation of any kind being sent to the company by the petitioner or the trustee on his sequestrated estates. It is denied that Mr Robertson undertook that the petitioner's name should be removed from the register of shareholders."

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Argued for the petitioner;—It was provided by section 16 of the Companies Act, 1862,\* that payment of calls in respect of shares in a company was a debt due by the shareholder to the company, and the liability was as much a debt due to the company whether the call was made in a winding-up or by the directors when the company was, as here, a going concern.<sup>1</sup> These shares were acquired, and all liabilities in respect of them were undertaken, prior to the sequestration. But the Sheriff had in the sequestration discharged the petitioner of "all debts and obligations contracted by him or for which he was liable at the date of the sequestration," and this debt of liability to pay calls was discharged as well as all the petitioner's other debts. It would be very anomalous if the petitioner's name was retained on the register when he alone among the shareholders had no liability (or at most a liability to pay in terms of the composition agreement) in regard to his shares, and it ought therefore to be removed. Further, the correspondence quoted in the petition amounted to a surrender of the shares. The petitioner might have refused to be re-invested in this portion of his estate, and though two years had elapsed between the discharge and his application to the directors he was entitled to take up that position even at so late a date, as the company was now in as good circumstances as in 1885.

Argued for the respondents;—The petitioner had stated no relevant ground for having his name removed from the register. There was no relevant averment of an agreement by the directors to accept a surrender of the shares, and, in point of fact, no such agreement was ever made. That being so, unless the shares had been transferred or forfeited, they must continue to stand in the petitioner's name, as there was no other legal method for a shareholder to get rid of his shares. No such transference or forfeiture was averred here. Whether the petitioner's name was to be removed was the only question before the Court, and there was no necessity to consider the extent of the petitioner's liability for calls.

**LORD PRESIDENT.**—In this case the petitioner previous to his bankruptcy was proprietor of seventy-five shares in the Union Heritable Securities Company, Limited, numbered 7481-7530 and 13,214-13,238, all inclusive. I give the numbers to shew that there is no difficulty in identifying the shares which were his property before the sequestration, and I use the word "property" advisedly, for there is no doubt that a right to shares in a company of this sort is a right of property, and in bankruptcy is an asset of the bankrupt estate, more or less valuable doubtless, but still a right of property.

What occurred in the sequestration was this. A trustee was appointed, and after certain procedure a composition arrangement was agreed to, and carried

\* Section 16 of the Companies Act, 1862 (25 and 26 Vict. c. 89), provides, *inter alia*, that "All monies payable by any member to the company in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt."

<sup>1</sup> *Wishart & Dalziel v. City of Glasgow Bank*, March 14, 1879, 6 R. 823; *Galletly's Trustees v. Lord Advocate*, Nov. 12, 1880, 8 R. 74.

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through, and thereafter the bankrupt was discharged and reinvested in his estate. The respondents state that the sequestration, composition agreement, and reinvestiture were all unknown to them. Be that as it may, it is certain that the company never claimed in the sequestration, and they now appear as respondents in the present application.

The petitioner demands that his name shall be removed from the register of the company, but I have all along understood, and no authority has now been cited to contradict that idea, that the name of a shareholder in a joint stock company cannot be removed from the register except in terms of the statutes regulating such matters, or of some provision in the memorandum or articles of association of the company, which are made under statutory authority. Now, I know of only three ways in which a shareholder can get rid of his shares—first, by transferring them to someone else; second, by forfeiture; and, third, by the company accepting a surrender. These are all statutory proceedings, and in no other way could these shares be disposed of. The statutes do not contemplate that shares shall simply cease to exist; there may be some provision in the memorandum or articles of association contemplating such a thing, but unless that is so the shares must belong to someone. Here there is no one else except the petitioner to whom these shares can belong, and until he divests himself of them in some statutory way his name must remain on the register.

Several questions have been suggested which may arise at some future time with regard to the liability of the petitioner for calls on these shares, but those questions are not now before us. It is sufficient to say that they appear to me to raise very considerable difficulties, but the only question before us is whether the petitioner's name should be removed from the register. I think no ground has been shewn to entitle him to such an order, and therefore I am for refusing the prayer of the petition.

LORD SHAND.—I can very well see that in the future very nice and delicate questions may arise between the petitioner and the respondents in this application,—in the first place as to the extent of the petitioner's liability for calls, whether it is limited in any way by his sequestration and discharge on payment of a composition, and in the second place, whether, if there is a limit on his liability, he was not bound to make his claim to that limitation timeously. But in this petition those questions do not arise, and it would not be proper to give any opinion with regard to them, and indeed I have not formed any opinion on the matter.

On the petition as it stands I am very clear that we must refuse the prayer. The petitioner asks that his name should be removed from the register on two grounds. The first is the sequestration and the composition arrangement. If that ground were given effect to here, it would be made the ground of similar applications in numberless cases where shares were valueless, and calls were likely to be made. There are cases where shares are very valuable assets no doubt, but in many cases, as here, they are of no value and subject the holder to liability for future calls.

Mr Lorimer, however, further tried to make out that these shares had been surrendered, but a surrender is a thing to be arranged between the shareholder and the directors, and there is nothing here to shew that the directors of this company entertained any such arrangement. I agree with your Lordship that

there are only three modes by which a shareholder can get rid of shares in a joint stock company, and here none of them has been adopted ; and, therefore, I am clearly of opinion that this petition must be refused.

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LORD ADAM.—I have no difficulty in coming to the conclusion that this petition must be refused.

LORD MURE was absent.

THE COURT refused the petition.

P. MORISON, S.S.C.—J. & R. A. ROBERTSON, S.S.C.—Agents.

REV. WILLIAM HASTIE, Pursuer (Reclaimer).—*Party*.  
REV. JOHN M'MURTRIE AND ANOTHER, Defenders (Respondents).—*Sir Charles Pearson—Low.*

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*Contract—Church—Foreign Mission of Church of Scotland—Principal of Missionary Institution—Nature of office.*—On 16th April 1878 the Foreign Mission Committee of the Church of Scotland (a committee appointed yearly by the General Assembly to manage the affairs of the Foreign Mission, which was supported entirely by voluntary contributions), determined to offer the post of principal of their institution at Calcutta to W. H., who was then a licentiate, "on the usual salary and allowance." The committee's minute of 8th May bore that W. H., who was present, agreed to accept office "on the terms minuted at last meeting." On 16th July the committee appointed W. H. to be principal "on the terms and under the conditions already agreed on."

Some years previous to that appointment the committee had drawn up certain regulations, which were approved by the General Assembly, in reference to the employment of missionaries in India. Under these rules the committee had power, *inter alia*, to dispense with the services of a missionary at any time by giving six months' notice. W. H. had a copy of these regulations in his possession, and had considered them at the date of his acceptance of office. On W. H.'s acceptance, the Presbytery of Edinburgh met, and having sustained his trials (as the minute of meeting bore), "he was . . . set apart to the office of the holy ministry and inducted to the office of principal of the General Assembly's institution at Calcutta." After he had been principal for five years the committee decided to dispense with his further services, and recalled him, paying him six months' salary in lieu of notice.

W. H. thereafter raised an action of declarator, payment, and damages against the committee, in which he maintained that they had acted illegally in recalling him, in respect (1) that, as matter of fact, he had, before accepting office, stipulated that he should not be bound by the regulations above referred to, and (2) that, having been ordained and inducted to his office in due form by the presbytery, he held it *ad vitam aut culpam*. Held, after a proof (1) that the office in question was not a *munus publicum*, but that the pursuer's employment depended on an ordinary contract of service ; and (2) that his engagement was terminable at six months' notice by either party in terms of the regulations. The defenders were therefore *assolized*.

*Public officer—Nature of office—Induction—Appointment ad vitam aut culpam.*—*Observations* (per the Lord President) on the history and effect of induction to an office or cure.

*Observed per* the Lord President,—“The law applicable to appointments *ad vitam aut culpam* may be summarised thus—Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last class are embraced only offices of the nature of *munera publica*. Public officers are irremovable except for fault. Holders of benefices in the church are public officers, and these offices are *munera publica*.”

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1ST DIVISION.  
Lord Fraser.  
M.

IN January 1888 the Reverend William Hastie, Edinburgh, raised an action against the Rev. John M'Murtrie, convener, and John Thomson MacLagan, secretary, as representing the committee of the Foreign Mission of the Church of Scotland, and the whole individual members thereof, in which he concluded for declarator " (first) that upon the 16th day of October 1878 the pursuer was by the Presbytery of Edinburgh ordained and set apart to the office of the holy ministry in the Church of Scotland, and inducted to the office of principal of the General Assembly's institution at Calcutta, to which office he had been nominated and elected by the said mission committee, by which ordination and induction he became entitled to the emoluments, salary, and whole profits attached to the said office, so long as he continued to hold the same, and should not demit the said office, or be legally removed therefrom, according to the laws and constitution of the said Church of Scotland; and (second) that immediately thereafter the pursuer went to Calcutta and entered upon the discharge of the duties attaching to the said office of principal of the General Assembly's institution there, and continued in the discharge of said duties until the 15th day of December 1883, when he was wrongfully, illegally, unwarrantably, and maliciously extruded and removed from the said office, and prevented from discharging the duties thereof by the defenders, the Foreign Mission Committee aforesaid, or by representatives thereof for whom the said defenders are responsible, and that since the 15th June 1884 he has been wrongfully and illegally deprived of the emoluments, salary, and whole profits attached to his said office, in violation of the rights conferred upon him by his ordination and induction thereto as aforesaid under the laws and constitution of the said Church of Scotland"; and further concluded (third) that the defenders should be ordained to make payment of arrears of salary and for future payments thereof in all time coming during his lifetime, "or until he demits the said office, or is lawfully removed therefrom according to the laws and constitution of the said Church of Scotland; and (fifth), in any view, for payment of £7500 as damages."

The pursuer averred that in 1878, "while acting as a licentiate of the Church of Scotland, he was called and nominated to the office of principal of the General Assembly's institution at Calcutta by the Foreign Mission Committee represented by the defenders. This call and nomination was accepted by the pursuer on the condition that he should not be bound by the special rules applied by the committee to their other missionaries. Thereafter on the motion and request of the said Foreign Mission Committee, the pursuer was taken on trials, and was ordained and set apart by the Presbytery of Edinburgh upon the 16th day of October 1878, to the office of the holy ministry in the Church of Scotland, and inducted to the office of principal of the General Assembly's institution at Calcutta. In virtue of his ordination and induction by the Presbytery of Edinburgh, he became subject to its jurisdiction, and has remained ever since without interruption subject to its jurisdiction as a Court of the Church of Scotland. His induction to the foresaid office of principal of the General Assembly's institution in Calcutta conferred upon him a vested right to the said office, and to the emoluments, salary, and profits attached thereto, so long as he continued to hold the same and should not have demitted it or be legally removed therefrom according to the laws and constitution of the said Church of Scotland."

The defenders, in answer, referred to the minutes of the Presbytery of Edinburgh, and of the Foreign Mission Committee of the General Assembly; *quoad ultra* denied the pursuer's averments, and stated;—"The Foreign Mission Committee merely requested the presbytery to take the

pursuer on trials for ordination to the office of the ministry. The pursuer No. 133. accepted office on condition, *inter alia*, that he might be dismissed on six months' notice and being paid his passage to this country, and the Foreign Mission Committee had no power to make or sanction an appointment on a different tenure." June 4, 1889.  
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The pursuer further averred ;—(Cond. 2) "The Foreign Mission Committee represented by the defenders is appointed annually by the members of the General Assembly of the Church of Scotland in connection with the consideration of a report of the work of Foreign Missions in India, Africa, and China. The members of this committee do not require to be members of the Assembly, or even office-bearers of the Church of Scotland. The said committee is not a Court of the Church of Scotland, and it has no statutory recognition or authority. It has no ecclesiastical jurisdiction over ordained and inducted ministers, and when the exercise of such jurisdiction was required for the pursuer's ordination and induction, application for that purpose was made by the committee to the Presbytery of Edinburgh, of which presbytery the convener and several leading members of the said committee were members. It is not a committee of members of the General Assembly, nor does it represent the Assembly as an Ecclesiastical Court constituted by law, although it contains representatives from the different presbyteries of the Church. It has not been constituted by any Act of the Assembly, but is in reality a committee of members of the Church of Scotland contributing funds for missionary enterprises, and working as a voluntary association. It receives and administers all the funds raised for missionary purposes in connection with the Church of Scotland, and disburses these funds through its treasurer, and its investments are made, and rights and securities taken, in name of the convener and secretary of said committee and their respective successors in office in trust for behoof of said committee." (Cond. 3) "The said committee when they called and nominated the pursuer to the office of principal of the General Assembly's institution agreed to pay him the salary of £510 per annum, by monthly payments, being £100 more per annum than they paid to other missionaries appointed under their special rules, and in addition the said committee agreed to provide him with a house as principal of the General Assembly's institution or to pay an allowance in lieu thereof, which according to the usage at Calcutta is £100 per annum. From January 1879 to January 1881 the pursuer was duly paid his salary at the rate of £510 per annum, but in January 1881 it was increased by mutual agreement to £560 per annum, according to which agreement he has been paid up to the 15th June 1884. The agreement as to salary and allowance and the guarantee for the payment of these involved in the call and nomination of the pursuer to his office by the Foreign Mission Committee were known to the members of the Presbytery of Edinburgh, when they proceeded to ordain and induct him to the said office of principal of the General Assembly's institution at Calcutta. The pursuer was also appointed by the said committee to superintend its evangelistic mission in Calcutta, in which capacity it was his duty to report upon the progress of the mission and the character and qualification of its agents generally." (Cond. 4) "The conditions upon which the pursuer held his rights as the ordained and inducted principal of the General Assembly's institution at Calcutta were exceptional and special as regarded his relation to the Foreign Mission Committee. He was not an applicant for the office, and only agreed to accept the call of the committee on the ground of the special arrangements made for his exemption from the special rules of the committee, and for his holding his office under the same securities as apply to other ordained



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and inducted ministers of the Church. The special rules of the Foreign Mission Committee have never been applied to the relations of the pursuer to his office, but he has continued till now under the authority and jurisdiction of the Presbytery of Edinburgh, as regards the conditions and obligations imposed upon him in connection with the duties of the said office. The pursuer was the only principal of the General Assembly's institution who was so appointed and inducted at any time to this office. The reason of this special arrangement in the case of the pursuer was the desire of the convener and Foreign Mission Committee of 1878 to secure his services. . . . It was on these grounds that the pursuer agreed to sacrifice his prospects in the Church at home, and that the special guarantee of induction as a security for his position in connection with the Church was given to him by the Presbytery of Edinburgh. During the course of these arrangements it was impressed upon the pursuer by the convener and other members of the Foreign Mission Committee that his mission was expected to be largely a work of reform, as it was known throughout the Church that the missionary efforts at Calcutta had been for a long time unsuccessful as regarded the proper purposes of the mission, and much dissatisfaction was felt throughout the Church with the mission in consequence." (Cond. 5) "Immediately after his ordination and induction as aforesaid, the pursuer proceeded to Calcutta, and entered upon the discharge of the duties of his said office of principal of the General Assembly's institution there, and he remained in the discharge of these duties until the 15th day of December 1883. . . . The pursuer, on the 1st day of December 1883, to his great surprise, had intimation made to him by the Reverend William Macfarlane, an agent of the Foreign Mission Committee, that on the 6th day of November preceding the Foreign Mission Committee had passed a resolution summarily dismissing him from his office on the ground, as they alleged, that he had given unmistakeable proofs of a temper and disposition not only unsuited to the high position which he occupied, but also incompatible with the successful management of the institution, and appointing the said Reverend William Macfarlane to take charge of the management of the institution. This resolution was passed by the Foreign Mission Committee at a meeting privately held in 22 Queen Street, Edinburgh, without the knowledge of the pursuer, and without any intimation to him that such a resolution was contemplated, and it was carefully concealed from his law-agents and friends in Edinburgh, in order that he might be more taken by surprise, and prevented from taken steps to correct or resist it. On receiving this resolution, the pursuer protested against it as illegal and incompetent, and as emanating from persons who had no ecclesiastical or other jurisdiction over him; but as it became impossible for him in consequence of the said resolution to carry on the work of his office, he was compelled to desist from discharging its duties. He was forcibly extruded not only from the office but from the dwelling-house attached to the institution, which he was then occupying, and he was prevented from further discharging the duties of principal of the General Assembly's institution and superintendent of the mission there. . . ." (Cond. 8) "In consequence of the action of the Foreign Mission Committee in illegally dismissing him from his office, and in publicly maligning his character, conduct, and capacity as principal of the General Assembly's institution at Calcutta, the pursuer has suffered greatly in his patrimonial interests, reputation, and health, and by their said unjustifiable dismissal, and their malicious conduct towards the pursuer, the committee have rendered themselves liable in reparation and damages to the pursuer. In consequence of the manner in which he

has been dealt with by the members of the Foreign Mission Committee, No. 133. the pursuer has also suffered so greatly in his public character and reputation that he believes his whole prospects in life have been blasted, and he has no hope of obtaining employment at home as a minister or professor of the Church of Scotland. The damages he has thus sustained at the hands of the Foreign Mission Committee by their malicious, illegal, and unjustifiable conduct, are moderately estimated at £7500."

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The pursuer pleaded;—(1) The pursuer having been elected to the said office by the said Foreign Mission Committee, and having been ordained and inducted thereto in due and competent form according to the laws and constitution of the Church of Scotland, is entitled to declarator in terms of the conclusions of the summons. (2) In respect of said election and of the pursuer's ordination and induction as aforesaid, he is entitled to the salary and whole profits and emoluments of the said office and to declarator of his right thereto. (3) The pursuer neither having demitted the said office, nor being legally removed therefrom, is entitled to the salary and emoluments thereof from the date of his wrongous extrusion therefrom, as concluded for. (4) In any event the pursuer, having been wrongfully and illegally removed from the said office without notice or any just or sufficient cause, is entitled to damages with expenses as concluded for.

The defenders pleaded;—(1) The action is incompetent. The Foreign Mission Committee is a mere committee of the General Assembly. (2) All parties not called. (3) The pursuer's statements are irrelevant. (4) The pursuer's whole material averments being unfounded in fact, the defenders should be assoilized.

On 30th May 1888 the Lord Ordinary (Fraser) repelled the defenders' first, second, and third pleas in law, and allowed parties a proof of their averments.

The defenders reclaimed.

Thereafter when the cause came before the Inner-House the parties, by joint minute, consented to the proof allowed by the Lord Ordinary's interlocutor "being restricted to a proof of the terms and conditions of the pursuer's appointment to the principalship" at Calcutta, "and the tenure of said appointment," and the Court accordingly affirmed the interlocutor in so far as it repelled the first and second pleas, and remitted the cause to the Lord Ordinary to proceed, reserving to the parties their whole pleas, so far as not disposed of by this interlocutor.

Thereafter on 17th July 1888 proof was led before the Lord Ordinary, and from the oral and documentary evidence the following facts appeared:—The Foreign Missions Committee of the Church of Scotland was appointed annually by the General Assembly of the Church, their duty being to administer the scheme of the Church for sending missionaries to foreign parts (particularly to India). The scheme was carried on entirely by voluntary subscription, there being no permanent endowment of any kind belonging to the scheme or to the offices under the charge of the committee.

The following were the minutes of the Foreign Mission Committee relating to Mr Hastie's appointment:—"16th April 1878.—The convener reported his communication with the Rev. William Hastie as to accepting the office of principal of the institution at Calcutta, and it was unanimously agreed to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum; also to make him an allowance until his departure for India at the rate of £100 per annum.

"8th May 1878.—The Rev. William Hastie, B.D., was introduced by the convener, and expressed his willingness to accept the appointment of principal of the institution at Calcutta, on the terms minuted at last meeting.

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"4th June 1878.—Mr Hastie appeared before the committee, and stated that from the 1st of this month he has come to Edinburgh to study specially for his new appointment. It was agreed to prepare for his ordination about the beginning of October.

"16th July 1878.—The committee resumed consideration of the case of the Rev. William Hastie, B.D., and being satisfied of the ability, scholarship, and piety of Mr Hastie, and that he is qualified to advance the cause of the Lord Jesus as a missionary to the heathen, do hereby appoint him to be one of their missionaries to India, and to be principal of their institution at Calcutta, on the terms, and under the conditions already agreed to. The secretary was instructed to forward extract of this minute to the Rev. the Presbytery of Edinburgh, with the request that they would be pleased to take Mr Hastie on trials for ordination to the office of the ministry. The committee would suggest that if agreeable to the presbytery the ordination should take place within the first fortnight of October.

"19th November 1878.—The Rev. William Hastie, B.D., appointed principal of the institution at Calcutta, was introduced to the committee, and was addressed by the convener, after which he was commended in prayer, led by Mr Wilson, to the grace and guidance of God.

"Mr Hastie acknowledged receipt of the regulations for salaries, &c., and expressed his satisfaction with them. He will sail from Liverpool on 23d inst."\*

It did not appear clearly from the evidence when the pursuer received a copy of the regulations referred to, but he admitted at the proof that he had seen a copy of them and considered it "before accepting the call" to go to Calcutta.

Mr Hastie deponed that at the meeting of 8th May 1878 (of which the minute has already been quoted) he stated to the members of committee present that he only accepted the office in question on certain conditions, of which the first was that he should not be bound by the special

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\* The regulations of the committee, adopted in January 1877, referred to in the last minute quoted, contained, *inter alia*, these rules:—

"I.—Ordained Missionaries.—Period and Terms of Engagement.

"1. Twenty-five years shall be taken as the full period of a missionary's service, at the expiry of which time his engagement ends without notice on either side. All further engagements shall be matter of special arrangement between the committee and the missionary.

"2. A missionary may resign at any time, by giving six months' notice: but if he resign within the first five years he shall, if called upon, refund the outfit and passage-money paid on his account, and shall not be entitled to a passage home. Notice of resignation by a missionary shall count from the date of his letter addressed to the Home Committee.

"3. The committee may dispense with the services of a missionary at any time, by giving six months' notice, and paying his passage if he wishes to return to this country at the close of that period.

"4. In case of immorality, or other gross misdemeanour, the committee shall have power of summary dismissal. The committee shall be sole judges of the merits of any case coming under this and the preceding rule, and their decision shall be final.

"5. The committee reserve the right of determining the place at which, and the work in which, a missionary is to be employed."

The regulations then went on to deal with the outfit and salaries, leave to Europe, payment of passage, life assurances, retiring allowances, and annuities to widows and orphans of ordained missionaries.

The General Assembly, on the report of the committee, approved "of the revised regulations for the salaries and allowances of missionaries in India."

rules applicable to the appointment of other missionaries.\* The Rev. Dr No. 133.  
Herdman deponed that he felt "sure that Mr Hastie did not claim to be

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\* Mr Hastie deponed,—“On 7th May I went to Melrose to see Dr Herdman (convener of the Foreign Mission Committee in 1878), but missed him, and on coming back to Galashiels I found a note from him asking me to meet with the committee in Edinburgh on the following day, the 8th of May. At that time I had not intimated my acceptance of the call. I went in to Edinburgh on the morning of the 8th, and had a talk with Dr Herdman in connection with the difficulties that occurred to me as to the appointment. My impression is that Dr Herdman travelled with the same train as I did, but I did not see him *en route*. I had a conversation with him generally as to the difficulties that I felt on the subject. It was in Edinburgh that I had that conversation with him. The conversation was with reference to this proposed appointment. I explained to him generally the difficulties that I felt in going to India. The conversation turned mainly upon the difficulty that was arising on their own side in carrying out the arrangement harmoniously, because objection was made to my appointment by Mr James Wilson, who was *locum tenens* of the principalship in Calcutta. The import of the conversation was that I was to shew him consideration, I think ‘tenderness’ was the word Dr Herdman used, but I said that I would use Mr Wilson with all consideration. Mr Wilson had shewn a little soreness about being superseded and at not getting a permanent appointment. I think in that conversation with Dr Herdman that morning we discussed the dangers of the climate and the difficulties of the work mainly. I afterwards went to the offices of the Church in 22 Queen Street, to meet with the committee. I remember meeting with Dr Scott, of St George’s, before the meeting. When I got in I sent for Dr Herdman, who came downstairs. I told him that I had come now prepared to accept. He then went upstairs to where I understood the committee were met, and after a time Dr Scott came down, shook hands with me, and expressed his gratification at my having resolved to accept this appointment; and then he went away. Before he went away, he said: ‘Now they are ready for you, and you can go upstairs.’ I went upstairs and found the committee met. It was a large meeting. I was introduced to them by Dr Herdman, and got a seat at his left hand at the head of the table. He turned to me and made a short address, in which he said that he hoped I was now prepared to accept of this offer—I think he said ‘call,’ but he certainly said ‘offer’—and hoped that I saw my way to undertake the duties of the office, with some other general expressions of that kind. Then I made a short statement in reply. I began by saying that they knew that I had not been an applicant for this office; that I had done nothing to bring before them any qualification which I might be supposed to have for the duties of the office; that their call had weighed with me very greatly, and that I had resolved now to accept it, but only on four conditions, which I distinctly stated. The first was that I would not be bound by the special rules applicable to the appointment of other missionaries. The second was that I should only be appointed principal of the institution and not also superintendent of the mission, as I had studied the duties involved in the former office, but did not quite understand what responsibilities were attached to the latter. The office of superintendent of the mission involves evangelistic work entirely outside the institution. The institution is a teaching establishment. The third condition was that I should not be bound by any particular period of service. The fourth was that I should be allowed to go away quietly, without any public demonstration being made about my appointment. By going away I meant going away from this country. I stated these conditions articulately, just as I am putting them now. I did make further remarks of a more general character. Dr Herdman was in the chair at the time. He demurred to one of the conditions. He said: ‘It is advisable that Mr Hastie should be the head of our mission—should be superintendent of our mission as well.’ That was all he said. I don’t think I replied anything to that; I acquiesced. I did not press my objection. Of course it was understood on my side that he laid that duty upon my head, but it did not enter

No. 133. exempted from any of the regulations" at the meeting of 8th May.\* Mr MacLagan, secretary of the committee, the Rev. Mr Wilson, Mr Horatio

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formally into my appointment. I remember that reference was made by one of the members again to Mr Wilson's position. I cannot say which member it was, but he asked if I had been informed about Mr Wilson's feelings and views, and how I would act towards him. I replied that I had been informed, and that Dr Herdman had referred to it in his letter, and that I had promised to treat him with all forbearance and with every consideration, and that I would probably have to learn some things from him. Reference was also made as to the date when I was to leave this country. It was arranged that I should leave in the end of the year—the cold season as we call it in the East. I had with me for reference a jotting of these four conditions that I made, but I cannot say that I held it in my hand. I have not got it just now, as all my books and papers have gone smash in consequence of this business. I don't know whether that jotting exists or not. I searched for it previously to this, but not just now. It was when discussing the matter with the presbytery that I searched for it. All these matters were before me then; I searched for my papers at that stage. At that time I was not able to find that jotting. I merely mentioned the fact that I had come prepared upon those terms, and that upon those terms alone would I accept the appointment. Those conditions were the result of previous deliberate consideration on my part. Nothing else of any consequence took place at that meeting. (Q.) Did you leave that meeting on the distinct understanding that you were not to be bound by the regulations one to five? (A.) Yes. (Q.) The minute of the meeting of the 8th May is in these terms,—“The Rev. William Hastie, B.D., was introduced by the convener and expressed his willingness to accept the appointment of principal of the institution at Calcutta on the terms minuted at the last meeting?” (A.) Yes. I would only say about that minute that those terms said to be minuted at last meeting were not overtly put before me. Dr Herdman put it to me and it was on the understanding of his communication to me that I accepted these terms. The only thing noticeable about these terms is that I got a special allowance of £100. These are the only terms referred to in the minute of 8th May. But I did not refer to these terms. I laid down my conditions that I accepted. (Q.) That is to say, at that meeting you did not refer to these pecuniary terms? (A.) No. (Q.) Had you in view the rules relating to arrangements subsequent to appointment at all? (A.) These were not strongly before my mind; it was simply a question of the condition of the appointment. I resolved that I could not accept office if these were to govern my appointment. That had been a matter of conversation between me and my friends. (Q.) I notice that in these rules one of the conditions is that twenty-five years is to be taken as the full period of a missionary's service; were you prepared to bind yourself to twenty-five years' residence? (A.) No; that was the first rule which staggered me; I would not accept a definite engagement for twenty-five years. (Q.) What else in them seemed to you of the nature of what you would not accept? (A.) I objected to them all. Take the fifth rule in particular; I could never have accepted that rule. My appointment was to be principal of this institution, and I could never have accepted it under the condition that could have shifted me from that to

\* Dr Herdman deponed,—“(Q.) Is it the case that at the meeting of May or any subsequent meeting Mr Hastie disclaimed being bound by any of the regulations? (A.) I think not; I feel sure that he did not claim to be exempted from any of them. (Q.) If such a claim for exemption had been laid down by him as a condition of his appointment would you have taken notice of it? (A.) I was in the habit every two or three months of having to deal with the appointment of a missionary, who comes before the committee and who is sent out under these regulations. If any missionary had stipulated that he was to be exempted from the regulations it would have been such an extraordinary thing, and so utterly unequalled in the history of the committee, that it must have impressed itself upon my mind.”

Macrae, and others, members of the committee who were present at that meeting, all gave evidence to the like effect. No. 133.

On 16th October 1878 the Presbytery of Edinburgh met to ordain Mr Hastie preparatory to his sailing for India. The minute of meeting bore, June 4, 1889.  
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—“Mr William Hastie, B.D., delivered the discourses which had been prescribed to him as part of his trials for ordination, all of which were sustained; and the presbytery having taken a conjunct view of all his trials, and approved of the same, resolved that he should be ordained to the office of the holy ministry. Whereupon the questions appointed to be put to all ministers previous to ordination were put, and having given satisfying answers to all the same, he was, by solemn prayer and imposition of the hands of the presbytery, set apart to the office of the holy ministry, and inducted to the office of Principal of the General Assembly's Institution at Calcutta. Thereafter he subscribed the formula, and was suitably addressed by the moderator on the duties of his office.” Immediately after his ordination Mr Hastie proceeded to Calcutta, and entered on the duties of his office.

On 6th November 1883, at a meeting of the Foreign Mission Committee, a resolution was passed that Mr Hastie's “connection with this mission must immediately cease,” and instructions were given to the secretary “to arrange for the payment of Mr Hastie's salary for six months from date on which he will receive intimation of this decision.” The intimation was received by Mr Hastie on 15th December 1883, and he was paid his salary for six months from that date.

On 20th July 1888 the Lord Ordinary assoilzied the defenders from the conclusions of the summons.\*

any other work at any time. With regard to the other rules, I may say that, although careful not to carry back my more definite feelings of late, I regarded them as rules that no ordained minister could accept, and I would not have accepted an appointment in this country, or in the Church of Scotland, with these rules. I had studied the law of the Church to some extent, and I understood that I would have been under proper professorial government, and that those rules are inconsistent with that government. (Q.) Had you clearly realised to your own mind the position of an ordained minister of the Church as contrasted with a person under those rules of a committee of the Church? (A.) Certainly, and that was the ground mainly. (Q.) That was sharply before your mind? (A.) Yes. At that meeting I led the committee as distinctly to understand as I am now stating it, that I would not submit to the latter position. I anticipated objection, but there was no objection raised. I anticipated discussion, and was prepared to have objections stated to me, and that among others. I communicated to my friends immediately afterwards that I had accepted the appointment. I stated to them that I was not bound by the rules in any way. I have throughout, from that hour to this, maintained that position. If I have used any expression inconsistent with that, it must have been inadvertently.”

\* “OPINION.—I regret that there ever should have been any cause for this litigation. The pursuer of this action is, according to the evidence of all the gentlemen called as witnesses for the defence, a man of much learning and varied gifts. If he had been a priest of another communion than the Church of Scotland, or of any other Presbyterian Church, these gifts would have been utilised in a different sphere, if they had proved unsuccessful, from that where he was first planted. But the utilisation of talent in this way is not a characteristic of our Presbyterian governing bodies. When a collision comes between them and a minister, the course adopted is to cut him off, without reference to his powers of usefulness in some other department of the Church's labour. The pursuer did not seek the place of principal of the Calcutta College. He was besought by the Foreign Mission Committee to take it, and bribed to do so by an increased salary beyond that had by other missionaries and his predecessors in the Calcutta

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The pursuer reclaimed, and argued ;—The first five of the regulations by which it was said he was bound had never been approved by the

College. One cannot but sympathise with a man so inveigled away from the fair prospects he had of advancement in his own country, when we find him roughly turned adrift on the first collision with the Mission Committee.

"However, I am not called upon to express further any opinion upon this aspect of the case. My duty here is simply to decide in a civil action as to whether the pursuer has proved his case. The action is for damages for breach of contract, and nothing else. The defence *in limine* is, that there was no breach of contract, in respect that what the defenders did they were entitled to do, according to the very terms of the contract. They dismissed, or rather, to use more appropriate language, they recalled their appointment of the pursuer as principal of their institution at Calcutta, and superintendent of their mission there, holding that, according to the terms of the contract, they could do so upon giving him six months' notice. They did not give him six months' notice, but in lieu thereof they gave him six months' salary. The rule upon which they found is in the following terms :—'The committee may dispense with the services of a missionary at any time by giving six months' notice, and paying his passage if he wishes to return to this country at the close of that period.'

"Now, the question is whether such was the contract, and I am of opinion that the contract was as stated by the defenders. The pursuer has not proved to my satisfaction any special agreement with him, to the effect that he should be exempted from the rules and regulations applicable to other missionaries, and that his appointment was one *ad vitam aut culpam*. It would be rather a hazardous and extraordinary contract to enter into on the part of the Foreign Mission Committee to appoint any missionary *ad vitam aut culpam*. The labours of a missionary are in a foreign land, and under a climate somewhat obnoxious to Europeans, and no Foreign Mission Committee would in these circumstances be justified in entering into a life engagement with any missionary. Exceptions were made in two points with regard to the pursuer, on account of his energy and his abilities. He received £100 a-year more than other missionaries did, and when the physician declined to certify him as a good life, he was exempted from the obligation to insure his life for £500, which is required by the rules. But there were no further exceptions made in the pursuer's favour from the rules binding upon all missionaries. He himself admits that he had read these rules before his appointment ; and it would have been very odd if he had not. A man of the pursuer's acuteness was not the person to enter into the service of the defenders without knowing exactly what were the conditions under which he was to work. The minute of 19th November 1878, which sets forth that he had received a copy of the rules and regulations, and was satisfied therewith, truly sets forth what took place at that meeting. The result is that the defenders must be assoilzied from this action. It is true that before dispensing with the pursuer's services, the defenders did not give him six months' notice as required by the rules, but turned him out of the institution at Calcutta without any notice at all. A more gentle and a more considerate mode of treatment of the man whom they had invited to go to India might have been expected from persons in the position of members of the Committee of the Foreign Missions of the Church of Scotland. If the connection was to be broken, it might have been done in such a way as not unnecessarily to hurt the feelings of the servant who was to be dispensed with. But this is a matter also for which the law provides no redress. When a servant is entitled to notice before dismissal the obligation is complied with if the wages during the period of notice are paid ; and there is much to recommend this rule, for it frequently would be impossible to carry on the work when the servant appointed to discharge it is under notice to quit. The defenders have paid the salary for six months to the pursuer, and his passage money home from India, and having done that they have fulfilled their legal obligation.

"With reference to expenses, I am of opinion that these should be found due to neither party. The defenders set up a number of untenable preliminary pleas,

General Assembly, and were therefore not binding on him. The only regulations so approved were those relating to the "salaries and allowances," and not those relating to the "period and terms of engagement." Further, there was no reference to those five regulations in the minutes of the committee, and he had expressly stipulated that he should not be bound by them. But, even if there had been such a contract entered into as the defenders averred, *i.e.*, a contract of service terminable at six months' notice, it would have been a *pactum illicitum*. The Presbytery of Edinburgh had not only ordained him, but, as they were bound to do, had inducted him to his office. But it was illegal to induct for a limited period of years, as contemplated by the first regulation, and his status was that of a minister inducted *ad vitam aut culpam* to a particular charge, just as much as any parish minister in this country. The General Assembly was the head and governing body of the mission in India, and he was appointed by their instruction. That being so, any undertaking on his part to remove on six months' notice was not binding. There was no such thing as ordination in the Church of Scotland unless it was coupled with appointment to a certain cure.<sup>1</sup> He did not deny that the Presbytery of Edinburgh if they proved sufficient cause might remove him from office on the ground of fault, but the presbytery could alone deal with his case. The committee ought to have gone to the presbytery and obtained his dismissal through that body. At all events, the Lord Ordinary's interlocutor did not dispose of the question of damages for slander which was relevantly raised on record.

Argued for the defenders;—There was no contract entered into with Mr Hastie that he should not be subject to the usual regulations as to missionaries. The minutes made no reference to such a stipulation, and all the members present at the meeting of 8th May denied that Mr Hastie made any such statement on the subject as he stated he had. His statement was entirely uncorroborated, and if such a departure from the ordinary procedure had been made some of the members of the committee must have remembered it. The appointment could not be *ad vitam aut culpam*. Such appointments could only exist where it was specially stipulated that the office was to be held for life, or where the official was the holder of one of the recognised *munera publica*, *e.g.*, parish ministers or parish schoolmasters. Here the pursuer held no such office. The mission work of the church was entirely carried on by voluntary subscription, and the precarious nature of the fund from which the committee paid their officials was in itself sufficient to shew that they could never appoint anyone *ad vitam aut culpam*. The law would impute perpetuity to an appointment, though it was not expressed in the contract, only in a very limited class of cases, where the official was in the truest sense of the word a public servant,<sup>2</sup> and in other cases the *onus* lay on the person averring perpetuity to prove his case.<sup>3</sup> This Mr Hastie had failed to do. The present case was analogous to the cases of *Gibson* and *Bell*, where the

and my judgment repelling these was carried to the Inner-House, whose judgment also was adverse to the defenders. The pursuer has no doubt lost his case upon the proof, but he was successful on the preliminary pleas. Upon the whole matter, the justice of the case will be attained by finding neither party entitled to expenses."

<sup>1</sup> Duff v. Grant, 1799, M. 9576.

<sup>2</sup> Duff v. Grant, M. 9576; Mitchell v. School Board of Elgin, June 15, 1883, 10 R. 982.

<sup>3</sup> Gibson v. Directors of Tain Academy, March 11, 1836, 14 S. 710, Dec. 22, 1837, 14 S. 301, March 2, 1840, 1 Rob. App. Cas. 16; Bell v. Milne, June 15, 1838, 16 S. 1136, May 4, 1841, 2 Rob. App. Cas. 286.



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institutions in question were purely private, and supported by voluntary contributions, as in this case. Here, though the institution was in connection with the Church of Scotland, the salaries were paid by voluntary subscription. The ceremony of ordination gone through by the presbytery only gave the pursuer the status of a minister, but gave him no civil rights in respect to any particular office, and "induction" added nothing to the effect of the ordination. Induction gave no right to the emoluments of a parish in Scotland; it had to be preceded, before patronage was done away with, by presentation, now by election to the cure. It was the presentation or election which gave right to the emoluments, and induction, though it necessarily followed, did not in any sense confer the right.

After the Court had intimated that they would take time to consider the cause, the pursuer tendered the following minute of amendment:—"The pursuer respectfully craves leave to amend the record in this action, so that his fourth plea in law may read as follows;—(4) In any event, the pursuer having been wrongfully and illegally removed from the said office by the defenders, and the defenders having libelled and slandered the pursuer to his loss, injury, and damage, and the sum sued for being only reasonable reparation in the premises, decree should be granted therefor, in terms of the conclusions of the summons."

At advising,—

LORD PRESIDENT.—This is an action for breach of contract. The defenders are the Foreign Mission Committee of the Church of Scotland, who are appointed annually by the General Assembly to administer the scheme of the Church for sending missionaries to foreign countries, and more particularly to India.

The maintenance of this scheme depends entirely on voluntary contributions, the only accumulated capital possessed and administered by the committee consisting of savings of such voluntary contributions. There is nothing in the way of permanent endowment belonging to the scheme, or attached to any office or appointment under the committee.

The pursuer was appointed in 1878 by the defenders, in terms of a minute to be more particularly noticed hereafter, "to be one of their missionaries to India, and to be principal of their institution at Calcutta." On the 6th of November 1883 the defenders recalled the pursuer's appointment, giving him a half year's salary from the date of his receiving notice of his recall, which was afterwards confirmed by the General Assembly. This recall constitutes the breach of contract of which the pursuer complains in the present action.

The contract is a parole agreement. There is no document signed by the parties embodying the terms and conditions of the contract. There is no interchange of missives sufficient of themselves to constitute a contract. There are certain minutes of meetings of the defenders; but these, so far from constituting a contract, are not even admissible in evidence in such a question, until it is established either by evidence or admission that they accurately represent the *res geste* of the meetings of which they bear to be the minutes.

The pursuer avers that "the conditions upon which the pursuer held his rights as the ordained and inducted principal of the General Assembly's institution at Calcutta were exceptional and special as regarded his relation to the Foreign Mission Committee. He was not an applicant for the office, and only agreed to accept the call of the committee on the ground of the special arrangements made for his exemption from the special rules of the committee, and for his holding his office under the same securities as apply to other ordained and inducted ministers of the Church."

The defenders, on the other hand, aver that "the pursuer accepted office on the condition, *inter alia*, that he might be dismissed on six months' notice and being paid his passage to this country, and the Foreign Mission Committee had no power to make or sanction an appointment on a different tenure." This averment is denied by the pursuer.

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In this state of the record it was apparent that the whole dispute between the parties depended on the terms of their parole agreement. If the pursuer was appointed *ad vitam aut culpam*, his recall in November 1883 was unauthorised, and constituted a breach of contract. On the other hand, if he was appointed on the condition that he might be recalled by the defender at any time on six months' notice, the recall in November 1883 was within the powers of the defenders, and there is no breach of contract. The parties therefore most properly and reasonably agreed by joint minute that the proof should be "restricted to a proof of the terms and conditions of the pursuer's appointment to the principalship of the General Assembly's institution at Calcutta, and the tenure of said appointment." Upon this arrangement evidence was led by both parties, and upon the concluded proof the Lord Ordinary pronounced judgment in favour of the defenders.

The pursuer contends that he was inducted into an office the natural tenure of which is *ad vitam aut culpam* (independently of the appointment of the defenders), by virtue of an act of ordination and induction by the Presbytery of Edinburgh. This argument I shall examine by-and-bye; but in the meantime, dealing with the agreement of parties as being truly a contract of employment, I have very little difficulty as to the import and result of the evidence. It is not seriously disputed that the minutes of the defenders as a committee accurately represent what took place (though perhaps in the pursuer's view not all that took place) at their meetings. On 16th April 1878, on the report of the convener, it was unanimously agreed "to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum, also to make him an allowance until his departure for India at the rate of £100 per annum." The pursuer was not present at that meeting, but he attended the next, on the 8th of May, "and expressed his willingness to accept the appointment of principal of the institution at Calcutta on the terms minuted at last meeting."

Then follows on the 16th July a more formal appointment in the following terms:—"The committee resumed consideration of the case of the Rev. William Hastie, B.D., and being satisfied of the ability, scholarship, and piety of Mr Hastie, and that he is qualified to advance the cause of the Lord Jesus as a missionary to the heathen, do hereby appoint him to be one of their missionaries to India, and to be principal of their institution at Calcutta, on the terms and under the conditions already agreed to. The secretary was instructed to forward extract of this minute to the Rev. the Presbytery of Edinburgh, with the request that they would be pleased to take Mr Hastie on trials for ordination to the office of the ministry. The committee would suggest that if agreeable to the presbytery the ordination should take place within the first fortnight of October."

The bargain was thus completed so far as regards the fact of appointment and the emoluments of the pursuer. But it certainly would have been a very strange and unbusinesslike proceeding if no agreement were made as to the nature of the duties expected of the person thus appointed, and as to the length

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of his service under the defenders. And accordingly, it now appears very clearly from the evidence that both parties had in view certain regulations adopted by the defenders so far back as January 1877 "in reference to the employment of European missionaries in India." It does not very clearly appear at what particular stage of the negotiations the pursuer was put in possession of a copy of these regulations, but he certainly had a printed copy, as he himself in his evidence states, "about the time the call was received by me, and when I was just considering the matter of accepting it, and before accepting it"; and from other parts of his evidence it appears that he studied the regulations very carefully as a matter vitally affecting his own position if he should accept the appointment offered to him.

The regulations are divided into two heads, the first applying only to "Ordained Missionaries," and the second to "European Missionaries." Under the general head of "Ordained Missionaries" the first subdivision is entitled "Period and terms of Engagement," consisting of five articles. These five articles provide in unequivocal language that the full period of a missionary's service in any case shall be twenty-five years, that a missionary may resign at any time by giving six months' notice, that "the committee may dispense with the services of a missionary at any time by giving six months' notice and paying his passage if he wishes to return to this country at the close of that period," that in cases of immorality or gross misdemeanour the committee may dismiss summarily, and that in this last case, as well as in the case of recalling on six months' notice, "the committee shall be the sole judges of the merits of any case," "and their decision shall be final." The remaining portions of the regulations have no material bearing on the present question.

Obviously, if these regulations form part of the contract between the parties, they furnish a complete and conclusive defence to this action. But the pursuer contends that he refused to be bound by these articles of the regulations, distinctly intimated his refusal to the defenders, and that they acquiesced in this arrangement. This contention is to be found not on the record, but only in his evidence as a witness, and to do full justice to the pursuer's view of this part of the case his evidence must be given in his own words. At the meeting of the 8th May when the appointment was offered to him by Dr Herdman, the convener of the committee, the pursuer says,—“Then I made a short statement in reply. I began by saying that they knew that I had not been an applicant for this office; that I had done nothing to bring before them any qualification which I might be supposed to have for the duties of the office; that their call had weighed with me very greatly, and that I had resolved now to accept it, but only on four conditions, which I distinctly stated. The first was that I would not be bound by the special rules applicable to the appointment of other missionaries. The second was that I should only be appointed principal of the institution, and not also superintendent of the mission, as I had studied the duties involved in the former office, but did not quite understand what responsibilities were attached to the latter. The office of superintendent of the mission involves evangelistic work entirely outside the institution. The institution is a teaching establishment. The third condition was that I should not be bound by any particular period of service. The fourth was that I should be allowed to go away quietly, without any public demonstration being made about my appointment. By going away I meant going away from this country. I stated these conditions articulately, just as I am putting them now. I did make

further remarks of a more general character. Dr Herdman was in the chair at No. 133. the time. He demurred to one of the conditions. He said,—‘It is advisable that Mr Hastie should be the head of our mission—should be superintendent of our mission as well.’ That was all he said. I don’t think I replied anything to that; I acquiesced. I did not press my objection.” Again he states,—“I had with me for reference a jotting of these four conditions that I made, but I cannot say that I held it in my hand. I have not got it just now, as all my books and papers have gone smash in consequence of this business. I don’t know whether that jotting exists or not. I searched for it previously to this, but not just now.”

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It is unfortunate that the pursuer did not preserve the jotting from which he spoke on the 8th of May; but this is the less to be regretted, because if it was not more definite than the account he now gives of the statement he made to the meeting, it would not much advance the decision of the question before us. He says he proposed four conditions. The first was that he was not to be bound by the special rules applicable to the appointment of other missionaries. But as these special rules comprehend the whole arrangements for salaries and allowances, which had been settled, and a variety of other matters about which apparently he was indifferent, the statement of this condition was apparently altogether wanting in point. The second, that he was to be principal of the educational institution only, and not also superintendent of the mission, he says he after some discussion abandoned. The third that he was not to be bound to any particular period of service was already secured to him in the rules to which he says he was objecting, and which provide that he may resign on six months’ notice. As regards the fourth he seems to have had his own way entirely, but whether in consequence of what passed at the meeting on 8th May or not is of no consequence.

But having thoroughly studied the regulations, if he intended to object to the power of the Mission Committee to recall him on six months’ notice, then was the time to state that objection and to protest that his appointment was to be *ad vitam aut culpam*; and yet there is nothing approaching to such objection and protest. Neither the power of the committee to recall nor the tenure of his office was according to his statement of the *res gesta* suggested to him for consideration.

Whatever may have been the impression on the pursuer’s mind when he left the meeting, the other persons present who are examined as witnesses for the defenders are quite clear that if any proposal had been made to alter the tenure of office of the pursuer, and to give him an appointment for life, or to limit the power of recall by the Foreign Mission Committee, the proposal would have been at once rejected, as one which they had no power even to consider, and that such a proposal if made would certainly have dwelt in their memory as something quite exceptional and unprecedented.

If there had been any conflicting or even ambiguous evidence to weigh or analyse I should have been inclined to attach a good deal of importance to the suggestion of the Lord Ordinary that it would be a hazardous and extraordinary contract for a Foreign Mission Committee to appoint a missionary *ad vitam aut culpam*. But it is unnecessary to resort to antecedent improbability when the direct evidence is so clear.

So far therefore as the appointment of the pursuer by the defenders, or more properly speaking, the contract of employment between the parties, is concerned,

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there is no room for doubt as to the soundness of the Lord Ordinary's interlocutor; but the pursuer relies very confidently on what followed on his appointment by the defenders as giving him a tenure for life.

It was necessary that the pursuer should be ordained as a minister of the Church of Scotland, because he was to go to Calcutta as an "ordained missionary," and the defenders by their minute of 16th July 1878 requested the Presbytery of Edinburgh "to take Mr Hastie on trials for ordination to the office of the ministry." The Presbytery of Edinburgh took Mr Hastie on trial accordingly, and ordained him "to the office of the holy ministry"; but their minute of 16th October bears further that they "inducted him to the office of principal of the General Assembly's institution at Calcutta." The pursuer seems to attach some mysterious importance to the term "inducted," but he has not been able to explain what precise significance he ascribes to it.

What is meant by "inducting" an ordained minister of the Church to an office? Induction is not a *nomen juris*, neither is it a *vox signata* in the existing ecclesiastical law of Scotland. By the canon law, which was the ecclesiastical law of Scotland prior to the Reformation, induction was the legal name of a ceremony by which, after collation by the bishop of the diocese, some inferior ecclesiastical persons gave the presentee actual and corporal possession of the church and benefice, under mandate from the bishop, by the use of certain symbols, which it is needless to enumerate. The ceremony was formal and imposing, and necessary to complete the presentee's title to the benefice. During the two comparatively short periods in the 17th century when the National Protestant Church of Scotland was governed by bishops, induction had again a fixed and technical meaning, and was the name for a somewhat similar ceremonial conducted under the authority of the bishop, which consisted in the inferior clergy of the diocese, after collation by the bishop, carrying the collated presentee into the church and placing him in the pulpit or some other conspicuous part of the church, and there delivering to him the keys of the church. But with the ceremony the name of induction as a *nomen juris* has perished. There is no use of the name in any of the numerous statutes relating to the settlement of ministers under Presbyterian Church government.

In the earliest of these statutes (1567, c. 7) it is provided "that the examination and admission of ministers be only in the power of the kirk." By the Act of 1592, c. 116, presbyteries are "bound and astricted to receive and admitt whatsumever qualified minister presented," &c. The Act of 1690 simply revived the Act of 1592. By the Act 10 Anne, c. 12, restoring patronage, the presbytery is "bound to receive and admit such qualified person or persons, minister or ministers, as shall be presented." The Aberdeen Act, 1843 (6 and 7 Vict. c. 61), bears in its title to be an Act respecting the admission of ministers, and by section 3 presbyteries are directed to "admit and receive into the benefice." Lastly, in the Act 37 and 38 Vict. c. 82, abolishing patronage and giving the appointment of ministers to congregations, it is enacted (sec. 3) that "the Courts of the Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof." As to the form of admission to the benefice, the Church Courts are left at perfect liberty to exercise their own discretion. But it is clear that they could not use, and never have used, the old ceremonial of induction.

It may be true that the name of the old ceremony of induction still lingers in the common speech of the country, and may be used popularly even in the

proceedings of Church Courts as an equivalent of "admission to a benefice." It is remarkable, however, that in the earlier authoritative or quasi-authoritative Church documents, as distinguished from Acts of Parliament, the term "induction" entirely disappeared. In the first and second Books of Discipline, in Pardovan's Collections, in Principal Hill's View of the Constitution of the Church of Scotland, "admission of ministers," and not "induction," is the phrase used. But what is the act of admitting a minister to a benefice, and what is its effect? There is no *actus solemnus* apart from ordination. By the imposition of the hands of the presbytery the candidate is admitted and set apart to the office of the holy ministry. If he has been already ordained the fact is minuted. What follows is not a ceremony at all, but merely a recognition of the new minister as a member of presbytery in his capacity of minister of the benefice to which he has been presented or elected.

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If the term induction was used in a merely popular sense by the Presbytery of Edinburgh in the present case it can have no effect whatever in law, because the pursuer had not been appointed to a benefice in the church, but to an entirely precarious office, depending for its subsistence on the continuance of voluntary contributions, and from which by his contract of employment he was liable to be recalled on six months' notice. If the pursuer was to be admitted in any sense to the office of principal, one would expect that to take place at Calcutta and not in Edinburgh.

It is said that there is no *ministerium vagum* permitted in the Church of Scotland, and that no man can be ordained unless for the purpose of undertaking a cure. This is true with a certain qualification. The Church will not ordain any man to the ministry unless he is about to be employed in the proper work of the ministry. But the Church is in use to ordain ministers who have no endowed benefice or appointment *ad vitam aut culpam*, otherwise there could never have been ordained ministers in chapels of ease, and just as little could there have been ordained missionaries whose emoluments and the continuance of whose office depended on the continuance of voluntary subscriptions.

This subject is well illustrated by the recent case of *MacLagan v. Brown*, 14 Ret. 1083. In that case the Court held that Mr Brown when he became the ordained minister of the Chapel of Ease of St Michael's in 1881 was not admitted to a benefice, because he had no permanent endowment or fixity of tenure, but was merely employed as an ordained minister of the Church to conduct the services in a chapel which was the property of certain benevolent persons who had built it at their own expense, and who engaged to pay £150 a-year for three years to the person undertaking to conduct the services in the chapel. The Court laid it down emphatically that the relation subsisting between Mr Brown and the owners of the chapel was that of parties to a mutual contract of employment. But the chapel, with a surrounding district, was subsequently, with the consent of the proprietors of the chapel, erected into a *quoad sacra* church and parish under the Act 7 and 8 Vict. cap. 44, with a permanent endowment. Mr Brown was then no longer acting under a contract of employment, but was a beneficed clergyman of the Church of Scotland, and was then for the first time received and admitted as such by the presbytery of the bounds.

The law applicable to appointments *ad vitam aut culpam* may be summarised thus: Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last class are embraced only offices of the nature

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of *munera publica*. Public officers are irremovable except for fault. Holders of benefices in the Church are public officers, and these offices are *munera publica*. But the pursuer's office was not of such a nature, for the reasons already fully explained.

At the conclusion of the hearing of the cause the pursuer tendered a minute of amendment, which now falls to be disposed of. It is in these terms:—"The pursuer respectfully craves leave to amend the record in this action so that his fourth plea in law may read as follows:—(4) In any event, the pursuer having been wrongfully and illegally removed from the said office by the defenders, and the defenders having libelled and slandered the pursuer to his loss, injury, and damage, and the sum sued for being only reasonable reparation in the premises, decree should be granted therefor in terms of the conclusions of the summons." This proposed new plea is based on breach of contract, and as I have already negatived that ground of action, the new plea seems necessarily to follow the fate of the pursuer's other pleas. But if it be intended by this new plea to convert the present action into an action for libel or slander on the assumption of there being no breach of contract, then it must be kept in mind that the proposal was made for the first time not only after final judgment by the Lord Ordinary, but after the argument on the reclaiming note had been completed on both sides, and the Court had intimated that they would consider the cause in private before giving judgment. In such circumstances it would not be possible to admit such an amendment in any case except under condition of the pursuer paying the whole previous expenses. But I am for refusing the amendment *de plano*, because I think it involves a proposal at this last stage of the process to alter entirely the nature of the action, which would, in my opinion, be an abuse of the privilege of amendment.

On the merits of the cause I propose, with your Lordships' concurrence, to refuse the reclaiming note and adhere to the interlocutor of the Lord Ordinary.

LORD SHAND.—Having had an opportunity of reading and considering the opinion which your Lordship has now delivered, I have to express my entire concurrence in the views which your Lordship has expressed. I shall only therefore, avoiding detail, endeavour to state shortly the grounds on which I am clearly of opinion that the judgment of the Lord Ordinary must be affirmed.

The pursuer's claim is rested entirely on the view that he held an appointment *ad vitam aut culpam*, and that consequently he could not be dismissed on six months' notice, or on payment of six months' salary. His office was that of a missionary to India and principal of the institution of the Church of Scotland at Calcutta maintained in connection with the Indian Mission by the Foreign Mission Committee of the Church.

In regard to such an appointment it is clear that the *onus* lies on the pursuer to instruct his averment that the person appointed has right to the office for life, for there is every presumption against the notion that the Foreign Mission Committee of any Church would give a missionary or teacher, or even the head of their institution, a life appointment, inferring continuing obligations, with a salary of considerable amount, and without any power to dispense with his services even if they found that the person appointed proved after a time to be quite unsuited to the duties required of him. The pursuer, contending against this presumption, has undertaken to shew that the defenders conferred on him a life appointment, and his whole case depends on his establishing this to be

the fact. An appointment to an office for life might arise, as your Lordship has observed, in either of two ways—either because of an express contract, or because of the nature of the office itself.

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At the close of the very full argument submitted by Mr Hastie in support of his appeal against the Lord Ordinary's judgment it was by no means clear whether he maintained that there was an express contract between the Foreign Mission Committee of the Church and himself giving him an office for life. I understood that he did not contend that anything of the kind had been proved, and that he rather rested his argument on the view that life tenure was to be inferred from the nature of his office, and his induction, as it has been called, to that office by the Presbytery of Edinburgh. But whatever the argument may be, I am very clearly of opinion that on the proof there is not the smallest ground for saying that the parties—the Foreign Mission Committee on the one hand and Mr Hastie on the other—contracted that Mr Hastie should have an appointment for life. In the negotiations and arrangements for the employment of the pursuer, next to the ascertainment of the services and duties to be required of him, it was of course necessary that the salary to be paid and the period of service should be fixed. It is scarcely conceivable that an engagement could be made without having these points settled; and I think they were clearly fixed by the rules which are admittedly referred to in the minutes of the committee of 16th April 1878, which records that it was “agreed to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum.” These rules were in the pursuer's hands and their terms were fully known to him, and it is clear that both parties contracted with reference to them. They provide in regard to ordained missionaries, of whom the pursuer was to become one, that twenty-five years should be the full period of service, at the expiry of which time the engagement should end without notice on either side; (2) that a missionary might resign on six months' notice; and (3) that the committee might dispense with the services of a missionary at any time by giving six months' notice. I have no doubt as the result of the proof that these rules were a part of the contract of service between the parties. The pursuer does not maintain that there was any special and exceptional arrangement made with him to give him an appointment for life, and it appears to be clear that the committee had no power to make any such appointment.

It remains only to consider whether there was authority in the nature of the situation or office which the pursuer accepted, or in what followed on his appointment, which could convert his service, which by contract was determinable by six months' notice on either side, into an engagement *ad vitam aut culpam*, and having listened patiently to the pursuer's argument I have heard no intelligible ground to support his contention. The office conferred by the committee was described as “one of their missionaries to India and principal of their institution at Calcutta”—an educational institution carried on mainly in furtherance of the mission. The appointment had nothing about it to suggest the idea of a public office—a *munus publicum* under the state or otherwise. The Mission of the Church to India was begun and has been carried on entirely by voluntary contributions, which might cease at any time; and the Church itself might at any time, for reasons which to it might seem good, cease to carry on the mission at all. Everything therefore in the nature of the office indicates that it must be, as in fact it was under the committee's rules, an office terminable on six months' notice on either side.



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But the pursuer says, though all this be true, I was inducted into my office by the Presbytery of Edinburgh, and the virtue of this act or ceremony of induction was so great as to convert my office—precarious in its nature, terminable on six months' notice on either side—into an office for life, with an obligation on the Foreign Mission Committee to pay a salary of several hundreds a-year, rising with the lapse of time, for my lifetime. I confess I find it difficult to treat this argument seriously. I am unable to conceive how anything which the Presbytery of Edinburgh could possibly do could add to or alter the terms or conditions of the contract between the Foreign Mission Committee of the Church and the pursuer. It was necessary that the pursuer should resort to the presbytery for one purpose and for one purpose only—for ordination as a minister of the Church, for he could only enter on his duty under his contract after becoming an ordained missionary. Accordingly the committee requested the presbytery to take Mr Hastie on trials for ordination to the office of the ministry, and suggested that the "ordination" should take place at an early date. He was taken on trials accordingly. The questions appointed to be put to all ministers previous to ordination were put, and he was ordained in ordinary form to the office of the ministry. The minute of presbytery bears as part of it also, that he was "inducted to the office of principal of the General Assembly's institution at Calcutta." So far as I can see, the Presbytery of Edinburgh had no warrant in the terms of the extract minutes of the Foreign Mission Committee, containing the limited request above quoted, for proceeding to induction of the pursuer to any office, and if that proceeding could have had any such marvellous effect as to convert an engagement terminable at six months' notice into an engagement for life it was clearly unauthorised, and therefore could have no such effect. The so-called induction, indeed, seems to me to have been a mistake altogether, proceeding on some supposed analogy between the case and that of a presentee to a benefice in Scotland, while there is no true analogy between the cases.

But, finally, suppose the induction to have been all regular and in order, it could never have the effect, for which the pursuer contends, of giving him his office for life. It was, in any view, besides ordination to the ministry, merely an act of recognition of his admission to his office—admission which could properly proceed only from the Foreign Mission Committee of the Church. The pursuer points to other cases of induction, to the ordinary case of a presentee before the abolition of patronage, or of a minister called or elected to a new charge under the recent statute, and because in these cases induction, it is said, gives an office *ad vitam aut culpam* the same result must follow in his case. For the reasons so fully stated by your Lordship I consider the term "induction" as now commonly used means admission to the office only. But the important consideration is that it is not by the admission or induction that the right to the office for life is given. That right is inherent in the nature of the office itself—a permanent charge with a right to stipend from the heritors, which is a permanent fund, and the right is conferred not by the act of the presbytery admitting to the charge, but by the presentation or the call, or election under the statute, which no doubt must receive the sanction of the presbytery—which indeed the presbytery in ordinary circumstances is bound to give. There is no analogy or similarity between such a presentation or election to a benefice of the Church and the precarious office of a missionary and principal of the Church's institution in Calcutta—precarious because there is no permanent fund like the teinds payable to the minister of a parish, for the Church's Mission Scheme to India may fail

for want of the annual voluntary contributions which support it—and precarious because the parties have wisely provided by their contract that the service of the missionary and principal or teacher shall terminate by six months' notice on either side. A clergyman presented or elected to a benefice carries in his hand to the presbytery his title to a *munus publicum* with a right to an office *ad vitam aut culpam*. The pursuer had no such office, and his engagement or contract expressly excluded any such right, and so his argument on the effect of induction or admission to his office by the presbytery entirely fails. No. 133.

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It may be that the proceedings of the Foreign Mission Committee in suddenly terminating their connection with the pursuer, paying him six months' salary, was a harsh measure, or at least an act in which due consideration was not shewn towards his feelings. On the other hand, it may be that the conduct of the pursuer in the management of the mission made it necessary summarily to bring his connection with the mission to an end. Any question of this kind is not before the Court, and I have no opinion in regard to it. But one thing is to my mind abundantly clear, and that is that the Foreign Mission Committee in what they did acted entirely within their legal rights, and in the result they are therefore entitled to succeed in this action.

LORD ADAM concurred.

LORD MURE was absent.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming note for the pursuer, the Rev. William Hastie, against the interlocutor of Lord Fraser of date 20th July 1888, and considered the cause, adhere to the said interlocutor, and refuse the reclaiming note: Further, having considered the minute for the pursuer, No. 103 of process, tendered by him, at the close of the debate on the reclaiming note on 23d May 1889, craving leave to add a new plea to his summons, refuse the desire thereof: Find the pursuer liable in expenses since the date of the Lord Ordinary's said interlocutor; allow an account thereof to be given in, and remit," &c.

WELSH & FORBES, S.S.C.—MRNZIES, COVENTRY, & BLACK, W.S.—Agents.

JOHN STRACHAN AND OTHERS (Patrick Strachan's Trustees), First Parties. No. 134.  
—Murray—W. C. Smith.

JAMES GLEN WILLIAMSON AND OTHERS, Second Parties.—Murray—  
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MRS BARBARA STRACHAN OR HAYNES AND ANOTHER, Third Parties.—  
Gloag—Lyell.

JAMES ALEXANDER MOLLESON (William Strachan's Factor) AND ANOTHER,  
Fourth Parties.—Low—M'Lennan.

JOHN STRACHAN, Fifth Party.—C. S. Dickson—G. W. Burnet.

GEORGE JAMES WALKER AND OTHERS, Sixth Parties.—Gloag—Lyell.

*Succession—Trust of special fund.*—A testator directed his trustees to hold £60,000 of his estate in trust "as a special fund for the special use and behoof of the four daughters of my brother . . . the survivors and survivor of them severally and respectively in liferent." He directed that "the interest or annual income arising from said special fund . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allanarly, during their respective lives, . . . and that, subject to said liferent, . . . the

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said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters, or either of them, to the extent of their respective mother's share in said special fund in fee, and that immediately, and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand, . . . and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing."

The four nieces survived the testator. The eldest died unmarried, and without having executed any deed of nomination. Another niece, A, died subsequently leaving children.

In a special case *held* that on the death of the eldest niece the fund had been properly divided into three shares, to the liferent of one of which the surviving nieces were each entitled; and that on the death of A her children became entitled to the fee of the third which had been liferented by their mother, and that unburdened by any liferent to their surviving aunts.

2D DIVISION.  
M.

PATRICK STRACHAN died on the 31st July 1872 leaving a last will and testament, by which he bequeathed his whole estate to certain trustees, whom he appointed his executors.

By article 6th of this will the testator directed his trustees, at the expiry of a certain period, to realise his securities in America and elsewhere, or otherwise to value them, and thereafter to hold the same "to the extent and value of sixty thousand pounds sterling (£60,000), or the equivalent of that sum, and as a special fund for the sole use and behoof of the four daughters of my brother George aforesaid, to wit—Jane, Barbara, Helen Patricia, and Georgina, the survivors and survivor of them, share and share alike; and I further direct that when said special fund is ascertained, and secured to be of the sterling value of £60,000 sterling, or the equivalent to that sum, the same shall be held by my executors and their successors in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent."

By article 7 of the deed, the testator provided,—“I further direct that the interest or annual income arising from said special fund of £60,000 sterling, or its equivalent as aforesaid, shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support *allenary* during their respective lives, . . . and that subject to said liferent as hereinbefore expressed, the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters or either of them, to the extent of their respective mother's share in said special fund in fee, and that immediately, and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand, however informal the same may be, and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing; and I hereby further direct and give power to my executors, the survivors or survivor of them, to assume and appoint new executors to act under this my last will and testament, with the same powers, privileges, and immunities, as belong to the executors hereinafter named; and I further direct that the residue or remainder of my whole estate, when its sterling value is ascertained and secured at the period more particularly described and provided for as aforesaid, over and above the said special fund of £60,000, or the equivalent of that sum as aforesaid, shall be paid over to my nephew, John Strachan, presently a merchant in Liverpool, for his sole use and benefit.”

The testator was survived by the four nieces mentioned in article 6 of No. 134. the will.

Miss Jane Strachan, one of the nieces, died unmarried and intestate on 12th March 1881.

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The revenue of the special fund was equally divided among the four nieces until the date of death, and thereafter was divided among the three survivors.

On 21st April 1887 Mrs Georgina Strachan or Williamson, another of the nieces, died, survived by two pupil children, William Frederick Williamson and Constance Rose Williamson.

Questions having then arisen as regarded the construction of the provisions of the will, this special case was presented to the Court.

The first parties in the case were the trustees of the deceased Mr Patrick Strachan.

The second parties were the two children of the deceased Mrs Williamson and their guardians.

The third parties were the two surviving nieces, Mrs Haynes and Mrs Thackeray.

The fourth parties were the representatives of William and George Strachan, who were brothers and heirs *in mobilibus ab intestato* of the testator.

The fifth party was John Strachan, the testator's residuary legatee.

The sixth parties were the heirs *in mobilibus ab intestato* of the deceased niece Miss Jane Strachan.

The questions of law for the opinion of the Court were as follows:—

"(1) Are the second parties entitled to a conveyance of one-third of the said special fund of £60,000, or are they entitled to a conveyance of only one-fourth of the said fund? (2) Are the third parties entitled to the liferent of the one-fourth which was payable to Miss Jane Strachan? (3) Are the fourth parties entitled to the fee of Miss Jane Strachan's one-fourth of the trust fund, and, if so, is their right burdened with a liferent in favour of the surviving nieces of the testator? (4) Is the fifth party entitled to Miss Jane Strachan's one-fourth share of the trust fund, as residuary legatee of the testator, and, if so, is his right burdened with a liferent in favour of his sisters? Or, (5) Are the sixth parties entitled to Miss Jane Strachan's one-fourth share of the trust fund as next of kin of Miss Jane Strachan, and, if so, is the right burdened with a liferent in favour of the surviving nieces of the testator?"

Argued for the second parties;—They were entitled to get one-third share of the fee of this special fund, because the settlement gave it to them, "to the extent of their mother's share." Their mother was rightly liferented in one-third of the sum set at liberty by Miss Jane Strachan dying without issue or nomination. In the gift of income there was a gift to the survivors in the event of a niece dying without children or without disposing of her share by will. The words "severally" and "respectively" were not inconsistent with this construction.<sup>1</sup> The express power to disburden of an accrescing liferent implied such liferent where the power was not exercised.<sup>2</sup> The words "share and share alike" were merely demonstrative of the mode of distribution. Besides, in a gift of income "survivors" did not primarily mean surviving the testator. There was an express gift to the survivors in the gift of income. No such consideration existed in the case of *Paxton's Trustees v. Cowie, &c.*<sup>3</sup>

<sup>1</sup> Barber v. Findlater, Feb. 6, 1835, 13 S. 422, 7 Scot. Jur. 210; Bell's Prins. sec. 1879.

<sup>2</sup> Tulloch v. Welsh, Nov. 23, 1838, 1 D. 94, 11 Scot. Jur. 80.

<sup>3</sup> Paxton's Trustees v. Cowie, &c., July 16, 1886, 13 R. 1191.

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Argued for the third parties;—The second parties were only entitled to an immediate conveyance of a fourth of the special fund. That fourth, the liferent of which had been set free by the death of their sister Jane, fell to be paid to the third parties and the survivor of them in liferent from and after the date of the death of their sister Mrs Williamson.

Argued for the fourth parties;—(1) The fifth party (the residuary legatee) was excluded by the terms of the deed. The residuary clause was not a bequest of residue in the ordinary sense, that being a bequest of a whole estate burdened with the debts and legacies. The clause here carried only the residue (as ascertained at a particular date in a particular way), "over and above the said special fund of £60,000." The residue and the special fund were here kept just as distinct and separate as if there had been two separate trust-deeds. (2) The second, third, and sixth parties, the beneficiaries in the special provision, were equally excluded by the terms of the deed. The bequest to the truster's nieces implied merely a liferent. Though words importing a fee occurred, they were restricted to a liferent by other words in the same clause, and not as in *Lindsay's Trustees v. Lindsay, &c.*<sup>2</sup> by words in a subsequent and distinct part of the deed. This liferent was granted to the four nieces "severally and respectively," and the mention of "survivors" related only to survivance of the testator. The same considerations applied to the initial clause of the seventh trust purpose disposing of the liferent. The liferent of one-fourth vested in each of the four nieces at the testator's death, and on the death of one of the four there was no accretion. The words "share and share alike" excluded accretion.<sup>3</sup> The fee of each fourth went to the children, if any, of each of the liferentrics. If there were none, then it went to her appointee, provided she made an appointment. Failing these contingencies, it fell into intestacy. It could not be maintained that the liferent clause had a different meaning where a deceasing niece left children from what it had where she left none; and whatever its meaning was, it must apply where children were left, because the bequest to children was "subject to said liferent as hereinbefore expressed." Clearly, therefore, there was no accretion either of liferent or fee. Therefore (3) the heirs *in mobilibus ab intestato* of the testator were entitled to succeed. No doubt the law was unfavourable to intestacy, but where it clearly appeared that a testamentary provision had failed, and that the fund was not otherwise disposed of, intestacy was inevitable.<sup>4</sup> Here it was natural that a testator who preferred strangers appointed by the liferentrics to the fiars under the deed should similarly prefer his own next of kin.

Argued for the fifth parties;—There was no vesting of their shares in the nieces who died.<sup>5</sup> There was no accretion.<sup>6</sup> There was a presumption against intestacy.<sup>7</sup> The residuary legatee was entitled to everything which in the event turned out not to be well disposed of by the testator.<sup>8</sup>

Argued for the sixth parties;—Miss Jane Strachan's next of kin were entitled to a fourth of the special fund. A liferent with an absolute

<sup>1</sup> *Storie's Trustees v. Gray and Others*, May 29, 1874, 1 R. 953.

<sup>2</sup> *Lindsay's Trustees v. Lindsay, &c.*, Dec. 14, 1880, 8 R. 281.

<sup>3</sup> *Paxton's Trustees v. Cowie, &c.*, 13 R. 1191, *supra*.

<sup>4</sup> *Fulton's Trustees v. Fulton, &c.*, Feb. 6, 1880, 7 R. 566.

<sup>5</sup> *Bryson's Trustees v. Clark, &c.*, Nov. 26, 1880, 8 R. 142.

<sup>6</sup> *Paxton's Trustees v. Cowie, supra*; *Stobie's Trustees*, June 27, 1888, 15 R. 340.

<sup>7</sup> *Aberdein's Trustees v. Aberdein and Others*, March 19, 1870, 8 Macph. 750, 42 Scot. Jur. 387.

<sup>8</sup> *Jarman on Wills* (4th ed.), i. 761.

power of disposal had been given to her, which was equivalent to a fee.<sup>1</sup> No. 134.

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**LORD JUSTICE-CLERK.**—The late Mr Patrick Strachan by his last will and testament set apart in the hands of the executors a sum of £60,000, as a special fund for the sole use and behoof of four nieces and of “the survivors and survivor of them, share and share alike,” and as regards the nieces themselves, the testator’s executors were directed to hold the money “in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent.” He directed that the annual proceeds should be divided and annually paid over to the nieces, “the survivors or survivor of them, share and share alike, for their personal maintenance and support allenerly during their respective lives.” Subject to this liferent provision he directed the fund to be held for the children of the nieces “to the extent of their respective mothers’ share in fee,” and this fee on the death of the mother is declared not to be burdened with a liferent to the surviving nieces. Failing children each niece is entitled to test on her share, either with or without the burden of a liferent to the surviving sisters as she might express by any document under her hand. These are all the important parts of this deed which it is necessary to refer to in deciding this case. The testator was survived by four nieces. One of these, Jane, died in 1881, leaving no issue, and another, Georgina, died in 1887, leaving two children. The two other nieces are still alive, and have no issue.

Now, the two questions which it seems to me require to be answered here, are—(1) How is Jane’s share to be disposed of as at her death? and (2) How is the share of Georgina as at her death to be disposed of? I am of opinion that the true interpretation of the deed is, first, that on the death of Jane without issue the fund fell to be divided by three instead of by four, so that the three other sisters as surviving Jane became each entitled to the liferent of one-third of the fund. And second, that on the death of Georgina her two children became entitled to the one-third of the fund, of which their mother had enjoyed the liferent between the time of the death of Jane and her own death. This being my view, the answers I would suggest your Lordships should give to the questions will be as follows:—To the first question, that the second parties are entitled to a conveyance of one-third of the special fund; to the second question the answer will be in the negative—that they are entitled only to a liferent of one-third each of the whole fund; and the three other questions will be answered in the negative.

**LORD YOUNG.**—One of the nieces died in 1881 eleven years after the truster and she left neither children nor nominee, to take the fee of what she liferented. The disposal of the share she had previously liferented depends upon the expression “survivors and survivor.” Did the testator mean to limit that expression to the survivors or survivor of himself, taking the period to be surviving his own life? That is the meaning which such words may bear, and most commonly do bear, it being manifest upon the face of the deed that that is the intention. But they may also mean, and frequently do mean, survivorship *inter se*, and if that shall appear to be according to the intention of the testator, that meaning must be attached to the words. Now, if we put that latter

<sup>1</sup> *Alves, &c. v. Alves, &c.*, March 8, 1861, 23 D. 712, 33 Scot. Jur. 354.

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meaning upon the words here the result will be that the £15,000 which Jane liferented till her death will go to the three surviving nieces. Admittedly that would have been the case if Jane had died before the testator. I think it quite clear that this accords with the intention of the testator, for he intends only these four nieces, and their children or nominees, to participate in this trust fund, as to which they are the only beneficiaries named.

The next decesser was liferentrix of £20,000. She left children, and I think, according to the language of the deed, the fee of that £20,000 which she liferented on her death must go to her children.

If, in the future, one of the surviving daughters die without children or nominees, the survivor will liferent the £40,000, and the fee of whatever she liferents will go to her children or nominees. But if the last should leave no children or nominees, then there will be a fund liberated, and there will be no recipients according to the trust. That will be a case of resulting trust, and there will be a question whether the trustees then hold for the residuary legatee or for the next of kin.

In the meantime my opinion is, with your Lordship, that Jane's death after the testator, without children or nominees, put matters in exactly the same position as if she had predeceased the testator, and that the surviving three thus took the whole fund.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—My only doubt has been whether the terms of the deed are not such as to confer the fee of an equal share upon the nieces who survived the testator. On the whole, however, after considering the case with the benefit of your Lordship's views, I am satisfied that there are no grounds for that view, and I therefore concur.

THE COURT pronounced this interlocutor:—"Answer the first of the questions therein stated to the effect that the parties of the second part are entitled to a conveyance of one-third of the special fund of £60,000: Find it unnecessary to answer the second question: Answer the third, fourth, and fifth questions in the negative."

AULD & MACDONALD, W.S.—HORNE & LYELL, W.S.—JAMES F. MACKAY, W.S.—Agents.

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ROBERT DICK FRASER (M'Dougall's Trustee), Pursuer (Respondent).—*Sol.-Gen. Darling—A. S. D. Thomson.*

EDWARD GIBBON, Defender (Reclaimer).—*D.-F. Mackintosh—Baxter.*

*Bankruptcy—Illegal preference—Act 1696, cap. 5.*—A, being indebted to B, granted along with a friend C, a promissory-note to B for the amount of the debt. Of the same date A disposed in favour of C certain heritable subjects by disposition *ex facie* absolute, but by back-letter declared to be in security merely of C if he should be called to pay under the promissory-note. A was sequestrated within sixty days of this transaction. The trustee in the sequestration brought a reduction of the disposition on the ground that it conferred a preference on B indirectly, in contravention of the Act 1696, cap. 5, but did not conclude for reduction of the promissory-note, nor call B as a defender. *Held (diss. Lord Lee)*, that looking to the transaction between A and C alone there was no ground for reduction under the Act 1696, as C was not a prior creditor of A, and that as B was not called as a party to the action the transaction as a whole could not be considered. The defender was therefore *assolvièd*.

*Observations on Miller v. Duncan*, 4 S. 283, and H. L., 2 W. and S. 583.

IN March 1887 James M'Dougall, wood-merchant, Bellfield Street, No. 135. Glasgow, was indebted to Brownlee & Company, timber-merchants, Glasgow, in the sum of £701, 14s. 1d., partly on a past due bill, and partly on open account. Being pressed for payment M'Dougall, along with Edward Gibbon, timber-merchant, Glasgow, granted a promissory-note for £701, 14s. 1d. at three months to Brownlee & Company. This note was dated 31st March 1887. On the same day M'Dougall and Gibbon, who were proprietors of certain subjects in Springburn Road, Glasgow, equally *pro indiviso*, executed a disposition of these subjects in favour of Gibbon. The disposition was *ex facie* absolute, but Gibbon granted a back-letter, dated 1st April, which, after narrating that he had signed the promissory-note for £701, 14s. 1d. for M'Dougall's accommodation, and the disposition in his favour, bore, "and whereas, although the said disposition bears *ex facie* to be an absolute and irredeemable conveyance of the subjects therein contained, yet the same was truly granted, so far as regards the beneficial interest of the said James M'Dougall therein, to secure me, in the event of my being called upon to pay the principal sum contained in the said promissory-note, and to secure me against all sums of money advanced or lent or paid, or which may hereafter be advanced or lent or paid by me to the said James M'Dougall, or for which I may become bound on his behalf by bill, promissory-note, or otherwise," Gibbon bound himself "to reconvey to the said James M'Dougall the one-half *pro indiviso* of the said subjects acquired by me under the foresaid disposition, and for that purpose to grant, subscribe, and deliver to and in favour of the said James M'Dougall, at his expense, a formal reconveyance of one-half *pro indiviso* of said subjects, . . . but that only in the event of my being freed and relieved of all obligations entered into by me on behalf of the said James M'Dougall, and repaid all sums of money advanced or lent or paid by me to him or on his account as aforesaid."

On 23d April 1887 the estates of M'Dougall and of James M'Dougall & Son, of which he was sole partner, were sequestrated, and Robert Dick Fraser was appointed trustee.

On 31st December 1887 the trustee brought an action against Gibbon for reduction of the disposition of 31st March. There were also declaratory conclusions which it is unnecessary farther to refer to. The summons also concluded against Brownlee & Company for reduction of certain transactions between them and the bankrupts, which disputes were settled extrajudicially, and Brownlee & Company were assoilzied. The summons did not conclude for reduction of the promissory-note for £701, 14s. 1d.

The pursuer after setting forth the sequestration, and the bankrupt's debt to Brownlee & Company, averred;—(Cond. 3) "The said James M'Dougall was desirous of paying up this debt to Brownlee & Company, and it is believed and averred offered to convey to them the property after mentioned in payment or security, but they, knowing him to be insolvent, and that a direct conveyance in their favour would be cut down under the Act 1696, c. 5, refused to accept a conveyance." (Cond. 4) "M'Dougall accordingly informed the said Edward Gibbon of this, and arranged with him to obtain his assistance in settling with Brownlee & Company. At this time Gibbon was perfectly well aware, and it is the fact, that M'Dougall was hopelessly insolvent. For some years prior to this period they had been intimately associated in building speculations, and, indeed, were partners or joint adventurers. One of the properties built by them at Blenheim Street and Springburn Road, Glasgow, was disposed by them in September 1885 to Brownlee & Company, in security of debts then due, and to become due by them, or either of them. Another of their properties at Avenue Street and Springburn Road was com-

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pleted at Martinmas 1886, and it was arranged between them that they should grant the promissory-note after mentioned to Brownlee & Company, jointly, and that M'Dougall should convey to Gibbon his whole interest in said last-mentioned property. This arrangement was carried out."

(Cond. 5) "The pursuer believes and avers that the value of M'Dougall's interest in the said property was far more than £701, 14s. 1d., and that the said disposition was arranged for and granted in pursuance of a fraudulent and collusive scheme, between them, to defeat the just claims and debts of prior creditors of M'Dougall and his firm, by withdrawing the property from them and transferring it to Gibbon. The said disposition is struck at by, and is reducible under the Act 1696, cap. 5, and is reducible also at common law."

The pursuer pleaded;—(2) The disposition challenged is reducible, both at common law and under the Act 1696, c. 5, as having been made and granted, in satisfaction or security of prior debts, within sixty days of notour bankruptcy, in preference to other creditors.

There were also averments and pleas applicable to reduction under the Act 1621, cap. 18, but this ground of reduction, looking to the opinions of the Court, need not be further considered.

The defender pleaded;—(3) The said disposition, dated 31st March 1887, not being reducible, in virtue of the Statutes 1621, c. 18, and 1696, c. 5, or at common law, the present defender is entitled to be assolized.

A proof was allowed. The import of the evidence sufficiently appears from the opinion of the Lord Ordinary.

On 6th August 1888 the Lord Ordinary (Lee) pronounced this interlocutor:—"Finds it proved that the disposition called for in the summons was granted by the bankrupt, James M'Dougall, in favour of the defender, Edward Gibbon, as part of an arrangement in which the defender was participant, to enable the said James M'Dougall and Edward Gibbon to use the bankrupt's share of the subjects conveyed by said disposition as a security for a prior debt due by the said James M'Dougall to Messrs Brownlee & Company, timber-merchants, and for which the said Edward Gibbon became liable as a cautioner under the promissory-note for £701, 14s. 1d. then granted and payable at three months' date: Finds that the whole transaction was within sixty days of the sequestration of the said James M'Dougall's estates under the Bankrupt Statutes, and finds that the said disposition was granted, though not directly in their favour, for the further security of the said Brownlee & Company, contrary to the Act 1696, c. 5: Therefore repels the defences of the said Edward Gibbon: Reduces, declares, and decerns in terms of the reductive conclusions of the summons, and finds the said Edward Gibbon liable to the pursuer in the expenses of process as between him and the pursuer, and remits," &c.\*

\* "OPINION.—I am unable to distinguish this case from that of *Miller v. Duncan* (Dec. 8, 1825, 4 Sh. 283); and my opinion is that the conveyance in favour of the defender Gibbon is reducible under the Act 1696, c. 5.

"The evidence shows that the defender was jointly interested with the bankrupt, not only in the various building speculations mentioned on record, but also in sundry bill transactions between the bankrupt and Messrs Brownlee & Company of the City Saw Mills, with whom the bankrupt had dealings in connection with their building operations. In March 1887 the bankrupt was due to Brownlee & Company a sum of £701, 14s. 1d. partly on open account, and partly on a bill which became due on the 25th of that month. He was pressed for payment by Brownlee & Company; and it appears from the correspondence with Messrs Hill, No. 57 of process, that he was being pressed at the same time for payment of a debt of £2000 heritably secured over certain subjects in King Street of Glasgow. It is established by the proof that the disposition under

The defender reclaimed.<sup>1</sup>

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reduction in this action, though *ex facie* absolute, was granted as part of an arrangement between the defender and the bankrupt and Messrs Brownlee & M'Dougall's Company, the object of which was to enable the bankrupt to satisfy the claims of Brownlee & Company through the intervention of the defender. This was not done by a cash payment in respect of which the defender at once extinguished the debt due to Brownlee & Company, and became himself immediately the creditor of the bankrupt, taking the disposition in question as his security. The arrangement was that as Brownlee & Company refused to be satisfied with a disposition to the Springburn Road subjects in their favour, the defender (who was joint proprietor of these subjects along with the bankrupt) should join the bankrupt in a promissory-note, payable in three months, to Brownlee & Company; and should take from the bankrupt a disposition to his *pro indiviso* half of the subjects 'to secure me (Edward Gibbon) in the event of my being called upon to pay the principal sum contained in the said promissory-note.' (See back-letter No. 21 of process.)

"This transaction was arranged, and the promissory-note and disposition were executed on 31st March; but the arrangement appears not to have been completed until the delivery of the promissory-note on 7th April. The disposition was delivered and recorded on 1st April, but delivery of the promissory-note to Brownlee & Company was withheld for a time, owing to the defender's desire to have an express undertaking from them that the promissory-note should be held as contingent on the security over the property being effectual. (See Messrs Brownlee, Watson, & Beckett's account, No. 33, and the letters in No. 110 of process.) But the whole transaction was within sixty days of the bankrupt's sequestration, the date of which was 23d April 1887.

"It is said that Brownlee & Company were not parties to any agreement that the promissory-note should be enforceable against the defender only in the event of the disposition in the defender's favour being effectual. This appears to be the case, although it is worthy of notice that in fact the note never has been put in force against the defender by Brownlee & Company, who have claimed in M'Dougall's sequestration without valuing the obligation of the defender, 'the bankrupt being the primary debtor in said debt.' But the material question under the Act 1696 is as to the footing on which the defender entered into the transaction with the bankrupt. This appears clearly enough from the evidence already referred to. He trusted that there would be no sequestration, but he took his chance of it. He accepted the position of becoming answerable for Brownlee & Company's debt on the security of the disposition in question. But he acknowledged that the disposition was only to secure him in the event of his being called upon to pay the promissory-note. In that event he would acquire right to Brownlee & Company's debt, and would, of course, become a creditor of the bankrupt in place of Brownlee & Company. In short, the substance of the transaction was that the disposition was given to the defender as a substitute for Brownlee & Company, and in satisfaction of or security for the debt of Brownlee & Company, which he undertook to pay, and for payment of which previously there was no security over the bankrupt's heritable estate.

"It was urged that the Act 1696 could not apply, because the defender was not a creditor before he obtained the disposition in question. If that were true, it would be a question whether the disposition was not granted contrary to the Act 1621 in favour of a conjunct and confident person, without true, just, and necessary cause, and without just price really paid. But, in the view I take of the case, it is not true that the defender, under the arrangement by which he obtained the conveyance, became creditor in a new debt. What he did was to

<sup>1</sup> *Defender's Authorities*.—Low v. Bell, June 12, 1827, 2 W. and S. 579; Miller v. Low, Dec. 11, 1822, 2 S. 77; Campbell v. Macgibbon, Aug. 10, 1780, M. 1139; Blackie v. Robertson, March 9, 1781, M. 887.

*Pursuer's Authorities*.—Carter v. Johnstone, March 5, 1887, 13 R. 698; Barbour v. Johnstone, May 30, 1823, 2 S. 351; Miller v. Duncan & Low, Dec. 8, 1825, 4 S. 283, H. L., 2 W. and S. 583.

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LORD YOUNG.—The pursuer is trustee in the sequestration of James M'Dougall,

interpose himself as security for an old debt, upon obtaining a conveyance in relief which could not have been granted to the creditor directly without being struck at by the Act 1696; and I think that the conveyance is not the less struck at by the Act 1696 when granted in favour of one who so interposed. The statute expressly applies to deeds granted 'directly or indirectly' in favour of creditors. The observation of Lord Gillies in the case of *Miller v. Duncan* appears to be applicable to the present case with the alteration of the name. 'This was just a security for a prior debt, and it is proved that Patrick Duncan was participant in and a party to the arrangement; so that it must be set aside as to all the parties in order to do justice to the other creditors.'

"The case of *Miller v. Duncan* does not stand alone as an authority for setting aside a conveyance granted not to the original creditor but to one who interposes as cautioner. I think, notwithstanding the observation of Professor Bell (vol. ii. p. 227, 5th ed.), that the point was tried and decided in the case of *Swinton's Creditors* (M. 1181). It appears from the report that the Lord Ordinary's judgment, so far as setting aside the vendition obtained by the cautioner, was acquiesced in by the cautioner, and that it was only as regards the validity of the promissory-note in the hands of the creditor that his interlocutor was altered. But it is unnecessary in this case to decide the abstract point referred to by Professor Bell, as there is evidence that the arrangement to which the defender was a party was a device for the purpose of granting a security which could not have been granted to the original creditor, by granting it in favour of a cautioner who paid no money, but obtained the conveyance as a security against the contingency of his being called on to meet the obligation which he undertook by signing the joint promissory-note, payable at three months' date.

"The case of *Spier v. Dunlop* (5 Sh. 729) went even further, and sustained the application of the statute to a cash payment made to an indorser of a bill not then due as a provision for payment of the bill when it became due. I think it unnecessary, however, to proceed upon that case in deciding the present.

"I have not thought it necessary in explaining the grounds of my judgment to go over the evidence in detail. But the evidence of the bankrupt shews that he knew his difficulties, and explained them to the defender. This is not contradicted by the defender. These difficulties were such that Mr Young, on behalf of Brownlee & Company, asked to see his books, and that the defender refused to interpose his security without getting a conveyance of the Springburn Road subjects in relief. They arose not only from the pressure of Brownlee & Company, who were the principal trade creditors, but also from the pressure of an heritable creditor; and it must have been obvious to the defender, as well as to the bankrupt, that the effect of the arrangement by which he obtained a conveyance to the Springburn Road subjects was to satisfy the largest of the trade creditors in a manner which must prejudice the other creditors who held no securities, and also those heritable creditors whose securities were insufficient.

"With regard to the claims of the defender founded on his allegations in statement 3, I may explain that it was intimated on his behalf, before the commencement of the proof, that the deed was not to be maintained as a security for the sum of £269 there referred to, but only as a security for the £701, 14s. 1d.

"I was informed that the pursuer's objections to the other transactions referred to in the summons, and in articles 7, 8, and 9 of the condescendence, have been given effect to extrajudicially; and as the conclusions against Brownlee & Company have already been disposed of, in terms of the joint minute No. 7 of process, by interlocutor of 3d February 1888, the only judgment now required is upon the reductive conclusions of the summons directed against the defender Gibbon.

"Upon that point I think that the pursuer is entitled under the Act of 1696 to prevail."

wood-merchant, Glasgow, and the action contains both declaratory and reductive conclusions. The declaratory conclusions are, I think, superfluous, and had better have been omitted. The only reductive conclusion with which we have to deal regards a disposition, of date 31st March 1887, by the bankrupt of part of his property in favour of the defender, Edward Gibbon, who is now the only defender in the case. There were others, and among them Messrs Brownlee & Company, but they have been assoilzied, the case, so far as they were concerned, having been settled to the pursuer's satisfaction and theirs.

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The disposition in question is challenged on the Act 1696, cap. 5. It is also challenged on the Act 1621, cap. 18, and at common law, but as the Lord Ordinary has decided the case only on the Act 1696, I shall confine my observations, in the first place at least, to that ground of challenge. And the disposition being on 31st March, and the sequestration of the disponent on 23d April following, the disposition is undoubtedly reducible on the Act 1696, provided the disponent received it in satisfaction or security of a debt then owing to him by the disponent. It is, however, admittedly not the fact that the disponent (the defender Gibbon) so received it. It was granted subject to a back-letter, which expresses the history of it with admitted truth, viz., that it was for the defender's security and relief of a promissory-note for £701, 14s. 1d. which he of the same date signed and delivered for the disponent's accommodation. This promissory-note was granted by the defender in conjunction with the bankrupt in favour of Messrs Brownlee & Company, who were at the time creditors of the bankrupt to the amount of it. It is plain—*res ipsa loquitur*—that Brownlee & Company were pressing their debt, which the bankrupt was unable to meet, and that the defender Gibbon was induced to join in the promissory-note to them on the condition of receiving the disposition to secure his relief.

It was contended by the pursuer that an undue preference, contrary to the Act 1696, was thus given to Brownlee & Company, and that the defender being a party to the proceeding by which they got it, thereby exposes his security to a reduction on that Act. Any creditor is entitled to demand and receive security or satisfaction from his debtor—no fraud being practised. Should the debtor become bankrupt within sixty days it will be set aside,—that is to say, he will be deprived of it, however honest he may have been in taking it, and his debtor in giving it. So here if the delivery to Brownlee & Company of this promissory-note for £701, 14s. 1d. was an undue preference to them for their satisfaction or security within sixty days of their debtor's bankruptcy, the pursuer is at liberty to challenge it accordingly, and if the challenge is successful, all virtue will be taken out of the disposition to the defender, which he holds only for his relief of the obligation upon him by that promissory-note, which will thereupon cease to exist.

But in the absence of Brownlee & Company, and they are not parties to the case before us, we cannot possibly hold that they received any undue preference, and, on the contrary, must assume that they not only honestly, but lawfully and regularly received the promissory-note signed by the bankrupt and the defender, and are entitled, as the holders, to enforce payment of it, or to transfer it by indorsation (which, for aught I know, they may have already done) to any other, it being a negotiable document of debt.

I must therefore deal with the case on the footing that the only defender before us is no otherwise connected with the bankrupt M'Dougall than as the grantee of the disposition in question and as an obligant on the promissory-note

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which he gave in return, and which was the only consideration for it. The idea of satisfaction or security for prior debt is thus excluded, and with it challenge on the Act 1696. The only debt of the bankrupt to the defender was the contingent debt arising on the promissory-note, which the defender signed for his accommodation on the condition of receiving the disposition in question and delivered in return for it, and the legal aspect of the case would not, in my opinion, have been different had it been a promissory-note to the bankrupt himself or to the bearer—so that the bankrupt might use it by discounting it in a bank, or endorsing it to anyone he pleased, or holding it in his own hands. The notion of reducing the disposition and leaving the promissory-note, which was given in exchange for it, to stand as a valid document of debt against the defender, is, I think, inadmissible. If the transaction is challengeable it must, I should think, be challenged as a whole, and restoration made to both the parties to it against the obligations which it involves *hinc inde*.

The pursuer plainly cannot invoke the provision of the Act 1696 without referring to some creditor of the bankrupt as having received an undue advantage in preference to other creditors directly or indirectly by and through the deed which he challenges. He accordingly refers to Brownlee & Company as the creditor thus preferred. I shall return to this topic, which I notice now only to observe that it is not alleged that Gibbon, the only defender before us, is such a creditor. The disposition to him was for a consideration given at the time, and he was therefore, to use the language of Professor Bell, “in no sense a creditor at the time of entering into the transaction” in pursuance of which the disposition was given, and so not a creditor receiving satisfaction or security “in preference to other creditors.” But, to return to the reference made by the pursuer to Brownlee & Company, it is averred that the preference designed, and effected if the transaction shall be allowed to stand, was to Brownlee & Company for a prior debt due by the bankrupt to them; that Mr Gibbon was participant in this design; and that the disposition to him was, “though not directly in their favour, for the further security of the said Brownlee & Company, contrary to the Act 1696, c. 5.” I quote these words from the Lord Ordinary’s interlocutor affirming the pursuer’s contention, and notice that his Lordship says in the note to his interlocutor that “the disposition was granted as part of an arrangement between the defender and the bankrupt and Messrs Brownlee & Company, the object of which was to enable the bankrupt to satisfy the claims of Brownlee & Company through the intervention of the defender”; and again,—“In short, the substance of the transaction was that the disposition was given to the defender as a substitute for Brownlee & Company and in satisfaction of or security for the debt of Brownlee & Company, which he undertook to pay.” Now, if this be all true, and the decision of the Lord Ordinary proceeds on the footing that it is, and on no other, it is, I think, clear law that the whole transaction is reducible on the Act 1696, and that Brownlee & Company cannot be permitted to retain the promissory-note for £701, 14s. 1d. which the bankrupt delivered to them signed by himself and by the defender Gibbon, a result which, as I have pointed out, would at once terminate the defender’s interest in and right or even desire to retain the disposition in question.

But can we, behind the back of Brownlee & Company, in an action to which they are not parties, affirm these alleged facts to any effect? I am humbly of opinion that we cannot, and that as we cannot it is prudent to abstain from

forming, or at least expressing any opinion on the import of the evidence respecting them, which I think ought not to have been taken in the absence of Brownlee & Company.

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It is, I think, sufficient for the decision of the case that in this action of reduction on the Act 1696 the only creditor of the bankrupt who is alleged to have received and to retain contrary to the Act a document for his satisfaction or security in preference to other creditors is not called as a defender, and that the document which he so received and retains is not challenged or sought to be reduced.

The law on the subject of a security given to a cautioner for such a debt as the Act 1696 applies to is, I think, rightly and satisfactorily stated by Professor Bell, 2 Com. 215-227. The case of *Monteith v. Douglas*, 12th December 1794 (Bell's Fol. Ca. 127) which he cites, distinctly supports his opinion, and it appears from a statement made in that case by the then Solicitor-General (afterwards Lord President Blair) that a corresponding question which arose in the case of *Swinton's Trustees v. Sir W. Forbes*, Feb. 19, 1790, M. 1181, "was not before the Court, so that no decision could be given on it, and was afterwards settled, and never received a judicial decision."

The reports of the case of *Miller v. Duncan* (4 S. 283, 2 W. and S. 583), both here and in the House of Lords, require examination, and I have read them carefully. In that case two actions were brought at the instance of the trustee in bankruptcy—the one against the Dundee Bank, which the creditor alleged to have been unduly favoured by the indorsation and delivery of a bill for £615, and of which reduction was asked under the Act 1696, and the other against Patrick Duncan, who had joined with the bankrupt as acceptor of the bill on receiving from the bankrupt a disposition in security for his relief, of which reduction was asked under the Act 1696.

The Court of Session pronounced decree of reduction in both actions, and ordained the bank to deliver up the bill to the trustee. Now, this was in accordance with the law as stated by Professor Bell, and the opinion which I have expressed—assuming the facts to be as found by Lord Eldin, whose interlocutor was affirmed—viz.,—"That the bond and disposition in security was granted in pursuance of a collusive plan to which Patrick Duncan was a party, intended for the purpose of giving a partial preference to the Dundee Bank to the prejudice of the other creditors of James Duncan at a time when he was insolvent, and in bankrupt circumstances, and within sixty days of the sequestration of his estate." Now, this judgment—reducing the disposition to Patrick Duncan—was not appealed, or the action in which it was pronounced ever before the House of Lords in any way. The two actions appealed (apparently by two appeals), were—1st, that in which decree was pronounced reducing the indorsation to the bank of the bill for £615 and ordering its delivery to the trustee; and 2d, a Sheriff Court action by the bank on this bill directed against Patrick Duncan, in which, reversing the judgment of the Sheriff, the Court of Session assoilzied the defender. In the first of these appeals Patrick Duncan was not a party, while the trustee in the bankruptcy was no party to the second. Both appeals appear to have been heard and decided in the House of Lords indeed, but by the then Chief Baron—Sir William Alexander. The result was that in the first appeal—that against the reduction of the indorsation of the bill, and order to deliver it to the trustee—the decree was affirmed, except in so far as the bill was thereby ordered to be delivered up; and in the second—the decree of absolvitor was

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reversed with a declaration that the bank were at liberty to sue on the bill—"forasmuch as it does not appear either by admission or evidence that the cashier of the Dundee Banking Company, or any other person authorised on their behalf, did concert with James Duncan (the bankrupt), or the said Patrick Duncan, that the said James should give to the said Patrick the heritable security mentioned in the proceedings in consideration of his the said Patrick's accepting the bill of exchange for £615 in question." I notice that the Chief Baron pointedly asked the question—"Have we before us the question as to the heritable bond, except in so far as it may be used in argument," and was of course answered in the negative.

I cannot regard this as an authority adverse to the statement of the law by Mr Bell in his Commentaries, or to the decision in the case of *Monteith v. Douglas*, or to the legal views which I have expressed in this case. I rather incline to think that the Chief Baron, holding the views in point of fact which are expressed in the judgment of the House of Lords (and which contrast strikingly with those of the Lord Ordinary in this case), would have set aside the reduction of the bond and disposition in security as well as the indorsation of the bill, had the question as to its validity been before him.

I have only to say further that I think the pursuer has no case either on the Act 1621 or at common law.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—I remain of opinion that the disposition in question was granted by the bankrupt as part of an arrangement to which the defender Gibbon was a party, and the effect and purpose of which was to give a security to Brownlee & Company, in preference to other creditors; and I still think that the security is struck at by the Act 1696, c. 5.

It does not affect my opinion that the security was not granted directly to Brownlee & Company, but was granted to Gibbon, in consideration of his becoming liable along with the bankrupt for the debt due by him to Brownlee & Company. For I consider it clear that the debt which was being secured was Brownlee & Company's debt, and that Gibbon was aware that the security was conveyed to him to enable him to pay Brownlee & Company.

I think it unnecessary under the statute to make out fraudulent collusion. The statute was not required to cut down fraudulent transactions. The question is, in my opinion, whether such an arrangement entered into for the purpose of defeating the statute, though in the belief that it was a legitimate mode of doing so, is struck at; and this is the question which I think must be answered in the affirmative.

I accept the law as stated by Professor Bell (5th ed. vol. ii. p. 226), "where the security is granted, not to the creditor in a prior debt, but to a cautioner who becomes bound to that creditor, it would appear that whenever the creditors" (or trustee) "cannot establish that there was a device to defeat the statute, and in which the cautioner is participant, or at least of which he has notice, they will not succeed against the cautioner."

I cannot regard the case of *Monteith's Trustees v. Douglas* (Bell's Folio Cases, 127), as having settled the law otherwise. That case has never been so regarded. It was not so regarded in the case of *Miller v. Duncan & Low* (4 Shaw's Rep. 282), and I think that it proceeded upon an erroneous view of the case of

*Swinton's Trustees v. Sir William Forbes & Co.*, which is reported in Morrison's No. 135. Dict. p. 1181, as having turned on the question whether there had been any concert for giving a preference, not whether there had been any fraudulent concert to that effect. June 4, 1889.  
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The judgment of the Court in *Miller v. Duncan & Low*, setting aside the heritable security granted to the cautioner, was not appealed; and I find nothing in the report of the proceedings in the appeal relating to the bills which should suggest that the learned Chief Baron who heard that appeal gave any opinion against the soundness of the decision of the Court of Session in the case which was not before him.

The question then is, was there any concert in this case between the parties for the purpose of giving a preference to Brownlee & Company? According to my view of the evidence, the proof on this subject is clear. The evidence of M'Dougall, and Gibbon, and Young, as well as the documents, and particularly the entries in the agent's accounts, shew that Gibbon knew the involved position of the bankrupt's affairs, and obtained the disposition in question to enable him to meet the promissory-note, in the event of his being called on to pay it. He even asked a promise that the promissory-note should not be put in force in the event of the disposition proving invalid. No doubt Brownlee & Company declined to give such an undertaking. But the fact that it was asked proves Gibbon's view of the transaction, and his knowledge that he was receiving this disposition to enable him to give on behalf of M'Dougall a preference to Brownlee & Company.

On the whole, therefore, my opinion is that the Statute of 1696 applies to this disposition, because it applies to any deed granted by a bankrupt for the satisfaction or further security of a creditor, if it be, directly or indirectly, in preference to other creditors, and within sixty days of bankruptcy.

With regard to the question as to Brownlee & Company's claim upon the promissory-note, I assume that Gibbon will be liable to pay it. He will thereby acquire right to Brownlee & Company's debt. But the fact that reduction of his security will have the effect of leaving him without any further security than could have been given to Brownlee & Company is, in my opinion, no reason why he should be allowed, contrary to the statute, to retain M'Dougall's property conveyed to him within sixty days of bankruptcy for the purpose of securing or enabling him to pay Brownlee & Company's debt.

It is said that Brownlee & Company were absent, and that we cannot decide in their absence that this was a preference. I notice that there is no such plea on record, and I think this not surprising. For in point of fact Brownlee & Company were called, and all we know of their absolvitor and absence is that it was in respect of a minute in which they concurred in stating that they had "acceded to the pursuer's claims as contained in the said summons." My opinion, however, is that the pursuer was entitled to challenge the only deed granted to the prejudice of the bankrupt estate, and if that deed be bad on the ground I have stated I think it can afford no defence to Gibbon that Brownlee & Company were not called, and that Gibbon has not attempted to reduce his promissory-note, or to make such reduction a condition of this action being entertained.

Gibbon's plea has been that the transaction was *novum debitum*, and I think that plea is not well founded upon the facts.

LORD JUSTICE-CLERK.—The bankruptcy to which this case relates took place



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upon the 23d April 1887, and it is undoubted that the whole transaction by which the defender joined with the bankrupt in granting a promissory-note to Brownlee & Company—thus accommodating the bankrupt—and received a disposition to the bankrupt's *pro indiviso* share of certain heritable subjects, to secure him for his risk in giving the accommodation, took place within the sixty days preceding the bankrupt's sequestration.

It is also quite certain that the defender Gibbon had no interest or advantage to gain in the way of securing debt due by thus mixing himself up with the bankrupt's obligations. He was not a creditor of the bankrupt, and it is not alleged that prior to the sixty days before the sequestration Gibbon and the bankrupt stood to one another directly or indirectly in the relation of creditor and debtor. The transaction into which the defender entered was not one by which he, being then a creditor, sought to obtain a preference over the other existing creditors of the bankrupt for a debt due. What he did was to bring himself under obligation to a firm who were creditors of the bankrupt by becoming joint obligant in a promissory-note, and in respect of his doing so securing himself, if he should be called on to pay the amount or any part of the amount in the promissory-note to the bankrupt's creditor, by taking a disposition to the bankrupt's share of heritable subjects.

It appears that the defender was anxious to obtain from the bankrupt's creditor an undertaking that the promissory-note was to be held as contingent upon the security over the property being effectual. Ultimately the defender did not withhold the note, but delivered it, and, as it is described in the lawyer's account, left himself in the creditors' (Messrs Brownlee's) hands. Thus, Brownlee & Company were no parties to any arrangement by which the promissory-note was to be held by them on any other footing than the ordinary one as regards enforcement of it against the obligants whose names were attached. There was thus, in my opinion, no collusive arrangement, no concert to give a preference in favour of a prior creditor.

The real question in this case is, whether the words of the Statute of 1696 apply, and whether the transaction which the defender Gibbon desires to uphold must be cut down, as being directly or indirectly a preference to a prior creditor, in fraud of the interests of the other creditors of the bankrupt.

I am unable to see how, in a question solely between Gibbon and the pursuer, it can be held that the granting of a disposition of the heritable property in question to Gibbon, subject to a back-letter, can be held to be a preference given to a prior creditor. It is only when the transaction with Brownlee & Company, by which they received from the bankrupt the promissory-note for £701 with Gibbon's indorsation upon it, is introduced into the inquiry, that any question of preference to a prior creditor can arise. Brownlee & Company were undoubtedly creditors of the bankrupt prior to the time when the sixty days preceding bankruptcy began to run. It is a question which does not arise here whether the granting of this promissory-note is open to attack under the Act, on the ground that the delivery of that note to Brownlee & Company placed them in a position of preference. This may or may not be, but there is nothing of the nature of preference apart from the promissory-note. For the disposition which Gibbon received had no force or effect independently of the promissory-note. For unless Gibbon was compelled to pay the sum in the note he was debarred by the back-letter he had granted from obtaining any benefit by the disposition. If the note can be challenged as an illegal prefer-

ence, the whole virtue—as Lord Young has expressed it—is taken out of the disposition which the pursuer is attacking, and it falls as a matter of course. The defender has no interest to maintain it.

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Now, we have no parties before us but the pursuer and Gibbon. There can, therefore, be no challenge of the validity of the note. Gibbon's position is that not being a creditor he exchanged his obligation on the note for a disposition of property. There was in this no giving by the bankrupt of satisfaction for a prior debt. He owed Gibbon nothing. Gibbon's right to demand anything depended upon his being called on to pay the sum in the note. The debt was not existing but contingent. If M'Dougall succeeded in retiring the note with his own funds all right in Gibbon ceased, and under the back-letter he would have been compelled to reconvey. The whole case, therefore, turns upon the note—not upon who is the debtor in the note, but upon who is the creditor in the note. The pursuer has clearly no case unless he can establish that he is suing someone who at the time of the transaction challenged was already a creditor of the bankrupt, and was by the transaction receiving “satisfaction or security” for his debt in preference to other creditors. But is there here any such creditor? I think it is clear that there is not. And if there is no such creditor here we have no basis for the application of the Act of 1696. To deal with the disposition to Gibbon by reduction, apart from the counterpart of the transaction in the promissory-note, would be, in my judgment, unjust in itself, and would be applying the Act of 1696 to a case to which it has no application.

On these grounds I concur in the opinion expressed by Lord Young, and have only to add, that I also concur in his views upon the cases referred to in the Lord Ordinary's note, and in the opinion that the pursuers have no case here either at common law or upon the Act of 1621.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

W. ELLIOT ARMSTRONG, S.S.C.—F. J. MARTIN, W.S.—Agents.

MRS JANET REID (Reid's Executrix), Pursuer (Respondent).—

*Salvesen—A. S. D. Thomson.*

JOHN SOMERVILLE & COMPANY AND R. B. M'CAIG, Defenders (Reclaimers).

*—H. Johnston—Wilson.*

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June 6, 1889.  
Reid v. Somerville & Co.

*Cessio—Bankruptcy and Cessio Act, 1881 (44 and 45 Vict. c. 22), sec. 9—Decree of cessio in debtor's absence.*—The Bankruptcy and Cessio Act, 1881, enacts, by section 9, that “if the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*.”

In a creditor's petition for cessio the debtor was cited to appear for examination on 28th February 1888. At the diet the Sheriff, on the petitioning creditor's motion, adjourned the diet to 16th March 1888, “in respect that there was a prospect of an arrangement being come to.” The debtor was not present at the diet, and the adjourned diet was not intimated to him. Disputes having arisen as to a trust-deed, the creditor at the adjourned diet moved the Sheriff to grant decree of cessio, and the Sheriff, “in respect of no appearance by or for the defender,” granted decree. Held that as notice of the diet had not been given to the debtor, the decree was disconform to the statute, and fell to be reduced.

JOHN REID, wine and spirit-dealer, Barachnie, Lanarkshire, raised an 2D DIVISION. action against John Somerville & Company, wine-merchants, Leith, and R. B. M'Caig, accountant, Glasgow, for reduction of a decree of cessio

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No. 136. pronounced against him by the Sheriff-substitute of Lanarkshire at Airdrie, on 16th March 1888, in a petition at the instance of the defenders Somerville & Company. The other defender was the trustee appointed in the decree.

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Reid died during the dependence of the action, and it was afterwards insisted in by his widow and executrix-nominate.

More than one ground of reduction was alleged. The only objection, however, to the decree which required the consideration of the Court was the objection that the debtor, Reid, had not had due notice of the diet at which the decree was granted.

The facts as disclosed by a proof were as follow: The petition for cessio was presented by the defenders Somerville & Company at Airdrie on 8th February 1888. The defender M'Caig was acting for them, and had instructed the presentation of the petition.

On 10th February the Sheriff-substitute (Mair) made the usual first order in a petition for cessio, by which, *inter alia*, the debtor was ordained to appear for examination on 28th February 1888. Reid was cited to attend the diet.

On 28th February 1888, "on the craving of the petitioners and in respect that there is a prospect of an arrangement being come to with the debtor, and no opposition being made to the craving of the petitioners," the Sheriff-substitute continued the diet till 16th March 1888.

Reid was not present on 28th February, and the new diet for 16th March was not intimated to him.

In consequence of a dispute as to a trust-deed which Reid had granted, M'Caig determined that it would be better to proceed with the cessio. He therefore attended before the Sheriff on 16th March, and a motion was made on his behalf that decree of cessio should be granted, and that he should be appointed trustee. On that motion the Sheriff-substitute pronounced the following interlocutor, which was that brought under reduction:—"The Sheriff-substitute, in respect of no appearance by or for the defender, decerns the debtor, John Reid, to execute a disposition *omnium bonorum* to and in favour of Robert Burns M'Caig, accountant, Glasgow, who is hereby appointed trustee for behoof of the creditors of said debtor: Dispenses with the trustee finding caution *hoc statu*: Finds the pursuers entitled, out of the first and readiest of the debtor's funds, to the expenses of this process. . . ."

The pursuer pleaded;—(2) The procedure in said petition of cessio having been illegal and disconform to the Cessio Acts and relative Acts of Sederunt, the said decree should be reduced in terms of the conclusions.\*

The defenders pleaded;—The decree of cessio being legal and valid, the defenders should be assoilzied.

The Lord Ordinary (Wellwood) pronounced this interlocutor:—"The Lord Ordinary having considered the debate, together with the proof and process, in respect the late John Reid was not duly cited to the diet at which the decree of cessio under reduction was pronounced, and that no intimation of the said diet was made to him, finds, in the circumstances, that the said decree is reducible at the instance of his widow and executrix, the present pursuer: Therefore reduces, decerns, and declares, in terms of the conclusions of the summons."

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\* The Bankruptcy and Cessio Act, 1881 (44 and 45 Vict. c. 22), enacts, sec. 9,—“If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*.”

The defender reclaimed, and argued ;—The debtor had been cited to the meeting of 28th February. A citation to a Court was “with continuation of days.” It was for the debtor, not having appeared at the meeting of 28th February, to ascertain what was done. If so, he would have learned that the Sheriff had merely adjourned his examination till 16th March. It was unnecessary to give him notice of a mere adjournment.

Counsel for the pursuer were not called on.

LORD YOUNG.—My opinion is quite clear and distinct as to the intention of this clause 9 of the Act. Its purpose is to provide a very sharp remedy against contumacious absentees, and it is quite general in that view of it. It is in these words,—“If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum*, at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*.” This is with a view to the punishment of debtors who have been cited to attend meetings contumaciously absenting themselves. There must be citation to a meeting, or the clause has no application, and there must be no excuse for the failure to attend. The Sheriff must be satisfied that it is wilful, and in that case he may decline to adjourn the meeting, and grant decree of *cessio* at once, but there must be a meeting to which the debtor has been cited, and he must be contumaciously absent to warrant the decree of *cessio* at that meeting. I do not think that can be predicated of the meeting of 16th March. It is not such a meeting as this clause provides for. The debtor was not cited, and there was nothing to indicate that he was contumaciously absent. I think the whole proceedings are inept, and ought to be set aside accordingly.

LORD RUTHERFURD CLARK.—I think it would be very advisable that if a decree of *cessio* is pronounced in absence, the fact that the debtor is wilfully absent should be distinctly ascertained before decree is given.

LORD JUSTICE-CLERK.—I think it is necessary to state that this is a statute which requires to be carefully complied with. *Cessio* is nothing else than diligence.

LORD LEE concurred.

THE COURT adhered.

STURBOOK & GRAHAM, W.S.—JAMES COUTTS, S.S.C.—Agents.

ARTHUR DELANEY.—*James Clark.*

JAMES COLSTON AND OTHERS (Directors of Edinburgh and Leith Children's Aid and Refuge).—*J. C. Lorimer.*

No. 137.

*Parent and Child—Custody of children—Charitable institution—Responsibility of directors.*—Prior to 1884 S. established and managed a home for destitute children in Edinburgh.

In December 1882 a man applied to have his three children (all under five years of age) admitted to the home, and agreed to pay for their board at the rate of 2s. 6d. per week. The children were admitted, and he made payments to account of board down to June 1883, but not thereafter.

In May 1884 S. appointed a board of directors.

In May 1886 S. removed the children, without their father's consent, to a home she had established in Nova Scotia. The father having applied to the directors to have his children restored, S., at the request of the directors,

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**No. 137.** brought the children to Edinburgh in November 1886, and this fact was intimated to the father, but neither he nor the directors took any proceedings to obtain the custody of the children. S., who had concealed the children's address from the directors and from their father, again removed the children to Nova Scotia.

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In June 1888 the father presented a petition against S. and the directors of the home, praying to have the respondents ordained to restore the children to him. The directors maintained that they were not responsible for the delivery of the children, in respect (1) that they were not parties to their removal, and had never had them in their custody since; and (2) that they had intimated to the father the return of the children to this country in order that he might recover them if he wished to do so.

The Court, *holding* that the directors of the home had, by accepting office in 1884, become responsible for the custody of the children, pronounced an order ordaining them and S. to deliver the children to their father.

1st Division.  
M.

In December 1882 Arthur Delaney, painter, applied to Miss Stirling, the founder and honorary superintendent of the Edinburgh and Leith Children's Aid and Refuge, to have his three children (the eldest of whom was four years old) admitted into the Home at Stockbridge, Edinburgh, stating as his reason that their mother had died, and that it was impossible for him to look after them. They were admitted, and he agreed to pay for their board at the rate of 2s. 6d. each per week. He made some payments on account of board, but these appeared to have entirely ceased after June 1883.

In June 1888 Delaney presented a petition against Miss Stirling and the directors of the Refuge to the Court, praying that they should be ordained to deliver his children to him.

Mr James Colston and certain other directors, who alone appeared, stated that Miss Stirling had given up her house near Edinburgh, and had now taken up her residence permanently in Nova Scotia. With reference to the children they stated,—“(2) The object in Miss Stirling's acquiring her said property in Nova Scotia was that it might be a temporary home where she could maintain destitute and neglected children sent out from this country until they are placed in suitable homes in Nova Scotia, and through her means a considerable number of such children have been relieved and provided for, who have now a prospect of comfort and usefulness in that country. Of the petitioner's said children, one was taken by Miss Stirling to Nova Scotia in May 1886, and the other two in August of the same year—that is, after they had been for three and a-half or four years entirely neglected and deserted by their father. (3) In the end of the year 1886 the petitioner, through a law-agent, applied to the respondents for the children's address, which was at once given to him. He thereafter threatened proceedings for the return of the children. Shortly afterwards, and in order to save any trouble, the respondents communicated with Miss Stirling, recommending her to bring the children back to this country on her return. Miss Stirling, acting on this advice, brought back the children with herself, in November 1886, and the respondents believe she then took them to her private residence, which was then at Merleton, Wardie, near Edinburgh. Miss Stirling, however, never restored the said children to any of the homes under the management of the respondents, and she never informed them, and they do not know, how the said children were disposed of. The petitioner was aware, through information given to his agent by the agent for the respondents, that the children had been brought back to this country, and he made no effort to communicate with them or to obtain their custody. The law-agent who represented the petitioner intimated to the respondents that he had resolved not to take any proceedings such as had been threatened. In

these circumstances, the respondents submit that the petitioner, by deserting his children for four years, was himself entirely to blame for their having been taken to Nova Scotia, and further, that he is to blame for not asking the said children to be returned to him when they were brought back to this country. The respondents further submit that they did everything in their power to meet any reasonable desire on the part of the father of the children, by advising Miss Stirling to bring them back to this country as aforesaid. The present respondents have ceased to have any responsibility for the said children, and they have no control over their custody."

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Proof was led which bore out the statements made in the answers above quoted, and from which it appeared that the directors of the institution were first appointed in May 1884, that there were at one time a number of homes in connection with it, and that the charge and superintendence of these was to a large extent left to Miss Stirling prior to her resignation in 1887.\* It was shewn that the children had been brought back from

\* Mr Colston, the chairman of the board of directors, deponed,—“I am one of the directors of the Edinburgh and Leith Children's Aid and Refuge. I became chairman of the board of directors in 1884. Prior to that I was president of the committee of advice. Miss Stirling managed the whole establishment on her own account, but she desired the advice of friends occasionally, and I was one of those who acted as advisers. There had been no report published prior to 1884, and no list of directors. There was no board of directors prior to 1884. After that there were meetings of directors, and minutes were kept. The directors are in charge of the homes now, and have been since Miss Stirling resigned in the end of 1887. The directors did not manage the homes as they do now prior to Miss Stirling's giving up responsibility; it was Miss Stirling who managed them then. She was also the largest contributor to the funds, and I think the directors felt a diffidence in interfering owing to that fact. She contributed the greater part of the money expended.

The directors have never had anything to do with the management of the Nova Scotia farm, nor with sending out children to it. We knew that Miss Stirling was occasionally taking young people out, but we had nothing to do with selecting them. When children are sent abroad now it is under the directors' charge. I first heard about Delaney when Mr Considine" (who was Delaney's agent at that time) "threatened us with an action, towards the end of 1886. I had an interview with Mr Considine along with Mr Gray, and I stated that I had not the slightest objection to giving the children back. In pursuance of that view, a cable message was sent to Miss Stirling. I promised to Mr Considine that I would urge on Miss Stirling to bring the children back to Scotland. In November of the same year I heard from the secretary that the children had been brought back, and Mr Considine was informed of that fact. Miss Stirling refused to give up the children; she thought they were her property, and refused to give them up unless the law compelled her. The directors did not concur in her view. She refused to tell us where they were. The directors did everything they could to get Miss Stirling to give up the children, except bringing an action against her. The children were in Nova Scotia under Miss Stirling's care, and we induced her to bring them back, and having communicated to Mr Considine the fact that they were back, we expected he would look after them. They did not return to our home, and were not under our care. I don't know what was done with them when they were brought home: there is nothing in the books about them. We have no information about them except what is contained in Miss Stirling's recent letters to Mr Macdonald and Mr Gray. We have been all along, and are now, quite willing that the children should be restored to their father: we have no desire to have any litigation on the subject." Cross.—“The functions of the committee prior to 1884 were simply to assist a benevolent lady who desired to do good. I was president of the institution. The institution consisted of the

**No. 137.** Nova Scotia at the instance of the directors in November 1886, but that since the secretary of the institution had parted from Miss Stirling and them at the Caledonian Railway Station at that time, when he saw them into a cab, he had known nothing of their whereabouts. It was proved that the petitioner had thereafter unsuccessfully made every effort to ascertain where his children were. Letters were produced from Miss Stirling in Nova Scotia, the last dated 5th February 1889, in which she declined to give the directors the addresses of the children.

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After counsel had been heard upon the proof, and before the case was advised, the respondents lodged the following minute:—"Lorimer, for the compearing respondents, stated that, in consequence of the expression of opinion by the Court that the prayer of the petition could not be refused, the respondents undertake to apply forthwith to Miss Stirling for the return of the children to them, and, if necessary, to take proceedings in the Canadian Courts for that purpose; and they crave that in the meantime any judgment pronounced by the Court should be limited to the first finding in the prayer of the petition, namely, that the petitioner is entitled to the custody of his children."

At advising,—

**LORD PRESIDENT.**—When the petitioner applied in the month of December 1882 to have his children received into what is called the Edinburgh and Leith Children's Aid and Refuge, in point of fact the children were received by Miss Stirling, and it does not appear that anybody else was responsible for the custody of the children at that time except Miss Stirling. But it must be quite clear, I think, that when the respondents became directors of this institution in the year 1884 they assumed a responsibility for the safe custody of all the children that were in these homes or in other places belonging to the institution. And among other obligations and responsibilities which they thus incurred by

homes kept through Miss Stirling's benevolence, in which she was assisted by a good many ladies and gentlemen as advisers. My functions as chairman were just the ordinary functions of a chairman. I had no further duty. I should say Miss Stirling's contributions to the funds were five times as much as those of the general public. (Q.) When you heard that Delaney's children were in this country, why didn't you obtain from Miss Stirling information as to where they were? (A.) One man may take a horse to the water, but ten cannot make him drink. I don't consider that we were called upon to bring an action against her: we had brought the children within the forum of this Court, and Mr Considine knew Miss Stirling's residence at Merleton, Wardie. Mr Considine was told that the children were with Miss Stirling. She admitted that she had brought the children to this country. I did not consider it my duty to resign because Miss Stirling refused to give up the children."

A minute was lodged for the compearing respondents, which contained this statement:—"In the year 1884 a report was prepared and issued by Miss Stirling, titled 'Sixth and Seventh Annual Report, from January 1883 to January 31, 1884, of the Stockbridge Day Nursery and Infant Home.' It embraced the years 1882 and 1883, but there is no trace of any prior reports. It contains a 'List of office-bearers' for the future administration of the charity, including a president and seven directors. Miss Stirling's name is entered as 'Founder and Hon. Secretary.' The minutes of first meeting of the directors, which was written by Miss Stirling, is dated 1st May 1884.

"In the year 1885 a statement by the directors was issued, containing a history of the work of Miss Stirling. The directors therein announced that in future the movement should be known as 'The Edinburgh and Leith Children's Aid and Refuge for the Protection of Children.' In the years 1886, 1887, 1888, and 1889, annual reports were issued by the directors, containing a financial statement for the year."

becoming directors was the obligation to redeliver the children to their parents when they were demanded. Now, in point of fact, these children were taken out of the jurisdiction of this Court and out of the United Kingdom in 1886, and that was certainly a most indefensible proceeding. Nothing could justify that without the consent of the parents. The respondents, the directors of the institution, seem to have been sensible of that very soon after it took place, and they remonstrated with Miss Stirling, who had carried the children to Nova Scotia, and desired her to bring them back. In that I think they acted quite rightly. But, then, I think they acted very far short of their duty after the children were brought back to this country, because they allowed Miss Stirling, after she had brought the children to the neighbourhood of Edinburgh, to conceal them from their parents, and also from the respondents themselves. Indeed, there is an appearance on the part of the respondents of an indisposition to acquire any knowledge of where the children were, and to all applications on the part of the petitioner for access to his children there could be no satisfactory answer made. The consequence was that the children were again carried out of the country. Now, for that I think the respondents must be answerable, because they were thus violating the obligation which they had undertaken to be responsible for the safe custody of the children while they were in the institution, and to deliver them when the parents required them.

It is therefore, I think, impossible not to say that the respondents are under an obligation to deliver these children now to the petitioner; and the only question of course which perplexes one in dealing with the case is, that as the children are not here, it may require the lapse of some considerable time, perhaps proceedings in another country, in order to accomplish the object for which this petition was presented. I approve entirely of the spirit in which the minute is expressed, which Mr Lorimer has just read, and I am very glad to find from that that the respondents are now fully alive to what their responsibilities are. But I think it would be hardly consistent with the duty of the Court to abstain now from pronouncing an order against the respondents for the redelivery of the children. Of course that must be qualified to this extent, that they must have time; and the order which I would propose, with your Lordships' concurrence, to pronounce, is to ordain the whole parties called as respondents in the petition to deliver to the petitioner his children James, Annie, and Robina Delaney, named in the petition, and that on or before the first sederunt-day in October next; and further, appoint the respondents to report to the Court on Thursday, 18th July next, what steps have been taken in pursuance of this order.

LORD SHAND.—I am of the same opinion. There can be no doubt that from the time when the directors took office they were responsible for the custody of the children, and from the minute-book which has been produced, and the number of entries which it contains in reference to the boarding and treatment of children, they seem in point of fact to have undertaken and realised that responsibility. It follows that they also clearly came under an obligation to restore the children to their parents and guardians.

The only defence which can be made to this obligation is for the directors to shew that the petitioner has relieved them of that obligation. They say here that they put it into the power of the father to get back his children when they had the children brought home from America. That is the defence they make, but I do not think that it has been sufficiently made out. The directors were

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bound to have vindicated the custody of the children from Miss Stirling when they were brought home and kept in concealment, and to have put them at the disposal of the petitioner. The ground upon which the respondents are now ordered to deliver up the children is that in 1884 they undertook the custody of the children, and have not shewn that they have done anything to relieve themselves of the responsibility which resulted. The order which we are to pronounce will, I think, strengthen the hands of the directors in taking measures to have the children restored.

LORD ADAM concurred.

LORD MURE was absent.

THE COURT pronounced an interlocutor ordaining the whole parties called as respondents to deliver the children to the petitioner, and that on or before the first sederunt-day in October, and further, appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order.

E. DENHOLM YOUNG, W.S.—R. C. GRAY, S.S.C.—Agents.

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Macdonald.

DUNCAN MACDONALD AND OTHERS, Pursuers (Respondents).—

*A. S. D. Thomson.*

ALEXANDER MACDONALD, Defender (Appellant).—*Sym.*

*Donation—Mortis causa donation—Deposit-receipt—Effect of destination in deposit-receipt in proof of donation.*—J. M. took from a bank a deposit-receipt in these terms,—“Received from J. M., and A. M. his brother, to be drawn by them, or either, or survivor, £286, 19s. 2d.” Some months thereafter J. M. died while on a visit to A. M. After his death A. M., who became his executor, produced the receipt and claimed to have right to it as having been given to him when the deceased was ill, and in prospect of death. In an action of count and reckoning against A. M. as executor, after a proof in which, apart from the terms of the receipt, the only evidence of donation was the testimony of the alleged donee and his daughter, *held* that A. M. was in lawful possession of the deposit-receipt as creditor therein, and that it did not form part of J. M.’s estate.

2D DIVISION.  
Sheriff of  
Midlothian.  
I.

JOHN MACDONALD died at Edinburgh on 22d December 1887, intestate and unmarried. He was survived by two brothers, Alexander Macdonald, residing in Edinburgh, and Duncan Macdonald, residing at Abriachan, Inverness-shire, and by certain nephews and nieces, the children of his brother James, who predeceased him. Another brother, Hugh, had predeceased him without leaving issue.

In May 1888 Alexander Macdonald was decerned executor-dative *qua* next of kin to the deceased.

In December 1888 Duncan Macdonald and the children of James Macdonald raised in the Sheriff Court at Edinburgh an action of count and reckoning against Alexander Macdonald, as executor.

They averred that the estate of the deceased included besides certain other sums two deposit-receipts, one of which was with the Caledonian Bank, Inverness, for £280, dated 5th May 1887, and was in the names of John Macdonald and Hugh Macdonald, “repayable to either or survivor,” and the other of which was with the British Linen Bank, Inverness, also dated 5th May 1887, and was in these terms:—“£286, 19s. 2d. Received from Mr John Macdonald, Dochfour, and Mr Alexander Macdonald, his brother, to be drawn by them, or either, or survivor, two hundred and eighty-six pounds, 19s. 2d. sterling, which is this

day placed to the credit of their deposit account with the British Linen Company." No. 138.

The defender admitted that the money in the deposit-receipt with the Caledonian Bank was part of the estate of the deceased. He denied, however, that the money in the deposit-receipt with the British Linen Company was part of the estate of the deceased at his death, and averred that it was his own property by donation from the deceased. June 11, 1889.  
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The defender averred that the money contained in it "consisted of monies belonging jointly to the said deceased John Macdonald and the defender, —that it was the intention of the said John Macdonald that the whole of the contents of the said deposit-receipt should belong to and be the property of the defender, in the event of his survivance. Further explained and averred that the said deceased John Macdonald, some time before his death, delivered over to the defender the said deposit-receipt as his sole property, and gifted the whole contents thereof, so far as belonging to him, to the defender, and the same is his sole and exclusive property."

The pursuers pleaded, *inter alia*;—(3) The sum in the said deposit-receipt for £286, 19s. having belonged exclusively to the deceased, and not having been gifted by him to the defender, the pursuers are entitled to their respective shares of the same, as representatives of the deceased.

The defender pleaded;—(2) The deposit-receipt in question having been taken jointly to the said deceased John Macdonald and the defender, payable to either or the survivor, and the said John Macdonald having intended that the same, and the contents thereof, should be the exclusive property of the defender, in the event of his survivance, the same does not form part of the estate available for division. (3) The said deceased John Macdonald having delivered the said deposit-receipt to the defender by way of gift, the pursuers are not entitled to participate in the contents thereof, and the same belongs exclusively to the defender.

The Sheriff-substitute allowed the defender a proof of his averments, and the pursuer a conjunct probation.

From the proof it appeared that the deceased had for many years been a butler in a family in Inverness-shire, while the defender had been a coachman with another family in Morayshire. Some time before his death the deceased had gone with his employer's family to reside most of the year at Brighton, but was also part of the year in Scotland. The defender having left his employment in Morayshire had come to Edinburgh about 1882, and the deceased when in Scotland had been in the habit of calling on the defender, with whom he was on affectionate terms. The deceased, who was about seventy years of age, came from Brighton to the defender's house in bad health in October or November 1887. At first he slept in a room taken for him by the defender, who could not receive him, owing to his house being occupied by lodgers, but he took his meals with the defender and his family, and spent the day with them. After a week, however, he resided altogether with them. He was ill of internal cancer, and was told by the doctor who attended him that he would not recover.

The parole evidence in proof of the alleged donation consisted only of that of the defender himself and of one of his daughters, and is quoted below.\*

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\* The defender deponed,—“My brother John came down from Brighton to my house about the end of October 1887. He was in bad health at that time, and came to reside with me on that account, to see if the change would do him good. The doctor had ordered him to take a change. He mentioned to me that he was to stay with me when he retired from the service of Lady Georgina Baillie. His health

No. 138. None of the pursuers had been in Edinburgh at the time of the death of John Macdonald. The deceased had been on friendly terms with them,

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did not improve after he came down to Edinburgh; he got weaker, and died on 22d December 1887. I recollect his taking an airing in a cab about ten days before his death. When he came into the house after the airing, he said to me that the doctor had told him he was not likely to get rid of his trouble, and he wished to settle matters. He opened his desk and took out a paper which he handed to me, and said 'That is for you, Sandy; that is for you wholly.' (Shewn deposit-receipt for £286, 19s. 2d., by the British Linen Bank, dated 5th May 1887)—That is the paper which my brother handed to me on that occasion. I said to him that I wished he could live a little longer and enjoy it himself. When I got the deposit-receipt from him, I put it into my own trunk. I never gave it back to him again. It remained in my possession in the trunk until the Saturday night after the funeral. When my brother gave me that deposit-receipt, he shewed me the deposit-receipt for £280, 11s. 4d., by the Caledonian Bank, dated 5th May 1887. He did not give me that one, but put it back, saying that 'he would settle about it to-morrow.' By that, I understood that he meant to draw the money. He did not draw the money. He was not so well next day, and was not able to go out. He got worse every day after that, till he died. He was never out again after the occasion when he gave me the deposit-receipt by the British Linen Bank. The other deposit-receipt remained in his desk till after the funeral. . . .

"Cross-examined.— . . . On the occasion when my brother returned to the house from the airing about ten days before his death, he said that he wished to settle up affairs, because the doctor thought that he would not get rid of his trouble. Then he opened his desk. I had not spoken to him on the subject first; it was he himself who referred to it. It was Professor Muirhead who was attending him. My brother opened the desk, and took out the deposit-receipt for £286, and said, 'That is for you, Sandy, wholly.' My daughter was present at the time. It was in the afternoon, but I cannot give the exact hour. His complaint consisted of cancer in the stomach. (Q.) When your brother spoke of settling up affairs, did you think he was giving you back what was your own? (A.) Yes, along with his own. (Q.) How do you know that he was not merely giving you back your own? (A.) It was only £100 I gave him. (Q.) How did you come to suppose that he was giving you the whole of the deposit-receipt? (A.) He said it; he said, 'That is for you yourself.' He gave me the paper as it was. (Q.) May he not have been giving you back your own money? (A.) I don't know; he may. (Q.) Did it not occur to you that he may have given you your own money back, and the rest to distribute as executor? (A.) No, that never occurred to me. (Q.) Is not that possible? (A.) I don't think it is possible. (Q.) Why? (A.) Because he said it was for myself. He left the other receipt in his desk. I am quite certain it was left there till after his funeral. While my nephew and niece were in the house after the funeral, I did not take two receipts out of my own trunk; I just took out the one in question, for £286. The other was in the desk, along with the Post-Office Savings' Bank book. My brother did not give his watch to me; it was to my daughter he gave it. I did not see him give it to her, but I know that she nursed him. He never told me that he was going to give the watch to my daughter. I found the purse on the table in my brother's own bedroom. It was there before he died. I did not leave it on the table when I first saw it; as far as I remember, I put it into my pocket or in the desk. I was north at Abriachan last week seeing the pursuers. (Q.) Did you ask Maggie Macdonald if she saw the receipts coming out of the desk? (A.) Yes. (Q.) Why? (A.) Because they said I had taken the two receipts out of the one place. (Q.) When did you hear that? (A.) I heard that at Abriachan. They said I had taken the two receipts out of the desk. I asked her if she saw it, and she said 'No.' (Q.) When your nephew and niece were with you after the funeral, did you say in their presence, 'I wonder very much that John would put my name in the receipt without telling me'? (A.) No; I will swear that. (Q.) Did you not say it two or three times? (A.) No. It is

and had been in use to visit them at Abriachan when he was in the north. His last visit was in the month of April preceding his death, when he

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not very likely I would say that when I knew. I did not tell my nephew and niece when they were in the house that the sum in the deposit-receipt had been gifted to me. (Q.) Why? (A.) Because I had no reason for saying it. When I shewed them the deposit-receipt for £280, 11s. 4d. they got quarrelsome, and they said there was more than what I had shewn them. I shewed them the other receipt, but John took the pet and went away out for two hours. The deceased did not talk to me about the other receipt further than what I have stated. He was north at Hugh's funeral, and I was with him. He personally renewed the receipt. I have noticed that it was renewed after his brother died. (Q.) Is not that very curious? (A.) I cannot say whether he had done this before going to Inverness or after coming from it. My brother Hugh died two years ago in April. (Q.) Are you sure the Hugh Macdonald mentioned in the receipt is the man who is dead? (A.) Yes; I have a nephew of that name. (Q.) Could it not be he? (A.) No. I have given my brother John some money before I sent him the £30. I had given him £5 at a time. I sent the £30 from Oban to my brother in Inverness by a cheque on the bank. I sent the cheque through the post-office. I think the next sum I gave my brother was one of £10 about twelve months after that at Inverness. I believe that is the last sum that I gave him. My brother had money deposited in bank before May 1887, but I cannot say how long before. I knew that, because he was always speaking about it when we met. I knew that he had money in the Caledonian Bank. He had a deposit-receipt before, and I saw him change it in Inverness for the one now in question with the British Linen Bank on the 5th of May 1887. I was with him at the bank at the time. (Q.) Did he put more money into the bank on the 5th of May 1887, or did he get some out? (A.) I cannot say. (Q.) Did he give you any interest for the money you gave him? (A.) I understood that the interest was always added to the money. Re-examined.—(Q.) Repeat the exact words that John used when he gave you the deposit-receipt? (A.) He said to me,—‘Sandy, I wish to settle up affairs. I don't think I am going to get rid of my trouble.’ He said the doctor had been saying so. He then opened his desk and took out the deposit-receipt, and said,—‘That is for you, wholly to yourself.’”

Margaret Macdonald, the defender's daughter, deponed,—“My uncle died on 22d December 1887. I recollect him going out for an airing in a cab about ten days before his death. When he came back I helped my father to bring him into the house. He said,—‘The doctor told me—and I am afraid he is right—that I won't get better.’ He then asked for his writing-desk, and went to it, saying,—‘As long as I am able I would like to settle affairs, if I can.’ He opened his desk and took out a deposit-receipt by the British Linen Bank, and handed it to my father. I am now shewn the deposit-receipt. It was handed to me at the time, and I read it. When my uncle handed it to my father he said,—‘Sandy, here, take this; I give it to you wholly for yourself; and I hope that you will remember that Duncan has been my care all my life, and that you will always see to him, that he may never want.’ My father put the deposit-receipt into his pocket, and afterwards into his own box. My uncle, at the time he gave my father the deposit-receipt, took a Savings' Bank book for £19 out of the desk and handed it to my father, and asked him to give it to his brother Duncan. My uncle then lifted another deposit-receipt and said,—‘Tomorrow, if I am well, and spared, I will go and see about this, because I would like to have things made right for Duncan.’ (Q.) What did you understand by him saying that? (A.) From the rest of his conversation, I understood that he meant to go to the bank and withdraw the money. He did not mention what he was to do with the money. My uncle never was out after that; he grew gradually worse, until he died. The conversation to which I have referred took place in my uncle's bedroom while he was sitting in a chair. There was nothing else taken out of the desk at that time to my knowledge. (Q.) No bank book? (A.) No. He repeatedly asked my father to look after his brother Duncan.

No. 138. attended the funeral of his brother Hugh, and settled his nephew John Macdonald, one of the pursuers, in the croft at Abriachan, which was held by the family. They had been informed by the defender of the serious illness of the deceased shortly before he died, and two of them left Abriachan at once for Edinburgh in order to see him, but he was dead before they arrived.

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The evidence of these two pursuers was in conflict with that of the defender on certain points. They deponed that on the occasion of a conversation with the defender after the funeral he took both the deposit-receipt in question and that by the Caledonian Bank out of his own trunk, whereas the defender, in his evidence quoted above, stated that he kept the former deposit-receipt in his own possession after the gift of it to him and left the other in the deceased's desk. The pursuers also stated, in contradiction to the defender, that the defender had at the same occasion repeatedly expressed surprise at his name having been put in the deposit-receipt in question. They also stated that he did not at first tell them that the deceased had given him the deposit-receipt before his death; and further, that the defender had stated that he had himself given the gold watch belonging to the deceased to one of his daughters, whereas the defender stated that he had said the deceased gave the watch to the girl for nursing him in his illness.

At the time of the death of the deceased his purse, containing about £12, was in his room. The defender in his evidence stated that he had put it in his pocket or in the desk of the deceased, but that it had gone amissing at the time of the funeral.

The Sheriff-substitute (Rutherford), on 18th March 1889, pronounced this interlocutor:—"Finds in fact and in law (1) that the defender has failed to prove that the deposit-receipt, No. 10 of process, dated 5th May 1887, or the sum of £286, 19s. 2d. sterling therein mentioned, was a gift or donation to him by the deceased John Macdonald; (2) that the said sum of £286, 19s. 2d., with accruing interest thereon, was *in bonis* of the said John Macdonald at his death on the 22d of December 1887, and falls to be included in the account of his personal estate to be given up by the defender as his executor-dative," &c.\*

. . . Cross-examined.—My uncle John was very anxious that his brother Duncan should be taken care of. I believe Duncan is weak, mentally and otherwise, and my uncle took care of him as if he were a child. I was not astonished that my uncle John should speak of Duncan when he gave my father the deposit-receipt. I remember being in the kitchen with my father and my cousins after my uncle's funeral. They began to talk about money matters. My father shewed them the Caledonian Bank receipt. (Q.) Did he go to the desk for it? (A.) Yes; he went into the other room. As far as I remember, they went in with him; one of them, at least, did so. It was when they said there must be more that my father shewed them the British Linen Bank receipt. (Q.) Did your father take two receipts out of the chest in the kitchen? (A.) He took out three. One of them belonged to my mother, and was a deposit-receipt for £90 on the British Linen Bank. My father merely lifted it up and put it down again. . . . (Q.) Did your father tell either of your cousins that this deposit-receipt had been gifted to him? (A.) I believe he did. He said it was his own; but I don't know whether he gave them any particulars."

\* In a note the Sheriff-substitute stated that the defender's daughter gave her evidence in apparently a very truthful manner, but that the circumstances appearing from the proof, and which are detailed above, were "such as to suggest so much doubt (the Sheriff-substitute is very far from saying it is more than a doubt) regarding the evidence of the defender and his daughter, that he is unable to hold the proof of donation to be sufficient."

The defender appealed to the Court of Session, and argued ;—The story No. 138. of the alleged donation as told by the defender and his daughter was consistent and probable in itself. It was quite a probable thing that a man, believing himself to be dying, should give his brother, with whom he was on affectionate terms, a portion of his means. That derived great probability from the fact that the deceased had taken the deposit-receipt in that brother's name as well as his own. That shewed a purpose to benefit his brother which (though it was settled that a deposit-receipt could not receive effect as a testament by virtue of the destination in it) was important in proof of the gift.<sup>1</sup> The evidence of delivery was distinct, and unshaken in cross-examination. The Sheriff-substitute appeared to have thought it credible in itself, but to have held that doubt was raised by certain discrepancies between the evidence of the defender and that of the pursuers. But it was evident that the pursuers might be mistaken in their understanding of what the defender said at the time of their meeting, and as to the precise place from which he took the deposit-receipts when he shewed them. On the other hand, if the defender were not believed, there was no escape from the conclusion that he had clandestinely possessed himself of the receipt, and had along with his daughter invented and told a false story in evidence to conceal that. It was true that the deceased expressed a wish that the defender should take care of Duncan Macdonald, but there had been no attempt to make a verbal trust for administration. It was nothing but a pious wish. It was not proved that the defender had contributed any specific sum to the deposit-receipt, but it was proved that he had contributed something. That, again, made the defender's evidence as to the deceased's conduct the more credible.

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Argued for the pursuers ;—The deposit-receipt itself conferred no title.<sup>2</sup> Its terms would not constitute a legacy, nor settle whether part of the contents belonged to each, so long as the deceased kept the receipt, nor give the defender any right by mere survivance as against the other next of kin of the deceased. The terms of the receipt might be explained by the banker having suggested the taking of it in that form for convenience of administration. On the evidence donation was not proved. The defender had a heavy *onus* of proof to discharge.<sup>3</sup> The presumption was always against donation. It was the heavier from the circumstance that the deceased died in the house of the defender, with no other relatives near him than the defender and his family, though other relatives equally near might have been sent for in time to ensure their being with him at his death. The only evidence adduced to discharge that *onus* was that of the alleged donee himself and his daughter, and the Judge who had heard it had not held it sufficient. It would be very dangerous to accept the evidence of the donee himself as sufficient to prove the donation even if it was uncontradicted. Here it was contradicted, not indeed as to the fact of the donation, for there were no other witnesses present at the scene he and his daughter alleged to have taken place, but on numerous points as to what had occurred on the first occasion when other people were present. Even assuming the deceased to have used

<sup>1</sup> *Crosbie's Trustees v. Wright*, May 28, 1880, 7 R. 823 (Lord President's opinion); *Sharp v. Paton*, June 21, 1883, 10 R. 1000 (Lord Shand's opinion); *Connell's Trustees v. Connell's Trustees*, July 16, 1886, 13 R. 1175.

<sup>2</sup> *Cuthill v. Burns*, March 20, 1862, 24 D. 849; *Watt's Trustees v. Mackenzie*, July 1, 1869, 7 Macph. 930.

<sup>3</sup> *Ross v. Mellis*, Dec. 7, 1871, 10 Macph. 197, 44 Scot. Jur. 119; *Sharp v. Paton*, 10 R. 1000.

**No. 138.** defeat the evidence of donation, if it is in itself credible. I believe the defender and his daughter, and the counter evidence has made no substantial impression on my mind. The sort of discrepancy which exists between the evidence of the pursuers and that of the defender on the incidents occurring after the funeral is just such as one would expect to find where parties are at disagreement on money matters, and where one party is suspicious of and endeavours to discredit the other's evidence. Discrepancies as to whether the deposit-receipt was taken out of the deceased's desk or out of the defender's chest are just such discrepancies as will occur in similar circumstances, without there being any wilful falsehood on either side. They do not create any doubt in my mind as to the perfect *bona fides* of the defender and his daughter.

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I come then to the conclusion that the interlocutor of the Sheriff-substitute ought to be altered. I think he has given too much weight to the discrepancies in the evidence which I have noticed.

**LORD YOUNG.**—I am of the same opinion, and generally on the same grounds. I ventured to point out during the course of the argument that though donation was in a sense the question involved here, the case is peculiar in this respect that the true question is whether or not the defender is the lawful holder of this document of debt (which is a deposit-receipt), as the creditor therein. This deposit-receipt is simply a document of debt by a banker to his client.

It has been decided, and I say nothing upon the decision here, that such a document, being taken in terms payable to two persons and the survivor of them, will not operate as a destination in the same way as these words would operate in a money obligation granted by another person who is not a banker.

There is a great deal to be said for and against this decision, and I would only venture to indicate my own opinion that when a proper case arises I think the question may well be reconsidered. I only pause to notice here that the document in question, the lawful possession of which as creditor therein is the question in this case, is a deposit-receipt.

On that question we have the evidence upon which the Sheriff-substitute, whose judgment is entitled to great weight, has decided that the defender is not in lawful possession as the creditor therein.

In considering the evidence, I think it not amiss to inquire in this, as in many other cases, what must have been the judgment in the legal view in the absence of evidence on either side.

The defender is in the possession of the deposit-receipt, and his name is written upon it as creditor therein, and he is the only creditor therein in the circumstances which have occurred. What then, in the absence of all evidence, would have been the legal position? It is true his name happens to be mentioned second in the document. But I look on this as immaterial. Where you have a deposit-receipt granted to two persons for a sum placed to their credit, you must have one name mentioned first. Does it matter which? Therefore, in the absence of all evidence, Alexander Macdonald being the survivor, and being in possession of the deposit-receipt, is in exactly the same position as John Macdonald.

It is said, however, that upon the evidence he cannot be held to have got it lawfully as the creditor therein. How stands the evidence on this matter? It appears, on the only evidence upon which we must determine the question,

upon the point. I cannot help thinking that the pursuers here would have known of the practice if it really existed, and could have proved the fact in regard to this particular transaction had the fact been as they alleged in debate.

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We must assume, then, that the terms of the deposit-receipt were those in which John Macdonald requested that it should be drawn up, and in that view the case of *Crosbie* is of importance, because it is settled that the terms of such a receipt are, in the words of the Lord President, "very important elements of evidence, because they indicate some purpose of the deceased when he took the deposit-receipt in these terms." I may add that in that opinion all the Judges concurred.

Now, the receipt being in these terms, the defender says it was given to him as his own property by his brother John at a time when John believed himself to be dying. The evidence which we have as to what passed is given by the defender and his daughter Margaret, and they substantially concur in the matter. John Macdonald is said in the proof to have addressed the defender thus,—“Sandy, I wish to settle up affairs. I don't think I am going to get rid of my trouble.’ . . . He then opened his desk, and took out the deposit-receipt, and said, ‘That is for you, wholly to yourself.’” This is the evidence given by the defender, and his daughter Margaret confirms it. The words deponed to by her are not exactly the same as those deponed to by the defender, but they are substantially in each case the same words.

It is proved that added to these words there was an expression used by John to the effect that he desired that the defender should take care of another brother Duncan, who was imbecile. I cannot assent to the pursuers' criticism upon this evidence that it evinces a desire on the part of the deceased that the money contained in the deposit-receipt should be administered in trust for Duncan, rather than an intention to hand it over to the defender for his own use, with a pious request that he would look after his weak brother. It appears to me that if the words were used they were used with the latter intention only.

The next question is whether the evidence of the defender and of Margaret, who is the only other witness who could speak to the facts, is to be believed. I for my own part do believe it, and I think that we ought to dispose of the case on that footing.

But then it is said that there is some contradictory evidence, and undoubtedly there is, but not as regards what occurred at the time when the donation was given, but as to what occurred after the funeral.

In my opinion, however, the question is not as to whether there is contradictory evidence. It was suggested in the argument on the proof that unless the evidence of the party supporting the donation stood absolutely uncontradicted it could not be given effect to. But the true question is whether the contradictory evidence casts any doubt on the evidence as to the truth of the proof of donation. It would be impossible in most cases to establish a donation at all, and the donee would be at the mercy of the party interested in disputing the donation, if we were to accept the doctrine that because some evidence could be brought forward in opposition to that of the donee, therefore the donation must necessarily be held not proved. It would be iniquitous to allow the evidence of donation to be set aside merely because there existed some counter evidence. There must be a real doubt made upon the mind by the counter evidence to



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The defender is in the possession of the deposit-receipt, and his name is written upon it as creditor therein, and he is the only creditor therein in the circumstances which have occurred. What then, in the absence of all evidence, would have been the legal position? It is true his name happens to be mentioned second in the document. But I look on this as immaterial. Where you have a deposit-receipt granted to two persons for a sum placed to their credit, you must have one name mentioned first. Does it matter which? Therefore, in the absence of all evidence, Alexander Macdonald being the survivor, and being in possession of the deposit-receipt, is in exactly the same position as John Macdonald.

It is said, however, that upon the evidence he cannot be held to have got it lawfully as the creditor therein. How stands the evidence on this matter? It appears, on the only evidence upon which we must determine the question,

that John paid the money into the bank, being accompanied by his brother at the time, on a deposit-receipt in the terms which I have quoted, and that he left it there. I lay aside all consideration at this moment of any evidence we have as to where the money came from, *e.g.*, Alexander depones that to the extent of £100 the money came out of his pocket, and, so far as he knows, the residue came out of John's. I lay all that out of sight, and I assume that John paid the whole money and kept the receipt.

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I am clearly of opinion that he was creditor on the face of the document, entitled to uplift the money, and under no obligation whatever, on the face of it, to Alexander. He might have gone to the bank, uplifted the money, and put it back again upon another receipt. He kept the money in his power by retaining possession of the deposit-receipt. I reach that conclusion upon the evidence.

How then did it pass into Alexander's hands? The evidence on this matter is that, some days before his death, John handed the document to him, and said, "That is for you entirely," meaning, as Alexander understood, that he was thereafter to be in lawful possession of the document of debt as the creditor therein on his own account in the bank. We may doubt the witnesses, but there is no other evidence. It has been suggested that Alexander, in whose house John died, took advantage of his opportunities of access to John's repositories and took out the document, either in John's lifetime without authority, or after his death. It would, in my opinion, be unwarrantable to deal with the testimony of the appellant and his daughter in that manner. It would be just saying that Alexander and his daughter were guilty of perjury to cover crime. I should not be prepared to do so, even if there were no antecedent probability in their account of the matter. But their account has every antecedent probability. It has, as your Lordship has pointed out, strong antecedent probability from the terms of the deposit-receipt, for these terms signify an intention on John's part when he took the document to act exactly as the two witnesses say he did act. He signified his intention as clearly as if he had said to a friend, "I intend to give the document to Alexander when my end approaches." That will give antecedent probability of his acting conform to his intention expressed in writing or otherwise. I think it is an intention expressed in writing. He had no obligation, but it remained a record of the intention which was in his mind at the date of it.

It is not upon the authority of any rule of law, but because human understanding cannot resist it, that we incline to believe evidence which states what it is likely a man would do with an intention influencing his mind. It is the merest truism to say that an antecedently probable story is more easily proved than a statement which is antecedently improbable. It was highly probable that John would act in conformity with the intention expressed on the face of the deposit-receipt.

The whole evidence is, as I have said, to the effect that he did so act, and in that view Alexander was thereafter in lawful possession of the document as creditor on his own account. I am therefore of opinion that the findings in point of fact in the Sheriff-substitute's interlocutor ought to be altered, and that we should find that the appellant is in lawful possession of the document as creditor therein.

LORD RUTHERFURD CLARK.—The sole question in the case is, I think, whether

No. 138. the deposit-receipt given to the appellant was a donation *mortis causa*. I confess I have felt great difficulty in its decision, but on the whole I think it has been proved that the donation was made. I think therefore that the appellant must succeed.

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LORD LEE.—I always feel great difficulty in altering the judgment of the Sheriff-substitute, who sees and hears the witnesses. I think, however, that the view taken by him here as to the evidence leaves the case open for us as one of evidence.

I do not find it necessary, as Lord Young does, to give an opinion upon the import and effect of being the holder of such a document as the one before us. I think the question as to what importance is to be given to the possession of such a document always depends upon the title upon which it is held, and that question depends necessarily on evidence. It may be a title of absolute property, or one of ownership by donation *inter vivos*, or by donation *mortis causa*. The question upon which of these titles such a document is held can only be decided upon evidence. I do not therefore think we can decide the question on the terms of the document alone and without evidence. I think it is not proved that any of the contents of the deposit-receipt in this case originally belonged to Alexander. The *onus* lies on the defender to prove this. He must prove donation, and donation *mortis causa*. It is not the same case as would have been presented if John had called in a witness, and handed over the deposit-receipt to Alexander in his presence. If such were proved, possibly a case of donation *inter vivos* might be made out, but it would depend on circumstances whether it was a donation *inter vivos* and revocable. Here it was only a donation *mortis causa*, and I hold that it lay upon Alexander to prove it. I agree, after an examination of the evidence, that it goes on the whole to favour the allegation that it was a donation *mortis causa*.

I only wish to add upon the question whether there was or was not donation, I consider it legitimate and reasonable to look at the fact that there was a deposit-receipt in these terms as bearing upon the question of antecedent probability, and therefore as tending to corroborate the evidence on oath of Alexander and his daughter.

THE COURT pronounced the following interlocutor:—"Find in fact that the late John Macdonald delivered the deposit-receipt for £286, 19s. mentioned in the record to the defender Alexander Macdonald, to be held by him for his the defender's behoof: Find in law that the defender is in the lawful possession of the same as creditor therein, and that it does not form part of the estate of the said John Macdonald: Therefore recall the judgment of the Sheriff-substitute appealed against: Sustain the third plea in law for the defender: Find him entitled to expenses in this Court: . . . Remit the cause to the Sheriff, with instructions to proceed therein as accords," &c.

ALEXANDER ROSS, S.S.C.—D. MILNE, S.S.C.—Agents.

THE BANK OF SCOTLAND, Pursuers (Appellants).—*Sol.-Gen. Darling—Murray.*

No. 139.

HENRY LAMONT & COMPANY, Defenders (Respondents).—*Low—C. K. Mackenzie.*

June 12, 1889.  
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*Bill of Exchange—When presentment for payment not necessary—Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), secs. 45, 46.*—The Bills of Exchange Act, 1882, enacts, by section 45,—“Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented, the drawers and endorsers shall be discharged,” and by section 46, subsec. (2),—“Presentment for payment is dispensed with. . . . (c) As regards the drawer, where the drawee or acceptor is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. . . .”

The affairs of a firm being involved, they, in November 1885, entered into an agreement with, *inter alios*, their principal creditors, including the Bank of Scotland, and L., a trader, who held their acceptance for £700, whereby, on the narrative that the creditors were willing to wait the result of the liquidation after mentioned, the firm conveyed their whole estates to certain persons as attorneys and managers to carry on the business, to ingather the debts due to the firm, and from time to time to make a rateable division of them among the creditors who were parties to the agreement. The attorneys and managers, by virtue of powers in the agreement, renewed from time to time L.'s bill above mentioned until April 1888, when they refused to renew it. In an action for payment against L., the drawer, by the Bank of Scotland, with whom he had discounted it, the defender pleaded that he was discharged from liability in respect of the fact, which was admitted, that the bank had not presented the bill to the acceptors for payment. *Held* that presentment for payment to the acceptors was not necessary, seeing that by the agreement the acceptors were not bound to pay the bill, and that the drawer had no reason to believe that it would be paid if presented, the acceptors being bound only to make payment rateably among the creditors of the funds in hand.

In November 1885 the affairs of Ferguson, Lamont, & Company, marine insurance brokers, Glasgow, were in a somewhat involved condition. Charles Lamont, the sole partner, entered into an agreement, dated 12th November 1885, for the purpose of having the business of the firm carried on and the debts of the firm gradually liquidated. Charles Lamont, as sole partner of the firm, was the first party to this agreement. The second parties were John M. Lamont and William Dodd, clerks of the firm, who were to act as attorneys and managers for carrying on the business. The third parties were the principal creditors of the firm, viz., Mr James Baill, submanager of the Bank of Scotland, Glasgow, as representing the bank, Henry Lamont, sole partner of H. Lamont & Company, and two other creditors.

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Sheriff of  
Lanarkshire.  
M.

The agreement proceeded on the narrative that it was “expedient that the first party should consent to a transference of his whole estate and effects excepting as after mentioned, and the management and conduct of his business affairs to the attorneys and managers herein named, and that with the view of the same being liquidated and applied towards gradual payment of the claims of the third parties; and whereas the third parties are willing to wait the result of such liquidation, and to grant time to the first party and his said firm, but that on the terms and conditions hereinafter stipulated.” By sundry clauses the first party agreed to abstain from active management of his business, and consented to his affairs being managed by the second parties, subject to the approval of a committee of advice representing the third parties; and he further assigned to the second parties the whole assets belonging to himself or his firm,

No. 139. constituting them managers and attorneys, with full powers to conduct everything relating to his business, and in particular to draw, accept, and negotiate bills.

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The eighth purpose of the agreement was as follows,—“As the object of these presents is to ingather the assets of the foresaid businesses, and gradually apply the same towards the reimbursement of the third parties, it is provided and agreed that after paying preferable charges, salaries, allowance to the first party, and other claims as aforesaid, and so soon as the funds received by the second parties as commissions and actual profits shall admit, a rateable division will be made with the concurrence of the said committee of advice to and among the third parties, and from time to time thereafter until their claims are duly paid, the amount of said claims as at the date of these presents being stated in the schedule annexed, and signed as relative hereto.”

A schedule of the debts due to the third parties was appended to the agreement. In this schedule the debt due to Henry Lamont was entered at £1502, 14s. 10d. Part of this sum consisted of a bill for £665, which was to fall due in December 1885, and which Henry Lamont & Company had drawn on Ferguson, Lamont, & Company, and they had accepted.

The affairs of the firm were managed under the arrangement during the years 1886, 1887, and 1888. The bill for £665 was from time to time renewed, the new bills being accepted by the second parties in the name of the firm. The last renewal was on 2d January 1888, when a bill for £720, 4s. 4d. (including interest) was granted. This bill which was accepted by Ferguson, Lamont, and Company, payable at their office, fell due on 6th April 1888.

The acceptors having, owing to some disagreement into which it is unnecessary to inquire, refused to renew the bill, the Bank of Scotland, with whom the bill had been discounted by the drawers, sent notice to the latter that the bill was due, but they refused to pay it, on the ground that it had not been presented to the acceptors for payment.

Prior to the 6th April the bank issued the usual notices to the drawers and acceptors that the bill would become due on that day. It was not however presented to the acceptors for payment, nor noted, as the bank's submanager thought that unnecessary in consequence of the agreement, his view being that the attorneys and managers for the acceptors were bound thereby to pay all the creditors rateably, and could not retire the bill.

The action was in consequence brought by the bank against the drawers for payment of the bill.

The defenders pleaded, *inter alia*;—(1) The pursuers having failed duly to present the bill for payment to the acceptors, and also to note the same for nonpayment, the drawers have been discharged.\* (2) The pursuers

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\* The Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), sec. 45, enacts,—“Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented, the drawer and indorsers shall be discharged.

“A bill is duly presented for payment which is presented in accordance with the following rules:—

“(1) Where the bill is not payable on demand, presentment must be made on the day it falls due. . . .

“(3) Presentment must be made by the holders or by some person authorised to receive payment on his behalf, at a reasonable hour on a business day, at the proper place, as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf. . . .

“(4) A bill is presented at a proper place (a) where a place of payment is specified in the bill and the bill is there presented.”

by their actings and also by their failure duly to negotiate the bill, and to protect the rights of the drawers in accordance with the statutes, have lost recourse against the defenders, and the action ought to be dismissed, with expenses. No. 139.  
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The Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds pursuers are holders for value of the bill in question, of which bill the defenders are the drawers, and Ferguson, Lamont, & Company the acceptors: Finds admittedly said bill was not duly presented: Finds that no binding waiver of presentment on the part of defenders has been proved by pursuers: Finds, therefore, that, under the 45th section of 45 and 46 Vict. cap. 61,\* defenders are entitled to absolvitor: Sustains accordingly the defences, and assoilzies the defenders," &c.

The pursuers appealed to the Court of Session, and argued;—Presentment of this bill was not necessary, for the attorneys and managers of the acceptors could not have retired it, consistently with their duty. Their duty was to make "a rateable division, with concurrence of the committee of advice," among the acceptors' creditors. All parties—the pursuers, the defenders, and the acceptors—were parties also to the agreement. The pursuers if they had presented the bill for payment would, as the defenders well knew, have been asking the acceptors to act in the face of the agreement, the purpose of which was a gradual liquidation through a committee. The pursuers would have had no right to take payment in full, if offered, on presenting the bill, and were therefore not bound to present it. It was a case of presentment being excused as provided by the 46th section of the Bills of Exchange Act.† Presentment would, in the circumstances, have been a mere form, and the defenders had no legitimate interest to insist upon it. The participation in the agreement operated as an implied waiver of presentment.

Argued for the defenders;—The liability of the drawer of a bill was conditional on certain proceedings, in case of dishonour, being duly taken.‡ By section 45 (quoted *supra*) a bill must be "duly presented" for payment under penalty of discharging the drawer and indorsers. The place of presentment must also be attended to, and here it was the office of the acceptors. It was said that presentment would have been futile, and that that liberated the pursuers from the obligation to present the bill. But that section applied to cases in which there was no reason to believe a bill would be paid. But this bill was not worthless. It was to be paid out of the funds of the acceptors by their managers and attorneys, who were conducting a profitable business. With authority of the committee of advice, the bill could quite competently have been paid. If the

\* Quoted *supra*, p. 770.

† The Bills of Exchange Act, 1882, sec. 46, enacts,—"*...* Presentment for payment is dispensed with,—(a) Where, after the exercise of reasonable diligence, presentment as required by this Act cannot be effected. *...*

"(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

"(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

"(e) By waiver of presentment, express or implied."

‡ The Bills of Exchange Act, 1882, enacts (sec. 55),—"The drawer of a bill by drawing it (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken."

No. 139. bill had been in the hands of another bank they would certainly have been bound to present it, and would have presented it for payment. The question was not whether the drawer had been prejudiced, it was whether presentment had been waived, or rather whether non-presentment had been excused.

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LORD JUSTICE-CLERK.—It appears that the main question which was argued in this Court was not argued to any extent before the Sheriff-substitute, but we have heard full argument on it, and I think we are now ready to dispose of it. The firm of Ferguson, Lamont, & Company parted in 1885 with the entire control of their own business, and also with their power to uplift the debts due to them and to pay those due by them. They assigned their whole estates and assets to a committee of their creditors to be managed under an agreement by which the committee of management were empowered to transact all the company's business, and collect the debts due to them and make a rateable distribution of the funds among the creditors. At the date of the agreement there were interested in the firm's estates, among others, the Bank of Scotland and Mr Henry Lamont, both of whom were creditors, and both of whom were also parties to the agreement. The debt due to Henry Lamont was about £1500. In connection with part of it he had drawn a bill upon Ferguson, Lamont, & Company for about £700. They accepted that bill, and he then discounted it at the Bank of Scotland and got the proceeds. While that bill, or a renewal of it, was current this agreement was entered into, the bill having been renewed when it fell due, and thereafter from time to time new bills being given to replace it.

Then there came a time when (owing, I think, to some personal disagreement between the brothers Lamont, which is not very clear upon the proof, and the cause of which it is not very material to ascertain) Mr John Lamont, the acceptor, declined to grant an acceptance of a renewed bill. The question then came to be whether the drawer Henry Lamont should be obliged to pay the bill or not.

Henry Lamont's only defence to the demand of the bank for payment of the bill by him as the person who indorsed it for value is that the bank failed in a duty to him as the drawer and indorser. That failure is said to be the non-presentation of the bill for payment to Ferguson, Lamont, & Company as acceptors. The question therefore is whether there was in the circumstances any obligation on the bank to present the bill for payment. The bank was a party to the agreement, and knew that no debt could be paid to individual creditors of the firm, but that on the contrary there must be rateable distribution of all sums payable by the firm among the creditors by the committee who were managing the firm's affairs. The bank therefore knew that to present the bill to the firm for payment would be an idle form. We have been referred to section 46 of the Bills of Exchange Act. That section provides that "presentment for payment is dispensed with . . . (c) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented." Now, I am quite satisfied on the facts brought out in the proof that the acceptor was not bound to pay the bill, and that the drawer had no reason to expect that the bill would be paid if presented, and if so, the case is within the exception stated in the statute, and the bank must prevail in this action.

LORD YOUNG.—I am of the same opinion. I think the case hinges on the agreements of 1885-6, which were subsisting when this bill fell due on 6th April 1888. The agreement was made between Ferguson, Lamont, & Company and their leading creditors, including Henry Lamont, who was a creditor for £1500. Part of that debt was represented by this bill, of which he was the drawer, and which fell due on 6th April. For Henry Lamont's own convenience, it had been kept up by renewals for a considerable time. Now, by the agreement the creditors had obliged themselves to abstain from enforcing their debts against the debtor, the debtor having on his part put his whole affairs into the administration of the liquidation committee for the security and satisfaction of his creditors. Henry Lamont, like the other creditors, had bound himself so to abstain, and to take payment only through a fair administration under the agreement. It is therefore clear that had the bill been in his own hands he could only have intimated his claim to the liquidators. He could not have presented it for payment or noted it for non-payment in the usual sense. Indeed, the liquidation committee knew it to be due. I think the contention untenable that the parties were to act as if there had been no agreement at all. Now, the bill had come into the hands of the bank. They had discounted it, and it was in their hands when it fell due. The bank knew of the agreement between Henry Lamont and Ferguson, Lamont, & Company, for the bank also was a party to it as creditor of that firm. The bank, therefore, knew that Henry Lamont, the drawer, was under an agreement with the acceptor not to exact payment except rateably through the liquidation committee. When the bill was due, and when it was ascertained that there was to be no renewal, the bank applied to Henry Lamont for payment, and his obligation to pay could not be doubted unless there were some exception on the ground that the bill had not been duly negotiated. Now, but for the agreement, the bank would have presented the bill for payment, and noted and protested it if not paid in the ordinary way. But knowing of the agreement they did not do so, and requested payment from Henry Lamont without taking that course. Henry Lamont, who had some difference with the agent of the bank, went to the bank to pay the bill according to his legal obligation, but before he had paid it he determined to take the point of law that the bank had not performed the holder's duty to him in making due presentation of the bill for payment. Now, I should have struggled to avoid giving effect to that plea, had that been necessary. But I think the case falls within the very provision of the Act which your Lordship quoted. I am prepared to find in fact that Henry Lamont, the drawer who states this plea, knew that the bill would not be paid. Indeed, it could not have been paid without a breach of the agreement, a transaction which the other creditors might have reduced. In law, I think, the acceptors were not bound to pay directly to Henry Lamont, and could not have done so without injustice to the other creditors, and violation of the agreement. I think the facts may be expressed in the very language your Lordship quoted from the statute, and therefore Henry Lamont cannot plead that there was not due presentment of the bill. I think the Sheriff-substitute has misapprehended the case, and that we should give decree for the pursuers, with expenses.

LORD RUTHERFURD CLARK concurred.

LORD LEE.—Apart from the agreement, it has not been, I think, maintained

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No. 139. to us that there was, on the part of Henry Lamont, any waiver of the right to have performed towards him the duty which the holder of a bill owes to the drawer. The reasoning of the Sheriff-substitute is therefore inapplicable to the case as it is now presented.

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But the question remains, whether—standing the agreement, and it is not disputed that the agreement remained in force—presentment of the bill for payment was not dispensed with in terms of section 46 of the Bills of Exchange Act, subsection (c), which your Lordship has quoted? Upon that question my opinion concurs with those which have been expressed.

THIS interlocutor was pronounced:—“Find in fact (1) That by the memorandum of agreement mentioned in the record the parties thereto, creditors of Ferguson, Lamont, & Company, undertook to allow the business of that company to be carried on under the management of a committee, which should collect all assets and distribute the same rateably among the creditors: (2) That the defenders were parties to that agreement, as creditors of the said company, to the amount of £1502, 14s. 10d., and previous to its date had drawn a bill on the company for part of the said sum, which bill was accepted by the company and discounted by the pursuers: (3) That the said bill was renewed from time to time, and discounted by the pursuers, and is now represented by the bill sued for: (4) That when the bill last mentioned fell due, the defenders, being parties to the agreement, knew that the acceptors, being the managers thereby appointed, having no power to pay creditors otherwise than rateably, could not retire it: Find in law that the defenders are not entitled to plead that the bill was not presented to the acceptors for payment: Therefore sustain the appeal; recall the judgment of the Sheriff-substitute appealed against; repel the defences; ordain the defenders to make payment to the pursuers of the sum of £740, 4s. 4d. sterling, with interest thereon at the rate of £5 per centum from the 6th day of August 1888 till payment: Find the pursuers entitled to expenses in the inferior Court and in this Court: Remit,” &c.

TODD, MURRAY, & JAMIESON, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 140.

CHARLES CROUCHER, Pursuer (Respondent).—*M'Kechnie—Hay.*  
THE REVEREND WILLIAM MASON INGLIS, Defender (Reclamer).—  
*Low—C. S. Dickson.*

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Croucher v.  
Ingilis.

*Process—Jury trial—Act 13 and 14 Vict. cap. 36 (Court of Session Act, 1850), sec. 40—Act 31 and 32 Vict. cap. 100 (Court of Session Act, 1868), sec. 28.—A Lord Ordinary approved of certain issues, and on the motion of the pursuer, which was not opposed by the defender, by the same interlocutor fixed a day for the trial of the cause. Held (distinguishing from Craig v. Jex Blake, 9 Macph. 715) that a motion by the defender to vary the terms of the issues was not incompetent.*

*Reparation—Slander—Issue—Want of probable cause—Parish minister.—In an action of damages for slander the pursuer alleged that the defender, the minister of the parish in which the pursuer resided, had, by letters written by him to the inspector of poor of another parish and to the Board of Supervision, represented the pursuer as grossly unfit to have the charge of pauper children boarded with him by the parochial board of that other parish.*

*Held that the pursuer was bound to put in issue want of probable cause as well as malice.*

CHARLES CROUCHER, general dealer, Kirkton of Auchterhouse, Forfarshire, brought an action of damages for written slander against the Rev. William Mason Inglis, minister of Auchterhouse, in which the following interlocutor was pronounced by the Lord Ordinary (Kyllachy), on 23d May 1889 :—" Approves of the issue as amended, No. 7 of process, as adjusted and settled for the trial of the cause, and appoints the same to be tried by a jury, . . . on Tuesday, the 2d day of July next . . . "

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On 30th May the defender moved the Court to vary the issues as adjusted by the Lord Ordinary.

The pursuer objected to the competency of the motion, on the ground that it came too late, as a day for the trial of the case had been fixed; and that although it had been so fixed at the pursuer's instance, the defender must be taken to have consented to it, as he had not objected.<sup>1</sup>

LORD PRESIDENT.—The interlocutor of the Lord Ordinary, upon which this motion is founded, consists of two portions. I must take leave to say that, in the circumstances, I do not think that is a proper interlocutor. An interlocutor approving of an issue as adjusted is one thing, and an interlocutor appointing a day for the trial of the cause is quite a different thing. Accordingly, it appears to me that in order to give a party an opportunity of moving the Inner-House to vary an issue in a cause as settled by the Lord Ordinary, there ought to be an interval of six days between the interlocutor approving of the issue and that appointing a day of trial.

I can quite understand that it may be a convenient matter for both parties that a day of trial should be fixed at the time that the issue is adjusted, because the days which a Lord Ordinary has at his disposal for the trial of jury causes in the course of a session are very few, and parties are generally anxious to have the earliest possible day they can get. Accordingly, in the present case, the parties may have allowed both matters to be included in the one interlocutor in order that they might get the 2d July fixed for the trial. If the six days during which a reclaiming note might have been presented had been allowed to expire before the Lord Ordinary was asked to fix a day for trial, the 2d July might not then have been available, and another day might not have been obtained this session. This probably accounts for the fact that a day for trial was fixed in the same interlocutor in which the issues were approved. It was a matter of convenience to the parties that this should be done.

But I cannot think that the right of moving the Court to vary the issues has thereby been taken away. That right is a very important one, and I should be very sorry to throw any obstacle in the way of its being exercised. In the case of *Craig v. Jex Blake* the defender's motion to have a day fixed for the trial was made after the issue was adjusted, and a day was fixed in a second interlocutor. The defender then took the case to the Inner-House, and moved the Court to have the issue varied. What the Court held was, that by asking the Lord Ordinary to fix a day for the trial during the time that she might have moved the Court to vary the issue the defender had shown that she was satisfied with the issue as adjusted, and the Court was accordingly of opinion that that constituted a bar to her subsequent application to have the issue varied.

I am therefore for repelling the objection to the competency of this reclaiming note.

<sup>1</sup> Act 13 and 14 Vict. cap. 36 (Court of Session Act, 1850), sec. 40; Act 31 and 32 Vict. cap. 100 (Court of Session Act, 1868), sec. 28; *Craig v. Jex Blake*, March 16, 1871, 9 Macph. 715.

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LORD SHAND.—In the case of *Craig v. Jex Blake* the defender moved the Court to vary the issue as adjusted by the Lord Ordinary, but she had already so far adopted the issue herself by moving the Lord Ordinary to fix a day for the trial, which his Lordship did by a subsequent interlocutor. I think the view the Court took there of the motion to vary the issue was that the defender was personally barred by the fact that a day for the trial of the cause had been fixed. In the present case, the motion to have the issues varied is made to us by the defender, whereas it was the pursuer who applied to the Lord Ordinary to have a day of trial fixed.

In regard to the practice, I am not prepared to say that the Lord Ordinary ought not in certain cases to fix a day for the trial of the cause at the same time that he approves of the issues. Where both parties are satisfied that this should be done I see no reason against it. Whether both things should be done in the same interlocutor appears to me to be of little consequence. In the majority of cases the form of issues is now stereotyped, and in such cases at anyrate there seems no reason why a day of trial should not be so fixed.

In the present case I agree with your Lordship that the objection to the competency should be repelled.

LORD ADAM concurred.

LORD MURE was absent.

THE COURT accordingly repelled the objection to the competency of the motion, and sent the case to the Summar Roll.

The alleged slander was contained in two letters written by the defender, the first sent to the Inspector of Poor of the Combination Parochial Board of Dundee, which had boarded certain pauper children with the pursuer, and the second to the Board of Supervision.

The following issues adjusted by the Lord Ordinary sufficiently indicate the nature of the slander complained of by the pursuer :—“(First) Whether the defender, on 16th October 1888, wrote and sent to Mr Thomas Brown, inspector of poor, Dundee, a letter in the terms contained in the schedule No. 1 hereto annexed; and whether the said letter is of and concerning the pursuer, and falsely and calumniously and maliciously represents him to be a man of such brutal character as to be unfit to have charge of children boarded out by the parochial authorities of Dundee under his guardianship, and that it was the duty of the parochial board forthwith to remove them, to the loss, injury, and damage of the pursuer? (Second) Whether the defender, on 20th November 1888, wrote and sent to the Board of Supervision a letter in the terms contained in the schedule No. 2 hereto annexed; and whether the said letter is of and concerning the pursuer, and falsely and calumniously and maliciously represents him as keeping a baby-farming establishment, and as being a man unfit for the guardianship of parochial children, as systematically ill-treating and starving them, and as being a drunkard and a worthless character, and as being a disgrace to the district, to the loss, injury, and damage of the pursuer?”

The defender moved the Court to vary the issues by adding the words “and without probable cause” after the word “maliciously.”

Argued for the defender;—The defender had written the letters complained of in the exercise of his duty as minister of the parish. Consequently he was not to be made liable in damages, even though the

statements in the letters were untrue, unless they were made without probable cause.<sup>1</sup> No. 140.

Argued for the pursuer;—A defender was entitled to have the words "without probable cause" added only if he had a right and title to put in motion judicial proceedings. If the case was one of mere privilege, the defender was entitled only to have the word "maliciously" inserted.<sup>2</sup> The present case belonged to the latter and not the former class.

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At advising,—

LORD PRESIDENT.—The pursuer is a person residing in the parish of Auchterhouse in Forfarshire, who calls himself a general dealer, by which, I suppose, is meant a hawker, and the defender is the minister of the parish. The ground of the pursuer's complaint is that the defender wrote two letters—one to the inspector of poor of Dundee, and the other to the members of the Board of Supervision—containing certain statements regarding the pursuer, which *prima facie* are certainly very slanderous. These had reference to the condition of certain children who had been boarded out by the Dundee Parochial Board with the pursuer. These letters are couched in exceedingly strong terms, and, as I have said, are *prima facie* undoubtedly libellous. As put in issue, they impute to the defender that in the letter to the inspector of poor he represented the pursuer "to be a man of such brutal character as to be unfit to have charge of children boarded out by the parochial authorities of Dundee under his guardianship"; and in the letter to the Board of Supervision he represented him "as keeping a baby-farming establishment, and as being a man unfit for the guardianship of parochial children, as systematically ill-treating and starving them, and as being a drunkard and a worthless character."

These are in substance the issues which must go to the jury, and the Lord Ordinary has determined that the word "maliciously" must be inserted in both of them. But the defender contends that he is entitled to have the words "and without probable cause" also inserted. That is the point which we have now to decide.

It appears to me that the sort of privilege which entitles a defender to have these words inserted in issue in a case like the present depends a good deal upon the character in which the defender was acting when the conduct complained of took place. The most ordinary cases are those of alleged malicious prosecution, or of a person giving information to the police of his belief that a crime has been committed. The present is not an exactly parallel case to these, but I think it falls to be ruled by the same principles. There can be no question that it is a duty incumbent upon every citizen to give information to the police when a crime has been committed, and to impart any knowledge that he has as to the offender, and accordingly every person in so communicating his belief is surrounded by the protection which is involved in the use of the words "want of probable cause" in the issue or issues.

In the present case the defender is a public official. He is the minister

<sup>1</sup> Forbes v. Gibson, Dec. 18, 1850, 13 D. 341; Gibb v. Barron, July 1, 1859, 21 D. 1099; Craig v. Peebles, Feb. 16, 1876, 3 R. 441; Kinnes v. Adam & Sons, March 8, 1882, 9 R. 698; Lightbody v. Gordon, June 15, 1882, 9 R. 934; Beaton v. Ivory, July 19, 1887, 14 R. 1057; Shaw v. Morgan, July 11, 1888, 15 R. 865.

<sup>2</sup> Davies v. Brown & Lyell, June 8, 1867, 5 Macph. 842.

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of the parish, and is charged with its well-being, and with the care of the morals of his parishioners. If, acting in such capacity, he gave information to the proper authorities of facts which came within his knowledge, it appears to me that he must be entitled to the same protection which surrounds those who give information to the police in such circumstances as I have mentioned. The Parochial Board of Dundee was the body under whose guardianship these children were placed, and in the exercise of their administration they boarded out the children with the pursuer. Accordingly, if the defender thought he was called upon to give information as to his knowledge of the state of the children, the parochial board was clearly the proper authority to whom to give it, and, failing them, the Board of Supervision was the appropriate tribunal to which to resort for the same purpose. Accordingly, so far as regards the authorities to whom the minister had recourse in communicating the facts which he states came within his knowledge, the defender did quite rightly.

In communicating the facts, it seems to me that the defender is entitled to the same protection as a person who gives information to the police as to the commission of a criminal offence. The circumstance that it turns out afterwards that the offence was never committed will not deprive the person who has given the information of the protection to which I have referred. So in the present case, it is not necessary for the defender to take an issue of *veritas*. Apart altogether from that, he may have been justified in giving the information he did to the proper authorities. I am therefore of opinion that he is entitled to have the words he desires put in issue.

It was urged that if a person in the position of a minister was entitled to have want of probable cause put in issue, the same rule must apply equally to every other citizen. That is a question upon which at present I do not offer any opinion. It may or may not be so, for the question must depend upon different considerations. But there can be no doubt of the duty of a parish minister, and I confine my ground of judgment here to that individual case.

LORD SHAND.—In the case of *Lightbody v. Gordon*, 9 R. 934, the Court had occasion to deal with the principles which fall to be applied in cases where criminal informations have been lodged with the authorities and actions of damages follow. It was there held that the person who seeks damages in such a case must take an issue that the defender acted not only maliciously but without probable cause. The ground of that judgment was that where a public duty is imposed upon a citizen, and *prima facie* in the exercise of that duty he proceeds to give information to the proper authority, or causes the apprehension of an alleged offender, the person so acting is presumed to have done so in perfect *bona fides*. If the law were different, the result would be that the ends of justice might often be frustrated. Accordingly, the pursuer in such an action has to prove that the defender acted not only maliciously, but also that the charge was made without any good or probable grounds.

The principle of the judgment in that case applies fully to the present case. When a person has reason to believe that a crime has been committed it is his duty and his right to inform the police. In the present case, the defender states that he had reason to believe that certain children who were out of the charge of their parents and in the custody of strangers were being cruelly used, and he accordingly gave information to the parochial board, and failing action by them he renewed his information in a letter which he wrote to the Board of

Supervision. I think that the defender, as minister of the parish, was acting on what was his duty and his right in giving that information. No. 140.

For my own part, I am not prepared to say that I can draw a distinction between the duty of a minister of a parish in such a case and the duty of any other citizen—say a minister of another denomination or anyone else—who may see such things taking place which he feels bound to report to the proper quarter. Where there is a duty or rather a right to do so, the law will assume that the representation is made *in bona fide*, and that it is made for the protection of society, or, as in the present case, in the interests of the children concerned. The issue which the pursuer takes must therefore embrace malice and want of probable cause. June 14, 1889.  
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Whether, if the information were given ultroneously and to other than the proper authorities, the same result would follow, is a different question. But where it has been given to the authorities who are bound to put a stop to it, if the information is correct, I am of opinion that the rule which was laid down in the case of *Lightbody* must apply.

LORD ADAM.—I think that the words “want of probable cause” ought to be inserted in the issue in a case of this kind, where the person called as defender had a right or duty to do the act complained of, where, for instance, he gave information to the police, or perhaps proceeded to the use of diligence. In the present case, I concur in your Lordship’s view that there was on the part of this defender not only a right, but also a duty to give the information he did to the authorities in question, if he saw that the pauper children who had been put in the pursuer’s custody were being ill-used, as he says they were. If he had that duty, I think he is entitled to have the words “want of probable cause” put in the issue. Whether there is a similar duty upon every member of the community to give such information is a question which does not arise in the present case. I am rather inclined to agree in the view which Lord Shand has taken, but I desire to reserve any definite opinion on the point until the question actually arises.

LORD MURE was absent.

THE words “and without probable cause” were inserted in each issue after the word “maliciously.”

JAMES SKINNER, S.S.C.—GUILD & SHEPHERD, S.S.C.—Agents.

MRS ANNE MARY STEPHEN (Stephen’s Trustee), Appellant (Respondent). No. 141.  
—*Murray—C. S. Dickson.*

ROBERT PALMER JENKINS (Macdougall & Company’s Trustee), Respondent June 14, 1889.  
(Appellant).—*Gloag—Low—P. J. Blair.* Stephen’s  
Trustee v.  
Macdougall &  
Co.’s Trustee.

*Partnership—Liability of assumed partner for debts incurred prior to assumption—Bankruptcy.*—A creditor lent money to a firm on the security of certain heritable subjects belonging to it—the obligation for repayment being granted by the firm and by its two partners. The money was expended upon the erection of buildings upon the ground, which were used partly as business premises, and partly as a house for the manager. Three years later the two partners proposed to take a new partner, and a new contract of copartnership was executed for carrying on the business in the same firm name as before by the three partners. The contract contained a stipulation that the new firm should have no concern with the debts due to or by the old firm. The right to the security subjects

**No. 141.** was not transferred to the new firm, which paid a rent to the old firm for the use of the premises occupied by them, and the creditor in the bond knew nothing of the change of partnership. The actings of the new firm were in keeping with the provisions of the contract of copartnership—sets of books being kept for each of the old and new firms, and payments of debts due by the old firm being entered to its debit. On the bankruptcy of the new firm, *held* that the heritable creditor was not entitled to rank in the sequestration.

1st Division.  
Sheriff of In-  
verness-shire.  
M.

By bond and disposition in security, dated 27th and 28th May 1879, “Messrs Macdougall & Company, of the Royal Clan Tartan Warehouse in Inverness and of Sackville Street, London,” and “Robert Grant and Alexander Maclellan, both drapers in Inverness, the individual partners of said firm, both as partners thereof and as individuals,” granted them to have borrowed and received from Mrs Anne Mary Stephen, as testamentary trustee of the deceased Reverend Thomas Stephen, of Kinloss, Morayshire, her late husband, the sum of £3500, “which sum we bind ourselves, conjunctly and severally, and the heirs, executors, and representatives whomsoever of us, the said individuals, without the necessity of discussing them in their order, to repay.” The subjects over which the security extended belonged to and were vested in the two partners individually, for behoof of the firm “as now existing, and to the survivor of them, for himself, and for the representatives of his predeceasing partner in the said firm.”

In 1882 Robert Grant and Alexander Maclellan, who up to that date had been the only two partners of the firm of Macdougall & Company, assumed Mr Donald Macbean as a partner under deed of copartnership, dated 15th June and 26th August of that year.\*

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\* The contract of copartnership, *inter alia*, bore,—“Whereas the said Robert Grant and Alexander Maclellan have, for a considerable time, carried on business as drapers in Inverness, with a branch establishment in London under the firm of Macdougall & Company, and it has been arranged that the said Donald Macbean shall be assumed as a partner, and a new firm constituted: Therefore the said parties do contract and agree as follows:—

“1. The said parties agree to be copartners in carrying on a drapery business similar to that now carried on by the existing firm of Macdougall & Company, under the same name or firm of Macdougall & Company.

“2. The partnership shall commence at 1st June 1882, and shall endure for the period of ten years from that date.

“3. The said Robert Grant and Alexander Maclellan shall grant a lease to the new firm (that is the firm hereby constituted) of the warehouse and premises in High Street, Inverness, occupied by the old firm (that is, the firm of Macdougall & Company heretofore existing), including the dwelling-house presently occupied by the said Robert Grant, for the period of ten years from the said 1st day of June 1882, at the yearly rent of £450 sterling, payable half-yearly at Martinmas and Whitsunday. The said Robert Grant and Alexander Maclellan shall also assign to the new firm the lease of the shop and premises in Sackville Street, London, occupied by the old firm. The new firm will pay the future rents and assume the whole burden of the lease.

“4. The capital of the company shall be £10,000, of which the said Robert Grant and Alexander Maclellan shall each contribute £3750, and the said Donald Macbean £2500. The shares of the partners in the profits and losses and in the capital shall be—of the said Robert Grant and Alexander Maclellan, three-eighths each, and of the said Donald Macbean, two-eighths.

“5. The new firm shall take over the whole stock and warehouse-fittings and furniture in Inverness and London of the old firm, and pay for goodwill and the London lease. The stock shall be at once taken by the parties themselves, and the value ascertained and fixed. The value of the warehouse-fittings and furniture is agreed to be £2000, of the London lease £2000, and of the goodwill of

On 25th March 1887 the estates of Macdougall & Company and of the three partners were sequestrated by the Sheriff-substitute of Inverness-shire (Blair), and Mr Robert Palmer Jenkins was appointed trustee. No. 141.

Mrs Stephen thereupon lodged a claim in the sequestration for a sum of £583, which she alleged represented the probable deficiency which would arise upon her loan after deducting the value of her security. In her claim she asked to be ranked in the sequestrations of Robert Grant and Alexander Maclellennan. Macbean's name was omitted, but it was afterwards stated that this omission was due to an oversight, and the case was argued on the footing that the claim had been amended to the effect of including Macbean's name as a partner of the firm subsequently to 1882. June 14, 1889.  
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The security subjects were burdened with heritable bonds amounting in toto to £14,500, and all entitled to a *pari passu* ranking. They were ultimately sold on 1st May 1888 for £11,600.

The trustee, upon 6th June 1888, pronounced this deliverance on the claim lodged by Mrs Stephen:—" . . . Finds (1) That the heritable property in question belonged at the date of the sequestration to the said Robert Grant and Alexander Maclellennan, as carrying on business under the firm of Macdougall & Company in the year 1879, and up till 1882. (2) That at 1882, Mr Donald Macbean was taken into partnership by the said Robert Grant and Alexander Maclellennan, and the new firm of Macdougall & Company, being the firm now under sequestration, was then formed, the three partners being Mr Grant, Mr Maclellennan, and Mr Macbean. (3) That the heritable property in question over which the claimant holds security was never transferred by the said Mr Grant and Mr Maclellennan and the old firm of Macdougall & Company to the firm of Macdougall & Company as in existence at the date of the sequestration, and the three partners thereof, and that further no bond of corroboration was ever granted to the claimant by the firm of Macdougall & Company as existing at the date of the sequestration, or the partners thereof. (4) That in the books of Macdougall & Company, from the date of the formation of the new firm till the date of sequestration, the said Robert Grant and Alexander Maclellennan, and the old firm of Macdougall &

the business, £2500. The sum of £6500 shall therefore be added to the value of the stock in ascertaining the sum payable by the new firm to the members of the old firm.

" 6. As the capital of the new firm will not be sufficient to pay the whole value of the assets taken over from the old firm, including the value of the London lease and goodwill, the said Robert Grant and Alexander Maclellennan will allow the surplus value, which is hereby declared to be £3927, 17s. 11d., to remain in the hands of the new firm until it can conveniently repay the same, the new firm paying interest thereon (accumulated annually if unpaid) at the rate of five per cent per annum half-yearly at Martinmas and Whitsunday: For all other advances made by any partner to the new firm, and for all sums due to any partner by the new firm, from time to time, interest shall be paid to such partner by the new firm, at the rate of five per cent per annum, and all interest unpaid shall be accumulated annually with the principal advance or debt. . . .

" 8. The new firm shall have no concern with the debts due to or by the old firm. No commission or charge shall be made by the new firm for the collection and payment of the said debts, which will be done in the firm's premises. . . .

" 10. Books shall be kept and balanced annually according to the practice of the late firm. . . ."



No. 141. Company, as in existence prior to 1882, were treated as proprietors of the whole block of property, including the portion over which the claimant holds security, and that the firm of Macdougall & Company as sequestrated was charged annually by the old firm £450 as the rent of the premises occupied by them. (5) That in the claim lodged it is set forth that the property belongs to Mr Grant and Mr Maclellan. (6) That the claimant holds no personal obligation from, and has therefore no claim against the firm of Macdougall & Company, as sequestrated on 25th March 1887, but has a claim against the private estates of the said Robert Grant and Alexander Maclellan. (7) Finds that the claim as against the sequestrated firm of Macdougall & Company falls to be rejected *in toto*. Therefore rejects the claim accordingly."

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Mrs Stephen appealed to the Sheriff of Inverness-shire.

She stated, *inter alia* ;—" . . . (3) The appellant's loan was secured upon the heritable property in Lombard Street, Inverness, belonging to Macdougall & Company, and vested in the partners, Messrs Grant and Maclellan. This property was originally purchased by the funds of Macdougall & Company, and was rebuilt with monies raised by the firm. The property was always treated as an asset of the firm, the rents were drawn by the firm, and immixed with the firm's general funds, and the taxes, repairs, and other charges upon the property were from first to last paid out of the general funds of the firm. (4) It is now averred on behalf of the respondent that in the year 1882 Mr Donald Macbean, of Sackville Street, London, was assumed by Messrs Grant and Maclellan as a partner in the firm of Macdougall & Company, and that a new firm was thereby constituted different from the firm of Macdougall & Company which granted the said bond and disposition in security. . . . (5) The assumption of Mr Macbean as a partner was not notified to the public in any way, and in point of fact was practically kept a secret, so far as Inverness was concerned. He appeared to be an assistant in the London business, but in truth the bondholders did not even know of his existence. . . . The firm, it now appears, was hopelessly insolvent before 1882, and it is believed and averred that there never was any real alteration in the firm, and that the so-called assumption of Mr Macbean as a partner was simply a device for procuring money from persons outside the business. Mr Macbean had been for a number of years a shopman in the London shop, and had no means of his own. (6) After 1882 the firm continued as before to draw the rents of, and pay the rates and taxes upon the heritable property just as before, and the interests on the bonds were paid out of the firm's general funds as before. . . . (10) Notwithstanding the alleged change of firm, the debts owing by the firm at the date of the alleged change were paid by the alleged new firm out of the proceeds of their business, and the debts due to the old firm were collected and discharged by the alleged new firm. There was an absolute and entire continuity in the firm's affairs."

She pleaded, *inter alia* ;—(1) The bond and disposition founded on having been granted by Macdougall & Company as a firm, the appeal ought to be sustained. (2) The firm having been carried on after the alleged assumption of Macbean as a partner without any winding-up, or any notification to the appellant or the public of a change, and with the same stock and generally the same assets and liabilities, the firm, even if altered, assumed or continued to be liable for the obligations of the old firm.

Macdougall & Company's trustee pleaded, *inter alia* ;—(2) The bond and disposition in security not having been granted by the bankrupt

firm, the appellant has no claim against the estate of that firm. (3) The bankrupt firm not having adopted the debts or obligations of the old firm, or taken over the assets of that firm, the claim now under appeal ought to be rejected. (6) The amount due the appellant not being a trade debt, the bankrupt is, in any event, not liable for the same.

A proof was led, from which it appeared that the bulk of the money which had been advanced upon the security had been spent in the erection of buildings upon the ground; that they were afterwards occupied partly as business premises and partly by Mr Grant, the partner who managed the business, as a dwelling-house, and the buildings so occupied were entered in the rental-books at £450 a-year, and that the rents were credited to the old firm; that no intimation was made to Mrs Stephen of the change in the firm, which had not been made public except by trade advertisements, and in two local newspapers; that two sets of books were kept after the new partnership was entered into, and the transactions of the two firms were thus kept entirely distinct;\*

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\* Mr Grant, one of the partners, who was examined for the appellant, deposed in cross,—“At the time we entered into this new partnership we did so in the full belief that the old firm was perfectly solvent, and no doubt Mr Macbean was of the same opinion. The bond and disposition in security granted by Mr Maclellan and myself in 1879 was prepared by Messrs Stewart, Rule, and Burns, as agents for Mrs Stephen, and they collected the interests on the bond for Mrs Stephen until our sequestration. Messrs Stewart, Rule, and Burns were also my own agents, and they prepared the contract between Mr Macbean, Mr Maclellan, and myself. . . . The provisions in the contract, so far as keeping our books are concerned, were carried out by us. We kept correct books from the date of the contract until the sequestration, and whatever the books shew is, so far as I know, and to the best of my knowledge and belief, correct, and they exhibit a true state of the affairs of both firms from time to time. Although the new firm was started in 1882 the old firm still existed so far as the collecting of the debts and so far also as the paying of the debts was concerned. (Q.) Is it the case that the heritable subjects in High Street and Lombard Street continue to be the property of the old firm? (A.) I believe so. The shop in High Street, where our business was carried on, was let by the old firm to the new firm at a rent of £450. There was no formal lease. If the new firm did not pay this rent year after year to the old firm they would be charged with it in the books; that is, the new firm would be debited, and the old firm credited with the amount. (Q.) In June 1882, after the contract was entered into, did the new firm open an account in their books with the old firm? (A.) I have no doubt they did; but the books will shew it. (Q.) And if the new firm received any money in payment of accounts due to the old firm, how was that money entered? (A.) That money would go into the general funds of the business, and be accounted for by the new firm to the old. It would be placed to the credit of the old firm in the new firm's books. On the other hand, when the new firm paid money on behalf of the old firm the old firm would be debited with the amount, and that continued to be done up to the date of our sequestration. There were also two separate bank accounts.”

The following is an extract from the report of an examination of the books of the firm by Mr R. F. Cameron, C.A. :—“ . . . The books gone over by me shew that following on the contract the new firm was created, and all along recognised as totally different from the old firm, and that the above conditions were in every particular strictly adhered to. So fully was the distinction between the old firm and the new firm drawn that separate cash-books, ledgers, &c., and even a separate bank account were opened and kept for the new firm, these containing the transactions incident on the continuance of the business proper or trading of the new copartnership, while the old firm's books merely record the winding up of the original business, and receipts and charges in connection with the heritable properties and bonds, regular balance-sheets, and

No. 141. that rents derived from the security subjects down to the date of the sequestration were collected by the firm, and receipts given for them, which were written out in the same way before and after June 1882. It appeared that in the original state of affairs in the sequestration the heritable property was included as belonging to the new firm.

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The Sheriff-substitute (Blair), on 16th March 1889, pronounced this interlocutor:—"Finds that the company of Macdougall & Company, whose estates were sequestrated on 25th March 1887, having taken over at 1st June 1882 the whole business and assets of the going business of the firm of Macdougall & Company, did thereby also assume the liabilities of the said firm, and among others the debt due to the appellant, Mrs Anne Mary Stephen, as a creditor of the said firm: Finds that the sum claimed by the appellant, after deducting the proceeds of the security held by her, amounts to £700, and that the appellant is entitled to be ranked on the sequestrated estate of the said Macdougall & Company on account thereof: Therefore sustains the appeal against the trustee's deliverance, and ordains the trustee to rank the said Anne Mary Stephen, appellant, on the said sequestrated estate accordingly."

Macdougall & Company's trustee appealed to the Court of Session, and argued;—There were certain facts in this case which distinguished it from previous cases which had been relied upon by the appellant. 1. There was a stipulation in the contract of copartnery of the new firm that it was to have "no concern with the debts due to or by the old firm," and the books of the two firms were kept quite distinct. Although debts due by the old firm were frequently paid by the new firm, the sums so paid were always debited to the old firm. 2. The new company did not take over the property of the old company. 3. The new company were not the owners of the property over which the security was granted. The title to the property, as appearing upon the security title, was in favour of Grant and Maclellan only in trust for the old company. The money advanced by Mrs Stephen was a mere investment, and the lender did not look to the stock in trade as a security. Upon the terms of the bond Macbean was not in any way liable, and the parole evidence was not admissible to construe its terms. It was a strong thing to say that Macbean agreed to become liable for the debt when neither he nor Mrs Stephen were examined as witnesses on either side. Even if the new company

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profit and loss accounts, copies of which are annexed, were made out yearly for each firm, shewing clearly their non-identity, and it is important to note that neither the heritable properties nor the bonds affecting them ever appear in the balance-sheets of the new firm, while, on the other hand, they are invariably included in the balance-sheets of the old firm, and the relative rents and interest are shewn in the profit and loss accounts of that firm. It may be added, that as provided in the contract, and noted above, the old firm collected the book debts outstanding at June 1882, and retained the sole burden of the liabilities then subsisting, with the exception of an overdraft from the Royal Bank, the responsibility for which was taken over by the new firm in 1885.

"Not only were these distinctions between the two firms maintained, but even transactions between them were entered in both sets of books, in the one set as a receipt, and in the other as a payment. Thus when, as was frequently the case, one firm had not available funds to meet a pressing obligation, and the payment was made out of moneys belonging to the other firm, the transaction was regarded as an advance by the one firm to the other, and was passed in the way indicated through both sets of books. Further, interest was periodically charged or allowed to one firm on the balance in favour of or against the other firm. . . ."

had agreed to take over the debt of the old company, there must be an express agreement between the creditor and the new company before the former could have a right of action.<sup>1</sup> 4. This was in no sense of the word a trade debt. If it were possible for a company to incur a debt which was not a trade one, this had been done here.

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The fact was that the actings of the new company were entirely in keeping with the provisions of the contract of copartnery. These had been carried out to the letter. Mr Cameron's report upon the books of the firm was uncontradicted.

Argued for Mr Stephen's trustee;—By the terms of the bond there was an obligation upon the company to repay the loan, and accordingly the presumption was that the company as constituted when the obligation came to be put in force was liable.<sup>2</sup> The loan in question was a trade debt of the firm. The money had been employed in the erection of buildings for the firm, a portion of these buildings being used as a manager's house. The debt was in no sense a private debt of the old firm.<sup>3</sup> There was evidence to shew that all the debts of the old firm, with the exception of the bond over the security subjects in question, had either been paid by or ranked upon the estate of the new firm. This was the only debt which the new firm repudiated, and all its other creditors had been paid off, to the prejudice of the respondent. The provision in the contract of copartnery of the new firm that it was to have no concern with the debts of the old firm could not affect the case, for the respondent was in ignorance of the contract and its terms. Further, its terms had not been carried out by the parties. For instance, the old firm had no separate bank account, except for a short period after the new firm came into existence; the new firm always granted receipts for the rents in its own name; and it paid the interest on the bonds. Besides originally, as shewing what the view of the parties themselves was, the heritable property was included in the state of affairs in the sequestration. The same thing had occurred in *Heddlie's* case.<sup>4</sup> It was no doubt true that sums paid by the new firm were debited to the old firm in their books, but these were mere book entries, and could not affect the substance of the transaction. Lord Chancellor Eldon had stated the law thus:—"If one man having debts takes another into partnership with him, a very little matter respecting those debts will make both liable."<sup>5</sup>

At advising,—

**LORD SHAND.**—At the term of Whitsunday 1879 Mrs Anne Mary Stephen, the respondent in this appeal, who claims to be ranked in the sequestration, lent the sum of £3500 to Messrs Macdougall & Company, and to Robert Grant and Alexander Maclellan, the individual partners of that firm, obtaining in return a bond and disposition in security in her favour, by which the firm and its two partners bound themselves for payment of the debt, and Grant and Maclellan, being themselves infert in certain heritable property belonging to them for behoof of their firm, of which they were the sole partners, conveyed the property in security in ordinary terms for payment of the debt. The sum advanced was

<sup>1</sup> *Ex parte* Parker, in *re* Samuel Stocks, 1842, 2 Montagu, Deacon, and De Gex, Bankruptcy Cases, 511; Lindley on Partnership, 5th ed. 208.

<sup>2</sup> *M'Whirter v. M'Culloch's Trustees*, July 9, 1887, 14 R. 918.

<sup>3</sup> *Miller v. Thorburn*, Jan. 22, 1861, 23 D. 359, 33 Scot. Jur. 180.

<sup>4</sup> *Heddlie's Executrix v. Marwick & Hourston's Trustee*, June 1, 1888, 15 R. 698; *cf.* *M'Keand v. Laird*, March 30, 1861, 23 D. 846.

<sup>5</sup> *Ex parte* Jackson, 1790, 1 Vesey jr., 130, Lord Chancellor Eldon, p. 132.

No. 141. to a large extent laid out in the erection of buildings on the ground embraced in the security, and, according to the estimated value of the property at the time, the heritable security was ample for the payment of the respondent's debt.

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Down to 1st June 1882 Grant and Maclellan continued to carry on their business of Macdougall & Company, which had existed for a number of years, both in Inverness and London, and they paid half-yearly the interest on the respondent's security, as well as the interest on other similar securities which they had granted in return for loans on adjoining properties held by them in the same way, and some of which were occupied by them for the purposes of their business down to that time. At that date they agreed to take into partnership Mr Macbean, who had been for about twenty years an assistant in the London business. A regular contract of copartnership was entered into, and from that date the business of Macdougall & Company was carried on under the same name by the three partners—Grant, Maclellan, and Macbean. This new company continued to carry on business for five years, but in March of 1887 the estates of the company and of the three individual partners were sequestrated.

The respondent claims to be ranked as a creditor of this later company for the debt constituted by the bond and disposition in security of 1879 in her favour, and the Sheriff-substitute, reversing the deliverance of the trustee in the sequestration, has sustained the claim to be ranked. After consideration of a full argument, I have come to the conclusion without difficulty that the judgment complained of should be reversed, and that the respondent's claim to be ranked should be refused.

The bond and disposition in security founded on was not granted by the company which came into existence in 1882, or by the partners of that firm, and of course it is incumbent on the respondent to aver and prove either an express undertaking by the later firm and its partners of liability for the debt, or facts and circumstances in the course of dealing of the parties which shew that this firm and its partners undertook such liability. The respondent's affidavit and claim sets forth no ground of liability, for it merely founds on the bond and disposition in security, which of course could contain no obligation by a company which only came into existence three years after that deed was granted. The claim as stated was one which the trustee in the sequestration would have been quite warranted in rejecting *simpliciter*, because it disclosed no ground of liability of the bankrupt company, but an appeal having been taken against the trustee's deliverance, a record by minutes was made up in the Sheriff Court, from which it appears that the claimant maintained that the bankrupt company "assumed or continued to be liable for the obligations of the old firm," and was therefore liable in payment of her debt. The facts mainly relied on as averred by the respondent were that the money lent by her was received by the firm in 1879, and mixed up with their general funds, and used for the general purpose of their business—that the assumption of Mr Macbean as a partner was not published to the world—that the money which he was said to have put into the business was really got by loans obtained by the firm from third parties, that "there never was any real alteration in the firm, and that there was a mere continuity of the old firm's business"—the new firm taking over the assets of the old firm on the one hand, and assuming liability for its debts and obligations on the other. And the authorities on which the claim was maintained were cases of which the most recent and important were the

cases of *Hedde*, 15 R. 698, and *M'Keand*, 23 D. 846, in both of which the No. 141.  
 judgments proceeded on the view that there had been no real change in the  
 copartnery beyond the assumption of a partner who obtained a small share of a  
 going business without putting in new capital, and where the new firm went  
 on to trade with the stock and assets of the old firm, taking these over without  
 any arrangement for the winding-up of the old company's affairs, or for an  
 accounting with the old firm or its partners, but undertaking liability for all the  
 old company's debts and obligations.

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It appears to me to be clear, on a consideration of the proof adduced by both parties, that the respondent has entirely failed to prove her material averments, and that the facts proved are in striking contrast with the facts held to be established in the class of cases to which I have alluded, and which in these cases were the ground of judgment.

1. In the first place, the nature of the debt and obligation are of considerable importance. There was no doubt an obligation for repayment of the loan granted by the old firm, and by Grant and Maclellan. But the transaction was substantially the taking of a heritable security on a permanent loan, and the lender looked mainly to the value of the property conveyed as the means of payment. As to the proceeds of the loan Mr Grant, the claimant's witness, says,—“The bulk of it was paid to the contractors for the buildings as they proceeded.” The debt cannot be regarded as in any sense a proper trade debt, like debts due to merchants supplying stock, or to bankers on a firm's banking transactions, and so is not one of a class for which it is at all probable that a new firm or company would undertake liability.

2. It is quite clear that not only the title to the heritable property which is the subject of the security, but the right to the property itself all along remained with Grant and Maclellan and the old company, of which they were the sole partners. Although immediately after the sequestration there seems to have been some confusion in the minds of certain of the bankrupts, and even of the trustee, or rather perhaps I should say in the minds of their advisers, as to the rights of proprietorship of the heritable properties, which truly belonged to the old firm and its partners, and part of which was occupied by the new firm, there can be no doubt that the right to these properties never was transferred to the new firm or its partners. It would be remarkable in these circumstances if the new firm were found to have accepted or adopted liability for a number of bonds over subjects in which they had no right of property or other interest. In any view, the case is not one in which, as in other leading cases, the new firm took over the whole property of the old firm and its partners, for these heritable properties, valued at upwards of £20,000, were not so taken over.

3. But, perhaps, of more importance still are the provisions of the contract of copartnery of 1882, which distinctly shew that the old company was to be wound up, and was to subsist for the purpose of being wound up, and that the new company was to be started on an entirely new basis, and was not to undertake any liability for the debts of the old company. Mr Macbean, the new partner, undertook to put £2500 into the business, as against £3750, the estimated capital of each of the other partners, and was to have a corresponding share of the profits. It is true that in order to enable him to raise the money his partners assisted him with their credit, but he became the principal obligant for the repayment of the loans, for which they were cautioners only. Then the new company took a lease of their premises from the old firm for the endurance

No. 141. of the partnership, being ten years, at a rent of £450, an arrangement which, in the most distinct manner, shewed how complete was the separation between the interests of the two firms, and that this separation was to be continuing and permanent. Finally and conclusively, the stock of the old firm was only taken over at a valuation made at the time, the amount of which the new firm became liable to pay to the partners of the old firm, interest on the amount to be charged against the new firm until it could conveniently repay the capital. And the contract expressly bore that "the new firm shall have no concern with the debts due to or by the old firm," a stipulation which is of course in its very terms and substance directly opposed to the whole idea on which the present action is based. It is unnecessary to notice the other provisions of the contract of copartnery, further than to say that there are subsidiary clauses providing for the keeping of books to be regularly balanced, that the new firm should make no charge of commission for the collection and payment of the old firm's debts, and, as to the London business, that the new firm should take over the lease of the London premises, and in that instance undertake the responsibility of the future rents. Taking the contract as a whole, I have only to observe that I could scarcely conceive a deed being more carefully framed for the purpose of distinguishing between the business and interests of an old company, and a new one formed to take up the old business, or in which it was made more clear that the new company did not take over the whole assets of the old, and only took over the stock at a price agreed on, and that the new company did not adopt or undertake liability for the debts of the old company.

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4. All this, however, might have been stipulated in writing only. The parties might in carrying on their business have disregarded their arrangement so carefully recorded, and have so acted or dealt with all the creditors as to accept universal liability for the old company's debts. But I find nothing in the proof to countenance such a suggestion. The contract was carried out so far as I can see in all its stipulations. From the formation of the new company in 1882 down to the sequestration there were two sets of books kept, one for the old firm and another for the new firm. Of course, it was in the books of the latter that the cash transactions, receipts, and payments were all in the first instance entered, but in every case where money was received or paid on account of debts due to or by the old firm, the amount was transferred to the books of the old firm to the credit or debit of that firm, as the case might be. In short, the old firm was treated as in liquidation of its trade debts and obligations, and as a company being wound up, and which when the debts due to and by the firm were paid would remain possessed only of its heritable property, subject to the bonds over it, the new firm acting as their agents in the winding-up. Mr Grant, the claimant's leading witness, says on this point:—"Messrs Stewart, Rule, & Burns were also my own agents, and they prepared the contract between Mr Macbean, Mr Maclellan, and myself. . . . The provisions in the contract, so far as keeping our books are concerned, were carried out by us. We kept correct books from the date of the contract until the sequestration, and whatever the books shew is, so far as I know, and to the best of my knowledge and belief, correct, and they exhibit a true state of the affairs of both firms from time to time. Although the new firm was started in 1882 the old firm still existed so far as the collecting of the debts and so far also as the paying of the debts was concerned. (Q.) Is it the case that the heritable subjects in High Street and Lombard Street continue to be the property of the old firm? (A.)

I believe so." The rents of the heritable properties collected by the new firm No. 141.  
or due by them to the old firm were entered to the old firm's credit, and the  
interests paid and outgoings for the properties were put to the old firm's debit, June 14, 1889.  
and these books were balanced annually by Mr Meston, an accountant from Stephen's  
Aberdeen, who went periodically to Inverness for the purpose. It is needless Trustee v.  
to pursue this subject farther than to say that the evidence of Mr Cameron, Macdougall &  
accountant, including his report on the books, shews that the provisions of the Co.'s Trustee.  
contract were carried out in every particular. It is true that in the end a very  
large amount of the debts due to the old firm proved bad and were not paid,  
and so the new firm made large advances beyond their receipts for the old firm;  
but this result, so far as I can see, was not anticipated, and in any case does  
not detract from the fact that the contract was acted on.

All this being so, I have really great difficulty in seeing on what grounds the  
claimant can say that the debt due to her was adopted by the new company,  
i.e. that the new company, in the face of the agreement to the contrary between  
the firms, undertook liability for that debt. The claimant and the new com-  
pany had no dealings or communication relating to any such liability. It is  
said the firm undertook responsibility for other debts,—for the balance due to the  
bank, and for the ordinary trade debts,—which were indeed paid off by the new  
firm. As to the debt to the bank, the mode in which that was dealt with is a  
very good illustration of what alone will generally give a creditor a legal right  
or obligation against a new firm. The bank's agent, having learned that a new  
partner had been assumed and a new company started, became alive to the neces-  
sity of having an obligation granted by the new firm for the bank's debt, and  
having pressed for this—intimating no doubt that a refusal would result in a  
stoppage of the bank account—he obtained the obligation he desired. The  
claimant has nothing of the kind in any transaction with her. Then, as to the  
ordinary trade creditors, most of them had furnished goods to the old firm; and  
the new firm continued to deal with them. In the course of such dealing the  
old and new accounts as in a question with the creditors were treated as one  
continuous series of accounts (though the payments made, in so far as made for  
the old firm, were placed to their debit); and in this way, as also in the case of  
bills current when the new firm began and afterwards renewed by them, the  
new firm by their mode of dealing in each case undertook liability for the old  
debt. In the result the new firm not only expressly undertook liability for these  
debts, but, generally speaking, paid them off, incurring new debts which have been  
ranked on the sequestration, and in the end none of the old firm's trade debts  
were outstanding unpaid. But in the claimant's case no such dealings occurred.

The only remaining point to which the claimant's counsel attached importance  
in the argument was that the new firm after 1882 regularly paid the interest on  
the claimant's bond, generally by the firm's cheques or bills, and the claimant  
had no notice of the change of partnership, and no knowledge of any change.  
But as regards the interest so paid the amount was in fact at once carried to the  
debit of the old firm by the new firm, who merely acted as their agents in mak-  
ing the payments. It is said that, nevertheless, the claimant is entitled to hold  
that the new firm became her obligant in the capital sum. I know of no legal  
principle which can support that view. The failure to intimate to a creditor of  
the old firm that a new company had been formed cannot infer an undertaking  
of liability by the new company for the old firm's debts, and the creditor, who  
knew nothing of the change of partnership, cannot on any principle of law which



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admits of being stated say that she acquired as a new debtor a partnership of which she knew nothing, because that new partnership paid the interest falling due on her bond under the arrangement between the two firms already fully stated. With such a contract of copartnery, acted on as I have stated, nothing short of a direct undertaking by deed or by dealing unequivocal in its character with the individual creditor could infer an undertaking of liability for a debt of the old firm. There was no such undertaking or dealing here, and therefore no such liability undertaken; and so I am clearly of opinion that the judgment of the Sheriff-substitute must be recalled, and the claim to rank must be rejected.

LORD ADAM and the LORD PRESIDENT concurred.

LORD MURE was absent.

THE COURT recalled the interlocutor of the Sheriff-substitute, and sustained the deliverance of the trustee.

JOHN C. BRODIE & SONS, W.S.—J. & A. F. ADAM, W.S.—Agents.

No. 142.

June 14, 1889.\*  
Semple v.  
Wilson.

THOMAS SEMPLE, Pursuer (Appellant).—*Murray*.  
JAMES WILSON, Defender (Respondent).—*Gloag*—*J. C. Lorimer*.

*Sale—Payment—Conditional payment—Repetition.*—S., a merchant, agreed to buy sixty tons of potatoes from a farmer. Subsequently he was informed by the seller that his crop and stock had been previously sequestrated at the instance of his landlord. S. thereupon entered into an agreement with the farmer, and with the landlord's factor, by which he agreed to prepay the price of the goods to the factor, to be applied in payment of the farmer's rent. S. sent a cheque for the amount to the factor, which he requested him to acknowledge "by receipt as per copy enclosed." This copy ran thus,—“Received from S. the sum of £120 in full payment of sixty tons of potatoes . . . . which I bind and oblige myself to deliver.” The factor retained and cashed the cheque, but refused to guarantee delivery of the goods. S. thereafter repudiated the contract, and raised an action against him for redelivery of the cheque, or for repayment of the amount thereof.

The Court held that as the pursuer had sent the cheque expressly on the understanding that the defender should guarantee delivery of the goods, the latter was not entitled to retain it or its proceeds, and ordered it to be repaid.

2D DIVISION.  
Sheriff of  
Stirling, Dum-  
barton, and  
Clackmannan.

1.

ON 2d November 1887 Thomas Semple, grain-merchant, Glasgow, bought sixty tons of potatoes from James MacAuslan, Kirkmichael Farm, Helensburgh, at 40s. per ton, for delivery up to 1st March 1888, payment to account to be made in eight days. MacAuslan's crop and stock had in the previous August been sequestrated at the instance of his landlords, who were the trustees of the late Sir James Colquhoun of Luss. He however obtained their permission to carry out the sale on condition that the price was paid to their factor, James Wilson, Helensburgh, to be applied in payment of rent then due.

Shortly after the sale, MacAuslan informed Semple of his position, and an agreement was entered into, to which they and Wilson the factor were parties, to the effect that Semple should pay the price of the potatoes to Wilson.

The account was accordingly sent to Semple, who on 18th November 1887, acting on his understanding of the above agreement, wrote in the following terms to Mr Wilson, enclosing a cheque in his favour for £120:—“Dear Sir,—I beg to enclose you herewith cheque value £120, in pay-

ment of potatoes, sixty tons 'Champions,' for which please acknowledge by No. 142. receipt as per copy enclosed.—I am, yours truly, THOMAS SEMPLE."

Copy receipt enclosed in above letter.—"£120.—Received from Mr Thomas Semple, grain-merchant, 57 West Nile Street, Glasgow, the sum of £120 stg., in full payment of sixty tons potatoes,—'Champion,' to be delivered free on rail at Helensburgh, in good order and condition, at time specified, from Mr James MacAuslan, farmer, Kirkmichael, which I bind and oblige myself to deliver. JAMES WILSON, factor for Luss Estate, Helensburgh. 18th November 1887." June 14, 1889.  
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Next day Wilson forwarded to Semple a receipt in these terms:—"Received by me, as factor for the trustees of the late Sir James Colquhoun, Bart., from Mr Thomas Semple, grain-merchant, 57 West Nile Street, Glasgow, the sum of £120 stg. (per cheque), being the price of sixty tons of 'Champion' potatoes, sold to him by Mr J. MacAuslan, farmer, Kirkmichael, to be delivered as per agreement entered into between the foresaid parties; and which sum of £120 stg. is applied by me towards liquidation of arrears of rent of the farm of Kirkmichael, due at and previous to Whitsunday 1887. JAS. WILSON, 19/11/87."

Semple wrote on the same day to Wilson as follows:—"Dear Sir,—I am in receipt of your letter of this date, with discharged account for sixty tons potatoes; but would prefer to have something more definite with regard to delivery. They might turn out less than sixty tons, and might also be carelessly handled. I want a guarantee that I will get delivery of sixty tons in good order and condition; otherwise will not run the risk.—I am," &c.

On 30th November 1887 Semple again wrote to Wilson requesting an answer to his letter of the 19th.

On 2d December Wilson wrote to Semple,—"Dear Sir,—In reply to yours of 30th, I beg to say I cannot give a further guarantee regarding the sixty tons of potatoes bought by you from Mr MacAuslan, Kirkmichael.

"Are you afraid he will dispose of them elsewhere?—Yours," &c.

On 3d December Semple wrote to Wilson,—"Dear Sir,—I am in receipt of yours of 2d inst. Very sorry if my previous notes should have left any impression that I was afraid of Mr James MacAuslan re-selling the potatoes. I am not in the least afraid of his doing so; but knowing that his stock and crop are under sequestration, I don't see my way to come under his obligation to deliver the potatoes. In other circumstances I would have had no objection. I must, therefore, request the guarantee necessary, as per receipt copy which accompanied my cheque for £120 stg., or to refund the money. Will wait your reply in due course."

No reply was sent to this letter, and Mr Wilson cashed the cheque.

On 22d March Semple wrote to Wilson, saying that he was prepared to take delivery of the potatoes, which he had sold for shipment to New York. As this letter was also ignored by Wilson, Semple repudiated the bargain, and on 5th June 1888 he raised this action against him in the Sheriff Court of Dumbarton for redelivery of the cheque, or failing redelivery, for payment of the amount, with interest.

The pursuer averred that he had only agreed to send the cheque on the understanding that MacAuslan and the defender had arranged that the latter was to become the seller, and was to further guarantee implement of MacAuslan's obligations. He further averred;—(Cond. 8) "The pursuer, assuming and holding the defender as having undertaken liability for implement of the contract, in respect he had retained the cheque on the conditions on which he had received it, wrote defender, on 22d March 1888, to that effect, and that he was ready to take delivery of the potatoes, and sent the defender 800 potato sacks, sufficient for the contract;

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and on two different occasions wrote the defender to get them filled with the sixty tons of potatoes, and put on rail at Helensburgh, addressed to the pursuer. But the defender took no notice of said request, and no portion of the said potatoes had been delivered to pursuer; by which failure the pursuer sustained additional loss and damage, for which he reserves his claim." (Cond. 9) "The defender has repeatedly been requested to grant the pursuer the receipt and obligation stipulated for in exchange for the cheque, or return it or the money to the pursuer, or to fulfil the contract; but he refuses or delays to do so; hence the present action has been rendered necessary."

The pursuer pleaded, *inter alia*;—(1) The pursuer having delivered to the defender the bank cheque for a specified purpose, and on special conditions, he was bound either to implement the contract and conditions, or to return the cheque to pursuer. (2) The defender having received the sum of £120 from the pursuer on the faith of his guaranteeing implement of the contract of sale, and having failed to do so, pursuer is entitled to repayment, with interest.

The defender averred that all he had undertaken was to guarantee that the pursuer should not be called upon to repeat payment of the £120, and that the sequestration should not be enforced in so far as the money was applied towards payment of the rent.

The defender pleaded;—(1) The defender having received pursuer's cheque, and applied its contents as arranged between the parties, is not liable in repetition thereof to the pursuer.

A proof was allowed, but it is unnecessary to give the evidence in detail, as the Court were of opinion that it was proved that the pursuer in sending the cheque to the defender understood the arrangement between MacAuslan and the defender to be such as entitled him to attach the condition to the cheque that the defender was to undertake responsibility for the delivery of the potatoes.

On 1st August 1888 the Sheriff-substitute (Gebbie) assoilzied the defender from the prayer of the petition.

On appeal, on 10th September, the Sheriff (Muirhead) adhered.

The pursuer appealed, and argued;—When the contract of sale with MacAuslan was originally made, the pursuer was ignorant of the sequestration. The effect of that sequestration was to nullify the contract.<sup>1</sup> A new bargain was consequently made, and that was, not that the defender was to become the payee under the old bargain, but was to become payee under a new bargain. The new bargain, as the pursuer understood it, was that the defender was to become the seller, and to guarantee delivery in that capacity. It was on this understanding that the pursuer had sent the cheque with its relative obligation. When the defender was informed that such was the pursuer's intention in sending that cheque, he was not entitled to reject the condition and still retain the cheque.<sup>2</sup>

Argued for the defender;—After the pursuer learned that the landlord had sequestered for rent, he did not annul the original contract of sale. All that he attempted to do was to get the defender to undertake obligations which were perfectly unreasonable. The alleged new bargain was simply, as far as the defender was concerned, an obligation on his part to remove any impediments which might be caused by the sequestration to the sale being properly carried out. The pursuer was aware that part of the arrangement was that the money was to be paid to the defender, to

<sup>1</sup> Bell's Prins. sec. 1244; Rankine on Leases, p. 355, and cases there cited.

<sup>2</sup> M'Gregor v. Alley & M'Lellan, March 4, 1887, 14 R. 535; Dominion Bank of Toronto v. Anderson, Feb. 10, 1888, 15 R. 408.

be applied in payment of rent due by MacAuslan. MacAuslan remained entitled to demand payment of the price, having made no assignation to the defender. In these circumstances the defender was quite entitled to keep the cheque and apply it in payment of MacAuslan's rent. No. 142.

After the hearing, the Court ordered the case to be re-argued before five Judges.

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At advising,—

The LORD JUSTICE-CLERK delivered the following opinion as the opinion of the Court:—

The Court having had the benefit of a re-hearing of this case, and the assistance of Lord Wellwood in considering it, are all of opinion that although the contract between MacAuslan and the pursuer may have continued to subsist, and might, with the consent of the defender, have warranted an assignation by MacAuslan of the right to demand payment of the price of the potatoes, it is proved that the pursuer, in sending his cheque to the defender, understood the arrangement between MacAuslan and the defender to be such as entitled him to attach the condition that the defender was to undertake responsibility for the delivery of the potatoes.

This being so, the Court is further of opinion that the defender, being informed that such was the pursuer's understanding, was not entitled both to reject the condition and to retain the cheque, but was only entitled, on discovering the misunderstanding, to withdraw his consent to the sale of the potatoes, and to fall back on his rights under the landlord's sequestration.

The judgment of the Court therefore will be to recall the interlocutors appealed from, and to decern in favour of the pursuer, with expenses.

THE COURT pronounced this interlocutor:—"Find in fact (1) that the pursuer purchased the potatoes in question from James MacAuslan, and agreed to pay cash to account, subject to the condition that the defender, as representing the landlord, at whose instance MacAuslan had been sequestrated, should guarantee delivery of the same, and in sending the defender a cheque for the price stipulated that such guarantee should be granted; (2) that the defender retained and cashed the cheque, but refused to guarantee delivery of the potatoes: Find in law that the defender was not entitled to retain the cheque except upon the condition attached by the pursuer, and find accordingly that he is bound to repay to the pursuer the amount of the cheque, with interest, as concluded for: Therefore sustain the appeal, recall the judgments of the Sheriff and Sheriff-substitute appealed against," &c.

THOMAS CARMICHAEL, S.S.C.—TAWSE & BONAR, W.S.—Agents.

ASSESSOR FOR COUNTY OF ARGYLL, Appellant.—*Low.*  
MARQUIS OF BREADALBANE, Respondent.—*Asher.*

No. 143.

*Valuation Acts—Remit to obtain further information—Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), sec. 9.*—The power conferred upon the Court by section 9† of the Valuation of Lands (Scotland) June 14, 1889.\*  
Assessor for  
County of  
Argyll v.  
Marquis of  
Breadalbane.

\* Decided Jan. 30, 1889.

† The Act 42 and 43 Vict. cap. 42, sec. 9, *inter alia*, provides,—“ . . . .  
The said Judges . . . may, if they think fit to do so, remit the case to the Commissioners or Magistrates by whom it was stated, with such instructions as the said Judges may consider necessary for having the case more fully stated.”

No. 143. Amendment Act, 1879, to remit a case, for further information, to the Commissioners or Magistrates by whom it has been stated, is limited to such matters as a mistake committed in the statement of the case, the setting forth specific details of matters stated generally, or the correction of a judgment of the Valuation Committee refusing to allow competent, or admitting incompetent, evidence.

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Marquis of  
Breadalbane.

An appellant in a valuation appeal moved the Court, in terms of the 9th section of the above Act, to remit the case to the Valuation Committee to take further evidence. Information of the facts which he desired to prove was in his possession when the case was before the Commissioners, and he failed to lead evidence thereof, or to move for an adjournment of the case to another diet to enable him to prove them.

The Court *refused* the motion.

Lands Valuation Appeal Court.  
Lord Fraser.  
Lord Trayner.

AT a meeting of the Valuation Committee of the County of Argyll, held at Oban on 13th September 1888, to dispose of appeals against the valuation of lands and heritages by the county assessor, for the year ending Whitsunday 1889, the Marquis of Breadalbane appealed against the following entries:—

Case No. 96.

No.	Description of Subject.	Proprietor.	Occupier.	Yearly Rent or Value.
9,678	Blackmount Deer Forest and Lodge Shooting and Grazing	PARISH OF ARDCHATTAN AND MUCKAIRN. The Marquis of Breadalbane	Proprietor	£720
10,132	Do.	PARISH OF GLENORCHY AND INNISHAEL. The Marquis of Breadalbane	Do.	£1860

The appellant contended that the present case was ruled by the case of *Assessor for Argyllshire v. Stuart* (the *Dalness* case),<sup>1</sup> and that accordingly £15 for each stag which might be killed should be adopted as the basis of the value of the forest. This value had proceeded upon a report submitted to the Committee of the values placed upon deer forests in Inverness, Ross, and Sutherland.

The Assessor contended that the *Dalness* case could not establish, and was not intended to establish, any general rule. The valuation was arrived at on the evidence of Mr N. B. Mackenzie, solicitor, Fort-William, as to what had been done in the counties of Inverness, Ross, and Sutherland, and was entirely incorrect. No such rule had been adopted in these counties, and, as matter of fact, in no case was there a forest valued at less than £20 per stag, while certain forests were let at much higher rates. He proposed to read and put in letters he had received from the Assessors of the counties in question. Counsel for the appellant objected on the ground that the writers could have been obtained as witnesses. The Committee sustained the objection to the reading of the letters, but agreed to admit the Assessor's statement as a witness as to material facts which he had ascertained. No other evidence was adduced by the Assessor in support of his statement, and the material facts relied on by him were denied by the appellant.

<sup>1</sup> *Assessor for Argyllshire v. Stuart*, March 15, 1888, 15 R. 588.

The Committee found the number of stags the forest was capable of producing, one year with another, to be 100, and fixed the valuation at £15 per stag for 100 stags = £1500, with £2 per head for 40 cattle grazed in the forest. They therefore directed the valuation of £720 in the parish of Ardhattan and Muckairn to be reduced to £440, and the valuation of £1860 in the parish of Glenorchy and Innishael to be reduced to £1140. The Assessor took a case, from which the above narrative of facts is taken.

No. 143.

June 14, 1889.  
Assessor for  
County of  
Argyll v.  
Marquis of  
Breadalbane.

Counsel for the Assessor moved the Court to remit the case back to the Valuation Committee to hear further evidence.

**LORD FRASER.**—In this case, which deals with the valuation of the Black-mountain Deer Forest and Lodge, and the shooting and the grazing belonging to the Marquis of Breadalbane, the parties are at issue in regard to simply the amount at which each should be stated in the Valuation-roll. In the case of *Dalness (Assessor for Argyllshire v. Stuart*, 15th March 1888, 15 R. 588), the Valuation Committee held that the value of that forest must be estimated at £15 per stag for 17 stags, making in all £255. This value proceeded upon a report submitted to the Committee of the values put upon deer forests in Inverness, Ross, and Sutherland shires. The Committee adopted this valuation, and although the Judges in this Court were divided in opinion, there was no division between them as to £15 being the proper valuation for a stag. We have now been told that the Valuation Committee in the case of *Dalness* were misled, and that instead of £15 being the rate per stag in the neighbouring counties, there was no case where a forest was let at less than £20 per stag. Now, it is relevant to attack the *Dalness* decision, as an authority, and to urge that it proceeded upon imperfect information; and if the appellant, the Assessor, had gone rightly about it he might, if he succeeded in his attack, have increased the valuation of each stag. But instead of this, what he proposed to do was to read and put in letters which he had received from the Assessors of Inverness, Ross, and Sutherland shires, to which the objection was taken that these letters could not be read, the writers of them being available as witnesses; and the Committee very properly rejected the evidence. Then the whole ground of challenge of the *Dalness* decision rested upon the Assessor's own statement, which the Committee agreed to receive, which certainly was very meagre proof; and it is mentioned that "no other evidence was adduced by the Assessor in support of his statement, and the material facts relied on by him were denied by the appellant."

The Committee rejected the contention of the appellant. He had an opportunity, if his witnesses were not present, of getting the case delayed to another diet, but this he objected to. It was moved on behalf of the Marquis to adjourn the case if further evidence was to be adduced, but this not being agreed to, the Valuation Committee could only pronounce judgment on the evidence before them. We are now moved by the counsel for the appellant to remit the case back to the Valuation Committee to hear the evidence that had not been forthcoming at the first meeting. I am clearly of opinion that we ought not to do so. The power of making a remit granted by statute to this Court in order to obtain further information must be limited in its character to such matters as a mistake committed in the statement of the case; the setting forth specific details of matters which are stated quite generally; or to correct a judgment of the Committee refusing to allow competent, or admitting incompetent, proof, and matters of a similar character. But it was never intended that, when the remit

No. 143. is asked for the purpose of beginning to make out a case *ab ovo*, and of leading evidence which could have been properly led before, a similar indulgence should be allowed. In all probability this case will come up again next year, if the information which the Assessor says he has got is in his possession.

June 14, 1889.\*  
Assessor for  
County of  
Argyll v.  
Marquis of  
Breadalbane.

LORD TRAYNER.—I take quite the same view. The appellant should have been ready with his proof before the Committee, to shew that the decision in the *Dalness* case had proceeded upon information which was erroneous. He now wants a remit to enable him to make a better case than he presented to the Committee. I think that is not one of the purposes for which we are authorised by the statute to send a case back to the Committee.

THE COURT were of opinion that the determination of the Valuation Committee was right.

DAVIDSON & SYME, W.S.—PARTY—Agents.

No. 144. DOUGLAS FRASER & SONS, Appellants.—*R. V. Campbell*.  
ASSESSOR FOR THE BURGH OF ARBROATH, Respondent.—*Hay*.  
June 14, 1889.\*  
Fraser & Sons  
v. Assessor for  
Burgh of  
Arbroath.

*Valuation Acts—Weaving factory—Spinning-mill temporarily silent.*—The proprietor of a weaving factory kept a spinning-mill, which formed part of the factory, standing from reasons of temporary expediency, and made no attempt to obtain a return from the mill by letting it, or otherwise.

*Held* that it was properly entered in the Valuation-roll by the Assessor at its full yearly value as a going mill.

Lands Valua-  
tion Appeal  
Court.  
Lord Fraser.  
Lord Trayner.

AT a Court, held by the Magistrates of the Burgh of Arbroath on 11th September 1888, for hearing appeals against valuations made by the Assessor for the burgh, Messrs Douglas Fraser & Sons, flax-spinners and manufacturers there, appealed against an entry in the Valuation-roll by which the Wellgate Works, of which they were proprietors and tenants, were entered at the yearly rent of £855.

They claimed that the works should be entered as follows:—

Weaving Factory, . . . .	£427 10 0
Spinning-mill, . . . .	£213 15 0

They stated that the spinning-mill, which formed a distinct and separate part of the several subjects embraced under the designation of Wellgate Works, had been unworked since Whitsunday previously, and would not be restarted till Whitsunday 1889. It should, therefore, be entered as a warehouse for machinery at half of its valuation as a going mill. They also expressed their willingness to give a guarantee that the mill would remain unworked till Whitsunday 1889.

The Assessor maintained that the spinning-mill was part of the Wellgate Works, that the Wellgate Works fell to be valued as a whole, and that the mill was silent for temporary purposes merely.

The Magistrates unanimously found that Messrs Fraser were keeping part of their works standing from reasons of temporary expediency, and had made no attempt to obtain a return from the mill by letting it or otherwise; that £427, 10s., being one half of the whole valuation of the Wellgate Works, fairly represented the proportion applicable to the spinning-mill, and that the same sum of £427, 10s. was the yearly worth or value of the spinning-mill, taking one year with another. They therefore refused the appeal, and sustained the valuation made by the Assessor.

The appellants took a case, from which the above narrative is taken.

At the hearing of the appeal, they cited the undernoted authorities.<sup>1</sup> No. 144.

LORD FRASER.—I am of opinion that the appeal should be dismissed. The June 14, 1889. case sets forth that “the Magistrates unanimously decided that Messrs Fraser & Sons v. Assessor for Burgh of Arbroath. were keeping part of their works standing from reasons of temporary expediency, and had made no attempt to obtain a return from the mill by letting it or otherwise.” We must deal with the case assuming that to be the fact. Now, if the owner or tenant of premises, from reasons of temporary expediency, or from caprice, chooses not to carry on business as usual, that is no reason for reducing the valuation.

LORD TRAYNER concurred.

THE COURT sustained the valuation.

W. HARRIS, L.A.—PARTY—Agents.

THE FORTH BRIDGE RAILWAY COMPANY, Appellants.—*Asher—J. C. Thomson.* No. 145.  
THE ASSESSOR FOR THE BURGH OF QUEENSFERRY, Respondent.—*J. Wilson.*

*Valuation Acts—Lands acquired for railway—Embankment—Whether valuation by burgh or by railway assessor—The Forth Bridge Railway Company, 1882 (45 and 46 Vict. cap. cxiv.), sec. 16—Lands Valuation Act, 1854 (17 and 18 Vict. cap. 91), secs. 3, 20, and 21—Unfinished Railway.*—A plot of ground lying within a burgh had been acquired by a railway company, whose Act of Parliament provided that the lands from time to time acquired by the company should, “for all purposes of tolls, rates, and charges, and for all purposes whatsoever, be the undertaking, railway works, and property of the company.” Part of the ground had been used in the construction of a railway embankment, the remainder being covered with the débris caused by the formation of the embankment.

The burgh assessor included the subjects in his valuation on the ground that they were not “wholly occupied by the railway and works,” and that the railway was still unfinished.

In an appeal against the determination of the Valuation Committee sustaining the assessment, the Court held that, as the ground in question formed part of the undertaking of a railway company within the meaning of sections 20 and 21 of the Lands Valuation Act, 1854, the burgh assessor had no duty in regard to it, and that the determination was wrong.

At the Lands Valuation Court of the Royal Burgh of Queensferry held by the Magistrates and Town-Council of that burgh, upon Monday, the 10th day of September 1888, for the purpose of hearing and disposing of appeals against valuations made by the Assessor of the said burgh, for the year from Whitsunday 1888 to Whitsunday 1889, the Forth Bridge Railway Company appealed against an entry in the Valuation-roll, the ground valued in that entry being situated in the parish of Dalmeny and county of Linlithgow, but within the parliamentary boundaries of the burgh of Queensferry, and so included in the area falling to be valued by the Burgh Assessor.

The ground in question, which formed part of the lands of Bankhead, near South Queensferry, had been acquired by the company for the purposes and under the powers of the “Forth Bridge Railway Act, 1882.” Part of it was used in the construction of a railway embankment, and

<sup>1</sup> Barbour, March 7, 1878, 9 R. 1236; Staley v. Overseers of Castleton, June 8, 1864, 33 Law Jour. Mag. Cases, 178; Harter v. Overseers of Salford, June 3, 1865, 34 Law Jour. Mag. Cases, 206.

\* Decided Jan. 31, 1889.



No. 145

June 14, 1889.  
Forth Bridge  
Railway Co. v.  
Assessor for  
Burgh of  
Queensferry.

the remainder of it was covered with the débris and loose material caused by the construction of the embankment. This was admitted by the Assessor.

The railway company stated that the land in question formed part of the undertaking of the Forth Bridge Railway Company,\* whose railway thereon had been for some time in course of construction, and was now approaching completion, the area in dispute being at the present time wholly occupied by the said railway and works. They stated further that "the land in question being wholly occupied by an unfinished railway, having as yet no connection with any portion of railway by means of which it could be in any way whatever utilised, was incapable of being let or yielding rent. If the land is to appear in the Valuation-roll at all it should be entered at nil." They accordingly maintained that the ground ought to be valued (if at all) as a part of their undertaking by the Assessor of Railways and Canals under section 21 † of the Lands Valuation Act, 1854, and not by the Burgh Assessor under section 3. ‡

The Assessor stated, that prior to its being acquired by the company the land had formed part of the arable farm of Bankhead, and was then valued at £4, and he maintained that its value had been increased on account of its convenient proximity to the Forth Bridge. He denied that at present, at anyrate, it formed a part of the railway company's undertaking, it being only, as stated by them, "a portion of an unfinished railway, having as yet no connection with any other portion of railway by means of which it could be in any way whatever utilised." He accordingly maintained that, in terms of sec. 21 of the Act, the land in question was not, and could not competently be, valued by the Assessor of Railways and Canals, and that, in the discharge of his duty, he was bound, in terms of sec. 3 of the Act, to enter it in the Valuation-roll for the burgh.

The Magistrates dismissed the appeal, and the railway company took a case, from which the foregoing narrative is taken. At the hearing of the appeal the undernoted authorities were referred to.<sup>1</sup>

At advising,—

LORD TRAYNER.—The Assessor of the burgh of Queensferry has placed the land in question on the Valuation-roll of the burgh, on the ground that it "was

\* The Forth Bridge Railway Act, 1882 (45 and 46 Vict. cap. cxiv.), sec. 16, enacted that, "Subject to the provisions of this Act, the lands and property from time to time acquired by the company under this Act, and the railway and works by this Act authorised, shall for all purposes of tolls, rates, and charges, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company, as if the company had by the Act of 1873 been authorised to acquire, make, and maintain the same."

† The Lands Valuation Act, 1854 (17 and 18 Vict. cap. 91), section 21, enacted that "the Assessor of Railways and Canals under this Act shall, on or before the 15th day of August 1854, and on or before the 15th day of August in every subsequent year, inquire into and fix *in cumulo* the yearly rent or value, in terms of this Act, of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking."

‡ Section 3 of the same Act enacted, that it shall be the duty of the various County and Burgh Assessors "annually to ascertain and assess the yearly rent or value of the several lands or heritages within the county or burgh respectively, other than the lands and heritages of railway and canal companies, which are hereinafter specially provided for."

<sup>1</sup> Edinburgh, Perth, and Dundee Railway Co. v. Arthur, Dec. 22, 1854, 17 D. 252, 27 Scot. Jur. 99; North British Railway Co. v. Greig, March 20, 1866, 4 Macph. 645, 38 Scot. Jur. 333; Dundee and Arbroath Joint Line Committee. Dec. 21, 1883, 11 R. 396; Forth Bridge Railway Co. v. Assessor of the County of Linlithgow, Feb. 10, 1888, 15 R. 595.

not, and could not competently be, valued by" the Railway Assessor, and that he was bound, in the discharge of his duty, under section 3 of the Valuation Act, to enter it on the Valuation-roll of the burgh within which it is situated. I think the Assessor has taken an erroneous view of his duty under the section he refers to. By that section he is required to ascertain and assess the yearly rent or value of the several lands and heritages within the burgh, "other than the lands and heritages of railway and canal companies, which are hereinafter specially provided for." He is not required to see whether the lands and heritages of railway companies have been valued or placed on any Valuation-roll; with that he has no concern. His only duty in reference to such properties is to see that they are not entered in the Burgh-roll. But before he excludes them from the Burgh-roll he must be satisfied that the lands and heritages so excluded are (as described in section 20 of the Valuation Act) "belonging to, or leased by, railway or canal companies, and forming part of the undertakings of such companies." If the lands are of this description, the Burgh Assessor has no duty with regard to their valuation whatever.

No. 145.  
June 14, 1889.  
Forth Bridge  
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Burgh of  
Queensferry.

The question now to be determined is whether the land, concerning which this appeal has been brought, falls within the description of section 20; and I am of opinion that it does. That land was acquired by the appellants for the purposes of their railway under the powers conferred by their Act of 1882, which provides that land acquired under that Act shall, for all "purposes whatsoever, be the undertaking, railway works, and property of the company." But, in addition to that, it is the fact, admitted by the Assessor, that part of the land in question has been already applied to the purposes of the railway, and been embodied in the appellants' undertaking by being used in the construction of a railway embankment. The remainder of it is covered with the débris and loose material which necessarily accompany the formation of such an embankment. The whole ground, therefore, in my opinion, is at present occupied by the railway works, and forms part of the appellants' undertaking. If it is the view of the Assessor that nothing can form part of an undertaking until the undertaking is completed, and in such a state that it may competently be valued, that is a view in which I cannot concur.

LORD FRASER.—I concur.

THE COURT were of opinion that the determination of the Magistrates and Town-Council was wrong.

MILLAR, ROBSON, & INNES, S.S.C.—PARTY—Agents.

WILLIAM MARTIN (Factor for George Stewart), Appellant.—  
*C. K. Mackenzie.*

No. 146.

ASSESSOR FOR BURGH OF LEITH, Respondent.—*Guthrie Smith—Salvesen.*

June 14, 1889.  
Martin v.  
Assessor for  
Burgh of  
Leith.

*Valuation Acts—Value—Consideration other than the rent—Obligation to erect a wooden circus removable by tenant.*—A lease of a plot of ground at a fixed rent contained an obligation on the tenant, within two months of his entry, to erect and complete a wooden circus upon the ground. The tenant was further to be entitled to remove his buildings at the termination of his lease, but he was bound to leave the site clear and free from all rubbish and débris.

Held that the obligation to erect the circus was not a "consideration other than the rent" within the meaning of the 6th section of the Lands Valuation (Scotland) Act, 1854.

No. 146. ALFRED EUGENE COOKE, circus proprietor, occupied a piece of ground in Great Junction Street, Leith, belonging to George Stewart of Thornhill, Lasswade, under and in virtue of a missive offer and acceptance dated June 14, 1889.

Martin v.  
Assessor for  
Burgh of  
Leith.

The missive offer was in these terms:—

“Andrew Wallace, Esq., S.S.C.

Chambers, No. 68 George Street,  
Edinburgh, 12th October 1887.

Lands Valua-  
tion Appeal  
Court.

Lord Fraser.

Lord Trayner.

Case No. 95.

“Dear Sir,—On behalf of George Stewart, Esq., of Thornhill, Lasswade, I hereby offer to lease to your client, Mr Alfred Eugene Cooke, circus proprietor, that piece of ground in Great Junction Street, Leith, . . . and that upon the following conditions, viz:—1. The rent to be £115 sterling per annum, payable half-yearly in advance, at the usual terms, and in equal portions, and you will personally guarantee payment of the first half year's rent at Martinmas first. 2. The lease to be for five years from Martinmas first 1887, but after, or on the expiry of the first two years thereof, the proprietor of the ground to have the right to resume possession of the ground for building purposes upon giving twelve months' notice in writing to the tenant. 3. Mr Cooke shall be bound, within two months from the date of his entry, to erect and complete a substantial wooden circus building in terms of the plans which he has submitted to me, and which I approve of, and the said building to be completed to my reasonable satisfaction. 6. Mr Cooke shall be entitled to remove his buildings at the natural or earlier termination of the lease, and shall be bound to leave the site clear and free from all rubbish or débris, and fenced in as at present towards the public street and east lane.—I am, dear Sir, yours truly,

W. HAMILTON BEATTIE.”

Thereafter Mr Cooke erected a circus on the ground in terms of his obligation.

The Assessor for the Burgh of Leith entered the subjects in the Valuation-roll for the year 1888 in the following manner:—

Nature of Subjects.	Situation.	Proprietor.	Occupier or Tenant.	Value.
Circus,	Gt. Junction Street,	G. Stewart, Lasswade,	A. E. Cooke,	£300 0 0

At a Valuation Court for the Burgh of Leith, held on 11th September 1888, William Martin, factor for and on behalf of Mr Stewart, appealed against the Assessor's valuation, craving that it should be altered to the extent and effect of describing the subjects as ground and not as a circus, and of stating the value thereof at £115.

The Magistrates and Council having adopted the Assessor's view, Martin took a case, in which the foregoing facts appeared.

Argued for appellant;—(1) The lease was a *bona fide* lease, and the rent payable under it was conditioned as the fair annual value of the subjects thereby let. Such rent must therefore in terms of the statute be deemed and taken to be the yearly rent or value thereof. (2) The stipulations contained in the lease were only matter of regulation as to the use of the property, and did not amount to a *grassum* or consideration other than the rent,<sup>1</sup> within the meaning of the 6th section of the Lands Valuation (Scotland) Act, 1854.

<sup>1</sup> North British Railway Co. v. Assessor for Leith, Feb. 9, 1884, 11 R. 558; Gosnell, &c., v. Assessor for Edinburgh, Jan. 27, 1885, 12 R. 571; Trustees of Dundee Harbour, &c., v. Assessor for Dundee, March 19, 1886, 13 R. 829.

Argued for the Assessor;—(1) The obligation upon the tenant to build the circus was as much a consideration and condition of granting the lease as the promise of payment of the money rent. (2) The circus having been erected, the nature of the subject was entirely changed, and the lands and heritages in question were not a mere piece of ground, but a house or building known as a circus, and must be valued accordingly.

No. 146.

June 14, 1889.  
Martin v.  
Assessor for  
Burgh of  
Leith.

At advising,—

LORD FRASER.—This case presents a question for decision which comes up at every sittings of this Appeal Court. The 6th section of the Valuation Act enacts that where the lands to be valued “are *bona fide* let for a yearly rent, conditioned as the fair annual value thereof, without *grassum* or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages, in terms of this Act.” The clause for construction is “consideration other than the rent.” It has presented itself in a variety of forms, as is illustrated by many decisions since the statute was passed. I adhere to all that I have said in the case of the *Trustees of the Dundee Harbour, &c., v. Assessor for Dundee* (19th March 1886, 13 Ret. 831), viz, that the consideration must be valuable, and not a mere matter of regulation as to how a tenant shall use the property; that the stipulation in favour of the landlord shall not be such as the common law implies apart from the conditions in the lease; and that the tenant shall be bound to do something which redounds to the advantage of the landlord.

The present case presents a point of difference from all the cases which have hitherto been decided. It is stipulated by the lease that the tenant “shall be bound, within two months from the date of his entry, to erect and complete a substantial wooden circus building, in terms of the plans which he has submitted to me, and which I approve of; and the said building to be completed to my reasonable satisfaction.” Now, if the lease had gone on further to stipulate that the building so to be erected should belong to the landlord at the termination of the lease, there would clearly have been a consideration other than the rent of £115, and that rent in consequence could not have been taken as the annual value of the subjects. But the contrary has been stipulated, for it is agreed that the tenant “shall be entitled to remove his buildings at the natural or earlier termination of the lease, and shall be bound to leave the site clear and free from all rubbish or *débris*, and fenced in as at present towards the public street and east lane”; that is to say, the tenant has right to leave the circus which he has built, or to take it away, at his pleasure; but if he does take it away, he must remove all *débris*. The landlord thus receives no advantage whatever from the erection of the circus, except to this extent, that during the subsistence of the lease it is a security to him to the extent of its value for payment of the rent, and the question then comes to be, whether this security is a consideration other than the rent.

Now, let us test this by the ordinary security of caution. In the present case, the landlord does get a cautionary obligation for the tenant, because it is a condition of the lease that the tenant’s agent “will personally guarantee payment of the first half year’s rent at Martinmas first.” Is this any consideration other than the rent? It clearly is not. It simply is a precaution taken by the landlord that the rent shall be paid, but this is not a consideration other than the rent. It makes the payment more secure, but that is all. Now, is the security afforded by the existence of the wooden circus in anyways different?

**No. 146.** It appears to me that it is not. I am therefore of opinion that the determination of the Magistrates in this case was wrong, and that the value in the roll should be reduced to £115.

June 14, 1889.  
Martin v.  
Assessor for  
Burgh of  
Leith.

**LORD TRAYNER.**—I agree with the opinion which your Lordship has delivered. The 6th section of the Act requires the Assessor (speaking in general terms) to take as the yearly rent or value of a subject actually let the rent expressed in the lease, but it adds that the rent expressed in the lease shall not be taken to be the yearly rent or value of the subject where the lease confers upon the landlord a *grassum* or consideration other than rent, that being an enhancement of the advantage which the landlord receives. In this case, the landlord gets a rent fixed by the lease, and he gets no advantage or consideration whatever for the land beyond the stipulated rent. It is true that there is an obligation to build a circus within two months, and, as your Lordship has pointed out, that may afford a security to the landlord for payment of his rent beyond what he would have had if the circus had not been built. But that is not a consideration which enhances the value of the subject to the landlord. When tested by the case of a cautionary obligation, as your Lordship has tested it, the argument of the respondent fails—the existence of the cautioner makes the landlord's chance of recovery greater, but, after all, whether he recovers from the cautioner or the debtor, he only gets the amount of rent stipulated. And so, in this case, whatever the landlord's security may be, he gets no more than the rent stipulated in the lease. It seems to me plain, therefore, that there is here no *grassum* or consideration other than the rent, and that under section 6 of the Act, the rent fixed by the lease must be entered in the roll as the yearly rent or value of the subjects.

THE following was the opinion :—" We are of opinion that the determination of the Magistrates and Town-Council is wrong, and that the valuation should be reduced to £115."

D. HILL MURRAY, S.S.C.—J. CAMPBELL IRONS, S.S.C.—Agents.

**No. 147.** THE CRAIGTON CEMETERY COMPANY, LIMITED, Appellants.—*W. Campbell.*  
THE ASSESSOR FOR LOWER WARD OF LANARKSHIRE.

June 14, 1889.\*  
Craigton  
Cemetery Co.,  
Limited, v.  
Assessor for  
Lower Ward  
of Lanark-  
shire.

*Valuation Acts—Principle of valuation—Cemetery.*—A cemetery company bought land which they laid out as a burial-ground. They derived an annual income from giving off lots for burial purposes, the right of the allottees being one of perpetual use.

*Held* that the valuation of the land ought to be based upon the rent at which in its actual state it might be expected to let to a tenant to be used by him as it had been used by the company, and not at its agricultural value.

At a meeting of the Valuation Committee of the Commissioners of Supply for the Lower Ward of the County of Lanark on 12th September 1888, the Craigton Cemetery Company, Limited, appealed against the entry made by the Assessor in the Valuation-roll of £500 as the yearly value of the lands belonging to the company, situated in the parish of Govan.

Lands Valuation Appeal Court.  
Lord Fraser.  
Lord Trayner.

Case No. 98.

In 1873 the appellants had acquired 29½ acres of land, and partly enclosed the same with a wall, and built an entrance lodge, and laid off

part of the ground for burial purposes. The property was then entered No. 147. in the Valuation-roll at £100.

At the date of the valuation in 1888 the company had disposed of nine acres or thereby for burial purposes, and the whole of these nine acres had practically been used for interments. The remaining portion of twenty-one acres had been laid off partly in carriage-drives and footpaths, and also for giving out for burial purposes. Of recent years the appellants had had a considerable surplus of revenue over expenditure, which they had divided amongst their shareholders. This revenue was principally derived from the sale of the land to lairholders. The income for the year at 31st December 1887 shewed a profit of £1395, 16s. 6d.

June 14, 1889.  
Craigton Cemetery Co., Limited, v. Assessor for Lower Ward of Lanarkshire.

The Assessor contended that this revenue ought to form the basis of the yearly value of the ground. In other words, he considered the revenue from sales of ground as profits of a business, and argued that a business yielding such a profit to the proprietor would let to a tenant at a rental of £500.

The appellants maintained,—(First) The revenue made by them arose from the sale of the *corpus* of their property, and was not rent or yearly produce of the lands. (Second) The principle adopted by the Assessor of ascertaining the annual value from a comparison of income and expenditure was an erroneous one. If strictly applied, it led to the anomaly that only such lands and heritages as yielded a surplus of income over expenditure would be treated as having an annual value. There were cemeteries in Glasgow which did not yield a surplus of revenue over expenditure, and which consequently did not yield any return to the proprietors, and in these cases the subjects were entered in the Valuation-roll at the agricultural value. In these circumstances the appellants maintained that if a valuation was to be placed upon burial-grounds, it must be the value at which the ground would in its actual state let from year to year; and that that value could only be the agricultural value. The amount of revenue derived from the disposal of land to lairholders could not affect in any way the question of the yearly value of the lands, in the sense of the Valuation Acts.<sup>1</sup> (Third) Ground disposed of or set apart for the burial of the dead was not a rent-producing subject. It was never utilised for any other purpose, and it had therefore no annual value. In point of fact the appellants' ground was not used in any other way than as a burial-place for the dead, and it yielded no annual return.

The appellants stated that £100 was a full estimate of the yearly value of their land.

The Committee sustained the appeal to the extent of £100, and fixed the valuation at £400.

The appellants took a case, from which the foregoing narrative is taken. At advising,—

**LORD FRASER.**—The appellants in this case are a joint stock company, who carry on a perfectly legitimate business. They have become owners of 29½ acres of land, which they have devoted to the purpose of a cemetery for the interment of the dead. Nine acres of this land have been already given off for burial purposes, and the remaining twenty-one acres have been laid off with carriage-drives and footpaths, and made suitable for the same purpose. The income of the company is derived from the grant of burial-stances and other fees; and the income for the year at 31st December 1887 shewed a profit of £1395, 16s.

<sup>1</sup> Assessor for Falkirk v. Falkirk Gas Co., Limited, Feb. 24, 1883, 10 R. 651.

No. 147. 6d. No information is given in the case as to the conditions on which lairs have been granted to the persons whose relatives are buried therein. The grants to these persons are called "sales." But this term is clearly inapplicable, for there can be no sale of heritage in Scotland except by disposition, which it is not said any of the grantees of the lairs ever received. Nor is there any information given as to what are the obligations of the company in reference to keeping in good order the plots of ground, nor as to any right of access to or control over the lairs allocated. I suppose it must be taken for granted that the cemetery is to be kept in order by the company, and that the nature of the transaction is a grant of perpetual use for the purpose of interment to the allottee, without any transference of the right of property from the company to the allottee. As explained to us at the debate, this was the nature of the right which the allottee claimed.

June 14, 1889.  
Craigton  
Cemetery Co.,  
Limited, v.  
Assessor for  
Lower Ward  
of Lanark-  
shire.

Now, then, what rent would a hypothetical tenant give for such a subject? If the joint stock company let the cemetery to a tenant, the latter would have all the powers which they possessed of utilising the cemetery for the purpose for which it was created, viz., a place for interment. The only way in which he could so utilise it would be simply by giving off lairs and receiving the price therefor from the allottees. The tenant could not be restrained from the use of the cemetery by the landlords, because such use was that to which it was devoted. The appellants contend as follows:—"That if a valuation is to be placed upon burial-grounds, it must be the value at which the ground would in its actual state let from year to year; and that that value can only be the agricultural value." Why should it be an agricultural value when the land has been laid out as a burial-ground, enclosed with a wall, and with the carriage-drives and footpaths suitable for a burial-ground? It must be dealt with as in its actual state as such burial-ground, and not as agricultural land.

In the next place, what is the income derivable from this cemetery? The only income which it yields is the sums paid for the lairs that are given off. That income will no doubt cease in time, when the whole area of this cemetery has been allocated, but in the meantime that must be treated as income; and, according to the balance-sheet annexed to the case, the profit on the year ending 31st December 1887 is £1395, 16s. 6d. Surely a tenant of the subject, whose expenditure would be very little,—only that of keeping the cemetery in good order,—could, upon receiving £1395, afford to pay a rent of £400, at which sum the Valuation Committee have fixed it. I observe that the case has been made the matter of decision by the Queen's Bench in England in the case of *The Queen v. Abney Park Cemetery Co.*, 1873 (L. R., 8 Q. B. 515), where the Court determined that the sums received for lairs were just income that must be taken into account. I am therefore of opinion that the determination of the Valuation Committee in this case was right.

LORD TRAYNER concurred.

THE following was the opinion:—"We are of opinion that the determination of the Valuation Committee is right."

JAMES DRUMMOND, W.S.—GORDON, SMITH, & PARKER, Writers—Agents.

SIR ROBERT MENZIES, Bart., Appellant.—*C. S. Dickson.*  
ASSESSOR FOR COUNTY OF PERTH, Respondent.—*Low.*

No. 148.

June 19, 1889.

*Valuation Acts—Lease—Voluntary reduction of rent.*—A landlord is not entitled to have a farm entered in the Valuation-roll at a lower rent than that stipulated for on the ground that he has granted a reduction of the rent, unless he can produce conclusive evidence to shew that he has bound himself to grant the reduction.

Menzies v.  
Assessor for  
County of  
Perth.

THIS was an appeal by Sir Robert Menzies of that ilk, Baronet, against a decision of the Valuation Committee of the Commissioners of Supply of the County of Perth confirming the valuation of the Assessor of the county of certain farms belonging to the appellant for the year ending Whitsunday 1889.

Lands Valua-  
tion Appeal  
Court.  
Lord Trayner.  
Ld. Wellwood.

The farms were occupied by tenants, and were held in four ways, viz., by (1) formal completed leases; (2) missives of lease, in which rent and endurance of lease were specified; (3) expired leases, but tenants continuing in possession on tacit relocation; (4) missives of lease in which the rent was specified, but no endurance of possession, and where the tenants continued to possess on tacit relocation.

Case No.  
101.

The entry to all these farms was at Whitsunday and at separation of crop, and the rents were payable at Candlemas and Lammas after entry.

Prior to the collection of rents due at Lammas 1887 the appellant wrote this letter to his factor,—“You can grant ten per cent reduction on the year's rent for the half year to the tenants in Appin for the half year's rent now due, except . . . This will be twenty per cent on the year's rent. ROBERT MENZIES.”

The Assessor entered the farms at the rents contained in the leases and missives of lease.

The Valuation Committee confirmed his valuation. They were of opinion that, in order to give effect to a deduction from the rent stipulated in a formal lease, such rent must be set aside either by writing on the lease or by some formal obligation under which the tenant could operate relief, and that neither of these methods had been adopted in the present case, the appellant's letter containing no obligation in favour of the tenants binding against him or his successors for future years.

The appellant took a case, from which the foregoing narrative is taken.

On 2d February 1889 the Court remitted to the Valuation Committee to “inquire and report whether the names of the tenants are entered in the rental-book of the estate at rents specified, and the duration of the tenancy, and to report whether there are any indorsations on the leases or entries in the rental-books of permanent deduction from the specified rents, and authorise the committee to take evidence and call for books and other documents to enable them to carry out this remit.”

The Committee reported as follows :—“There are no endorsements on the leases or missives of any farms shewing the deduction of rent given, and no writing on any of them shewing that deductions had been agreed upon in any case.

“The only books produced to the Committee under the call were the estate cash-book kept by the factor, shewing rents received, and the tenants' pass-books. According to the practice of the estate each tenant has a pass-book, in which there was entered on the one side the half-year's rent and the date at which it is due, and on the opposite side the payments made, with their dates. The pass-books are never in the hands of the proprietor or his factor, except when presented on a payment of rent about to be made, which as a rule is every half year about Candlemas



No. 148. and Lammas. No entry of a rent due is made in the pass-book until the tenant brings his book to the factor on making a payment, when the half year's rent is entered as at the date when due, and the payment made is entered on the other side.

June 19, 1889.  
Menzies v.  
Assessor for  
County of  
Perth.

"The abatements allowed under the letter of the appellant were given at Lammas 1887 and Candlemas 1888 in the form of repayment, i.e., the rent was entered in the pass-book at the full rent as under the lease or missive, but the abatement was allowed off and a receipt taken from the tenant therefor. At Lammas 1888 the reduced rents are entered on the debtor side of the pass-book, but, except in two cases to be afterwards mentioned, no explanation is given and no entries made in the book shewing permanent reduction.

"The two excepted cases are—245, Tirinie and Wester Tegarmuchd; 249, Easter Tegarmuchd.

"In these a deduction of  $12\frac{1}{2}$  per cent on the half year, or 25 per cent for the year, is given, commencing at Candlemas 1888, and there is an entry in the tenant's pass-book in each case, 'rents reduced for three years to £.' The factor's explanation of this difference is as follows:— 'Interrogated, What is the reason that in some of the tenants' books there is an entry of the reduction in the rent, and not in the others? Answer, There are only two of these, Tirinie and Easter Tegarmuchd, and in both cases the reduction is more than 20 per cent. The books of tenants holding under lease are kept on the same principle as the others which have been already exhibited, the rents in each of these being entered at the rents under the lease until August 1888, when the half year's rent is entered at the amount, less 20 per cent deduction. No entries have been made shewing permanent reductions.'"

LORD TRAYNER.—With regard to the two leases mentioned in the Committee's report as Nos. 245 and 249, I think there is sufficient written evidence to shew that the rent has been reduced as therein stated, and that accordingly effect must be given to the reduction in the Valuation-roll.

With regard to all the others, I am of opinion that the Commissioners are right, and that the appeal ought to be dismissed.

There are two groups of cases, the first consisting of formal current leases and missives of lease, which are in the same position as formal leases.

With regard to the rent stated in these, there is absolutely no evidence whatever that the rent stipulated has been reduced. In saying that, I am not ignoring the statements of Sir Robert Menzies and his factor, nor doubting their statements. But I think it is impossible to accept from them an explanation or statement that rents have been reduced, unless some formal mode be adopted of setting that forth so as to bind the landlord, and not make it a matter of goodwill merely.

The second group of cases consists of expired leases where the tenants continue to hold on tacit relocation. The only particulars in regard to these cases are to be found in the tenants' pass-books. Now here, except in the two cases I have referred to, where there are notes of the deduction, there is no evidence whatever of any intention or obligation on the part of Sir Robert Menzies to give the deduction referred to. I repeat that where the landlord wishes to get the apparent rent of his tenant reduced upon the Valuation-roll for the purposes of assessment, he must take such proceedings as will put it beyond all doubt that he is bound to give the deduction.

LORD WELLWOOD concurred.

THE following was the opinion:—"The Judges having considered the report of the Valuation Committee and heard counsel, are of opinion as regards Nos. 245 and 249, Tirinie and Wester Tegarmuchd, and Easter Tegarmuchd, that effect should be given to the reduction noted in the tenants' pass-books; and in regard to the other entries complained of, they are of opinion that the determination of the Valuation Committee is right."

No. 148.  
June 19, 1889.  
Menzies v.  
Assessor for  
County of  
Perth.

TODS, MURRAY, & JAMIESON, W.S.—PARTY—Agents.

MRS AGNES JAMIESON AND ANOTHER, First Parties.—*Strachan*.  
JAMES LESSLIE AND OTHERS (Mrs Lesslie's Trustees), Second Parties.—*Adam*.

No. 149.

June 19, 1889.\*  
Jamieson v.  
Lesslie's Trustees.

*Succession—Trust—Alimentary provision—Fee and liferent—Power of fiat to demand payment.*—A testatrix by her settlement directed her trustees to divide the residue of her estate equally between her two daughters, who were married, "and to their respective heirs and assignees, but declaring that the provision hereby made . . . is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their husbands, . . . but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions."

*Held* that the fee of the residue was vested in the daughters, and that they were entitled to have the residue paid over to them upon their own receipts, the receipts to bear the exclusion of the *jus mariti* and right of administration.

*Allan v. Allan's Trustees*, Dec. 12, 1872, 11 Macph. 216, *followed*.

MRS JANE LESSLIE died on 9th January 1881, leaving a trust-disposition and settlement, and codicil thereto. By the third purpose of the settlement she directed her trustees "at the first term of Whitsunday or Martinmas six months after my death, or as soon after such term as my trustees shall be able to realise my estate, to divide the whole rest and residue of my said estates and effects equally between my two daughters Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson, residing at Bonnytown, Linlithgow, share and share alike, and to their respective heirs and assignees; but declaring that the provision hereby made to my said two daughters is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their present husbands, or any future husbands they may marry, nor shall the same be assignable by them or by their said husbands, nor be liable to the deeds or subject to the legal diligence of the creditors, either of themselves or of their said husbands, for payment or in security of debts contracted by them; but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions, [with power to my trustees, notwithstanding what is hereinbefore written, and provided they be required so to do by my said daughters, or either of them, to pay to my said daughters, or either of them, the whole or such part of their respective provisions foresaid as they may request so to be paid to them, leaving my said daughters themselves to see to the application, use, or investment thereof, and without my trustees incurring any responsibility therefor:]

No. 149. and I declare that the receipts and all other writings with reference to the said provision, or to the interest or produce thereof, to be granted by my said daughters, shall be granted by themselves alone, and shall be good, valid, and sufficient to the receivers thereof, though the consent of their husband be not given thereto.”

June 19, 1889.  
Jamieson v.  
Lesslie's Trustees.

By the codicil Mrs Lesslie revoked that part of the settlement printed above within brackets.

The primary purposes of the trust having been implemented, and questions having arisen as to the rights and interest of the residuary legatees in the residue under the third purpose of the trust-disposition and codicil, a special case was presented by (1) Mrs Jamieson and Mrs Dawson, and (2) the trustees of the late Mrs Lesslie, submitting the following questions of law:—“(1) Whether the fee of the residue of the said estate is vested in the said Mrs Agnes Lesslie or Jamieson and Mrs Jane Lesslie or Dawson? (2) Whether they are entitled to have the capital of the said residue conveyed and made over to them, or any, and if so, what part thereof? Or (3) Whether the trustees are bound to retain the capital invested in their own names during the lifetime of the said legatees?”

Mrs Jamieson and Mrs Dawson both had children, who were all in minority.

The first parties maintained that the case was ruled by that of *Allan's Trustees v. Allan and Others*.<sup>1</sup>

Argued for the second parties;—They were willing to pay over the residue to the first parties, who probably had the fee, if they could do so with safety, but there was here no direction to pay as in *Allan's* case, and the conditional power “to pay” had been cancelled by the codicil. In order “to divide” and “to see to the investment” of the residue, so as to protect it for the first parties, as the testatrix desired it to be protected, it was necessary to keep up the trust during their lifetime. Payment could be made only to “their respective heirs and assignees.”<sup>2</sup>

At advising,—

LORD JUSTICE-CLERK.—The testatrix in this case, Mrs Jane Lesslie, by her will left the residue of her estate to her two daughters by a destination in these terms:—“I direct my trustees, at the first term of Whitsunday or Martinmas six months after my death, or as soon after such term as my trustees shall be able to realise my estate, to divide the whole rest and residue of my said estates and effects equally between my two daughters, Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson, residing at Bonnytown, Linlithgow, share and share alike, and to their respective heirs and assignees.” But she qualified these general words by a clause of declaration to the effect that what she thus gave to her daughters was an alimentary provision, and that the *ius mariti* and right of administration of their husbands were to be excluded, and that they should not be liable for the deeds or subject to the legal diligence of their own or their husband's creditors, and the trustees were directed “to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foressaid declarations and conditions” so as to carry out these intentions of the testatrix.

<sup>1</sup> Dec. 12, 1872, 11 Macph. 216.

<sup>2</sup> *Balderston v. Fulton*, Jan. 23, 1857, 19 D. 293; *Lady Massy v. Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173; *Whyte's Trustees v. Whyte*, June 1, 1877, 4 R. 786.

I think there can be no doubt that by the first provision which I have quoted No. 149. the daughters of the testatrix became entitled each to one-half of the fee of the estate. The trustees are directed to divide it between them, and although there is no direction in words to pay their halves over to them, there is no other way in which a division between them of the fee could be made, and unless the deed has that meaning there is no disposal of the estate of Mrs Jane Lesslie by it. But while it is thus certain that the testatrix disposed of her estate in favour of her daughters she had evidently a desire that it should as much as possible be protected for them, and accordingly she gave the special direction which I have quoted as to the investment of the funds. I am unable to see how that direction can be carried out. To invest the funds in such a way as to make them alimentary only would be practically the creation of a new trust, and the restriction of the rights of the daughters to a liferent. For unless they were restricted to a liferent, it would be impossible to protect the property given to them by the will from the claims of creditors or the deeds of the ladies themselves. But there is no power to create a new trust of this description, and even if it could be created, power could not be given to it to turn the gift to these ladies into a mere alimentary provision, protected from attack in the event of the beneficiaries incurring liabilities and from the acts of the ladies themselves.

I am therefore of opinion that the questions put to us must be answered, the first and second in the affirmative generally, and the third in the negative. As regards the exclusion by the testatrix of the husbands' *jus mariti* and right of administration, it appears to me that the precedent set by the decision in the case of *Allan* should be followed, and that the receipts for the shares of the ladies who take the fee should bear that the *jus mariti* and right of administration of their husbands are excluded.

LORD YOUNG concurred.

LORD LEE.—I was anxious to look into the case of *Balderston v. Fulton* and the other cases of that class before coming to a decision, but having now had the opportunity of examining them I have no doubt that the opinion expressed by your Lordship is the correct one.

There is no question now about the fee. The only question is, whether payment is to be postponed, whether in fact the trust is to be kept up.

The peculiarity of this case is that there is no ulterior destination beyond the two ladies. There is therefore nothing to be protected by keeping up the trust. The direction is that the money is to be divided between the daughters of the testatrix. In these circumstances *Balderston v. Fulton* cannot be founded upon as an authority for keeping up the trust. The cases of *Smith and Campbell*, May 30, 1873, 11 Macph. 639, and *Rennie v. Ritchie*, April 25, 1845, 4 Bell's App. 221, are quite distinguishable, because they are cases of annuity. I therefore concur with your Lordship's opinion.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Answer in the affirmative the first and second questions, and the third in the negative, and find and declare accordingly."

J. LOGAN MACK, S.S.C.—MACK & GRANT, S.S.C.—Agents.

June 19, 1889.  
*Jamieson v.*  
*Lesslie's Trustees.*

No. 150.

THOMAS PHILIP PARR, Pursuer (Respondent).—*Sir Charles Pearson—Murray.*June 19, 1889.  
Parr v. Maclean.HUGH MACLEAN, Defender (Appellant).—*C. S. Dickson—Salvesen.*

*Crofter—Right to cut peats—Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29).*—The yearly tenant of a croft, with the right to cut peats in the moss of A, in 1867 obtained permission from the landlord to cut peats from the moss of B, said permission to continue during the pleasure of the landlord. The crofter thereafter got his peats from B and not from A. In 1887 the landlord withdrew the permission to cut peats in B. The crofter having continued to take peats from B, the landlord applied for interdict against him. The defender maintained that the right to cut peats from B formed part of his holding in the sense of the Crofters Holdings Act, 1886, and that the application for interdict was therefore incompetent. *Held* that the landlord was entitled to withdraw the permission to cut peats conditionally given, and that interdict fell to be granted.

2D DIVISION.  
Sheriff of  
Argyllshire.  
1.

THOMAS PHILIP PARR, of Killichronan, Mull, brought an action in the Sheriff Court at Oban against Hugh Maclean, crofter under him at Kellon, for interdict against the defender taking peats from a moss at Killichronan.

The defender succeeded to the croft in 1877 on the death of his father, who had possessed it from 1865. The holding carried with it a right of cutting peats at Killimore, a moss on the pursuer's estate, about a mile and a-half from the defender's croft. In 1867 the defender's father obtained permission, during the landlord's pleasure and without payment of any rent, to cut peats at Killichronan Moss, which, though three miles from the croft, was accessible by a cart, while Killimore was not. The defender's father and the defender himself continued to take peats from Killichronan until December 1887, when the pursuer sent the defender a letter withdrawing the permission.

The pursuer admitted the defender's right to get peats, but denied that he had any right to take them from Killichronan.

The defender contended that his right to cut peats at Killichronan was part of his holding in the sense of the Crofters Holdings Act, 1886, and that the present action for interdict was therefore incompetent.\*

On 7th November 1888 the Sheriff-substitute (Maclachlan), after a proof, from which the foregoing facts appeared, pronounced this interlocutor:—"Finds (first) that the defender's father, Donald Maclean, became tenant of a croft at Kellon, on the estate of Killichronan, at that time the property of the pursuer's father, on or about the year 1865; (second) that the holding of which the said Donald Maclean became tenant included the right of cutting peats on a moss on Killimore Hill, part of said estate; (third) that the said Donald Maclean exercised the said right of cutting peats on said moss for two years or thereby, and thereafter applied to the

\* The Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 12, enacts,—" . . . It shall be competent for the Crofters Commission to draw up a scheme regulating the use by crofters on the same estate of seaweed for the reasonable purposes of their holdings, peat-bogs, and heather or grass used for thatching purposes, and to include the charge for all these in the fixed rent."

Sec. 34 enacts,—" . . . 'Holding' means any piece of land held by a crofter consisting of arable or pasture land, or of land partly arable and partly pasture, and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone or in common with others) immediately preceding the passing of this Act, including the site of his dwelling-house and any offices, or other conveniences connected therewith, but does not include garden ground only appurtenant to a house."

pursuer, who had then succeeded to said estate, and obtained permission from him to cut peats on a moss at Killichronan, on another part of said estate, but that said permission was granted by the pursuer during his pleasure only, and no rent was exacted therefor, and that said permission has now been withdrawn: Finds that the pursuer was entitled to withdraw said permission, and therefore decerns in terms of the prayer of the petition: Finds the defender liable in expenses," &c.

No. 150.  
June 19, 1889.  
PART v. Mac-lean.

On appeal the Sheriff (Forbes Irvine) adhered.

The defender appealed.

At advising,—

**LORD JUSTICE-CLERK.**—The evidence has satisfied the Sheriffs that the change from Killiemore to Killichronan was a piece of grace on the landlord's part, and not a right of the tenant. There is no evidence to the contrary. It was argued that the tenant had no right to get peats except from Killichronan. Such an argument is quite inconsistent with the universal rule and practice as we know it to exist, and would involve a hardship to crofters in the event of the peat at any particular place becoming exhausted. The privilege of being allowed to cut peats is not attached to any particular place. Crofters have a right to get peats, but the landlord has a right to point out where they are to go for them. If the landlord subjected the crofter to gross injustice by asking him to go to an extremely out-of-the-way place for his peats, a Court of law might interfere. Here, the distance he is asked to go is less than the distance he has hitherto gone. That advantage is, no doubt, counter-balanced by the fact that he can only use a horse, and must make more journeys than when he was able to employ a cart, but I think the Sheriffs were right in holding that this was within the landlord's discretion.

**LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE** concurred.

**THE COURT** pronounced the following interlocutor:—"Find in fact

(1) that the pursuer is proprietor of the lands of Killichronan in the Island of Mull, which includes the farm of Killiemore; (2) that the defender is tenant, under the pursuer, of a croft, part of said lands, with right to cut peats on the lands of Killiemore; (3) that in or about the year 1867 the pursuer gave leave to the defender's father, then tenant of the said croft, to cut peats during his, the pursuer's, pleasure, on the home farm of Killichronan instead of the farm of Killiemore, and that the tenants of the croft availed themselves of the privilege from that time till shortly before the institution of the present action, when the pursuer recalled the leave thus conditionally given: Find in law that the pursuer was entitled to recall the permission granted as aforesaid: Therefore dismiss the appeal: Affirm the judgments of the Sheriff and Sheriff-substitute appealed against: Find and declare, interdict, prohibit, and discharge in terms of the prayer of the petition: Find the pursuer entitled to expenses in the inferior Court and in this Court," &c.

F. J. MARTIN, W.S.—GILL & PRINGLE, W.S.—Agents.

No. 151.

ALEXANDER CORMACK, Pursuer (Appellant).—*Low—M'Lennan.*

SCHOOL BOARD OF WICK AND PULTENEYTOWN, Defenders (Respondents).

—*J. C. Thomson—Watt.*

June 21, 1889.

Cormack v.

School Board

of Wick and

Pulteneytown.

*Reparation—Dangerous condition of Premises—Child—Liability of School Board for condition of school premises.*—A child of seven years attending a public school was injured through the fall of an iron gate, which formed part of the school premises. The gate was in a defective condition, and fell in consequence of the school children swinging on it. Held that it was the duty of the school board to keep the gate in a safe condition, and that they were liable in damages for the injury.

2d DIVISION.

Sheriff of

Caithness-

shire.

I.

ON 9th March 1888 Robert Cumming Cormack, a boy seven years of age, attending the public school, Pulteneytown, was injured by the fall of an iron gate at the entrance to the school premises.

An action was brought by his father, Alexander Cormack, as his tutor and administrator-in-law, in the Sheriff Court at Wick, against "the School Board of the burgh of Wick and Pulteneytown" for damages, on the ground that the accident had been caused by the negligence of the defenders in having the gate in an insecure condition.

The defenders denied fault, and further pleaded contributory negligence.

A proof was led, from which the following facts appeared.

The gate, which was a heavy iron one, opened in two halves inwards, towards the school grounds. In the middle of the gateway there was a stop which was intended to prevent either half from swinging outwards. This stop was not in good order, and on one occasion when the gate was thrown open one of the halves of the gate had swung outwards beyond the stop and had struck the pillar of the gateway, wrenching the gate off its hinges. It was subsequently re-hung by a blacksmith, who fastened the hinges by two bolts, which, however, were not screwed up closely. The boys attending the school had been in the habit of swinging on the gate, and when the accident happened some of them were swinging upon the half of the gate which fell. There was some evidence that the pursuer's son had been swinging on it at the time. Other witnesses said he was merely passing. The swinging on the gate and the consequent pressure upon the hinges, as above explained, loosened the hinges, and the gate fell upon him, with the result that he was severely injured.

The Sheriff-substitute (Harper), on 24th December 1888, pronounced this interlocutor:—"Finds in fact the accident to the pursuer's boy occurred in consequence of the defenders' gate being insufficiently hung, and not provided with a stop: Finds in law the defenders were negligent and in fault in having the gate in that condition, that the boy did not by any negligence contribute to the accident, and that the defenders are liable in damages to the pursuer: Assesses the said damages at £40 sterling, and decerns against the defenders for that amount: Finds the pursuer entitled to expenses."

The defenders appealed to the Sheriff (Thoms), who, on 30th January 1889, pronounced this interlocutor:—"Finds that the pursuers have failed to instruct such negligence on the part of the defenders, as regards the condition of the gate at the entrance to the school mentioned in the petition, as to make them liable as concluded for: *Separatim*, Finds that if there was such negligence, there was contributory negligence on the part of the minor pursuer: Therefore assoilzies the defenders from the conclusions of this action," &c.

The pursuer appealed, and argued;—It was proved that the gate was defective, and that the accident arose from the defect. It was not proved

that the boy was swinging on the gate, but even if it had been, the defenders would be liable, because it might naturally be expected that children would swing on the gate, and it was the defenders' duty to make it reasonably safe against such usage.<sup>1</sup> There was a statutory duty on the defenders to keep the premises in good condition,\* for failure in which such a statutory corporation could be made liable in damages.<sup>2</sup>

Argued for the defenders;—No fault in the condition of the gate was established. The accident was due to the boy and his schoolfellows swinging on it, a use it was not intended for. In any view, that was contributory negligence, and a child could be barred by such negligence<sup>3</sup> from recovering damages. If a child meddled for no lawful purpose with what, if he left it alone, would not have hurt him, and received injury, no action of damages would lie for that injury.<sup>3</sup> The defenders had had the gate hung by a competent tradesman a short time before the accident. They could not therefore be liable in this action.

At advising,—

LORD JUSTICE-CLERK.—The pursuer has raised this action to obtain damages in respect of an accident to his son Robert, who is a boy about seven years of age. The boy was injured by the fall of a gate at the school known as the Pulteneytown Academy. At the time it fell upon him he was either passing close to the gate,—which is what was maintained upon the one side,—or was swinging on it,—which is the case maintained on the other. In the view which I take of the case, it is not necessary to decide which of these two contentions is correct.

Now, the gate by which the boy was injured was not itself an efficient or satisfactory one as regarded either its structure or the manner in which it was hung. It is proved that for some time previous to the accident the south half of it—that which fell—had no “stop” to catch it when shut, and that it could be swung round in the direction in which it was not intended to swing, with the effect that the gate acted as a lever, of which the fulcrum was the gate-post. The effect of children swinging upon the gate and bringing it round in this manner was to wrench the fastenings by which it was hung and so to bring it down. It was in this way that the accident occurred. The fastenings were also, it is said, defective, in consequence of the screw-pins not being sufficiently screwed home, but I have not thought it necessary to attach importance to that part of the case. It is sufficient, in my view, that the fastenings were liable to be wrenched in the manner which I have described.

Now the question is whether the School Board are responsible for the state of the gate, and for the accident that happened in consequence. I am of opinion that they are. It was their duty to have the gate, if they wished to have a gate at the place in question at all, in a condition reasonably safe having regard to the surrounding circumstances, and it is no answer for them to say that no

<sup>1</sup> *Beveridge v. Kinnear*, Dec. 21, 1883, 11 R. 387; *Findlay v. Angus*, Jan. 14, 1887, 14 R. 312; *Brady v. Parker*, June 7, 1887, 14 R. 783.

\* The Education Act, 1872 (35 and 36 Vict. c. 62), provides that “the school board of every parish and burgh shall maintain and keep efficient every school under their management . . .”

<sup>2</sup> *Mersey Dock Commissioners v. Gibbs*, 1864, L. R., 1 E. and I. Apps. 93; *Marshall v. School Board of Ardrossan*, Dec. 10, 1879, 7 R. 359, Lord Deas at p. 374.

<sup>3</sup> *Fraser v. Edinburgh Street Tramways Co.*, Dec. 2, 1882, 10 R. 264; *Hughes v. Macfie*, Dec. 7, 1863, 2 Hurlstone and Coltman, 744.



**No. 151.** accident would have occurred if children had not been swinging upon it. It is matter of common experience that young children do swing upon gates so placed, and the fact that in this case they did so is therefore just what the School Board had every reason to expect. I think that we ought to recall the judgment of the Sheriff, and revert to that of the Sheriff-substitute.

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Pulteneytown.

I should like to add that the proof laid before us seems far too long for the proper presentation of such a question, and that it is hardly creditable that it should have been allowed to extend to forty-three or forty-four large size pages of print.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD LEE.—I also concur. The Sheriff took the view that the boy had no right to swing on the gate, and "the defenders were not bound to provide a gate on which all or any of the boys attending the school could amuse themselves by swinging. Had a swing been provided, and it had fallen through the defenders' negligence, the case would have been different." But the evidence shews that the defenders allowed the children to use the gate in this manner. They had control of the boys in school hours, and they were under an obligation to see to the sufficiency of their premises. In this they failed, and the accident occurred in consequence.

THIS interlocutor was pronounced:—"Find in fact (1) that the pursuer's son, while a pupil at the Pulteneytown Academy, a school belonging to the defenders, was injured by the falling of part of the gate of entrance to the school; (2) that the gate was insufficiently hung, was not provided with a stop, and consequently on the occasion libelled swung outwards against a pillar, thereby breaking the hinge, and causing part of the gate to fall on the boy; (3) that he did not by negligence contribute to the accident: Find in law that it was the duty of the defenders to keep the gate in a safe condition, and that they are liable in damages to the pursuer as guardian of his son for the injury done to him: Therefore sustain the appeal: Recall the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-substitute: Of new assess the damages at £40 sterling: Ordain the defenders to make payment of that sum to the pursuer," &c.

THOMAS LIDDLE, S.S.C.—WILLIAM GUNN, S.S.C.—Agents.

**No. 152.** CICERI & COMPANY, Pursuers (Reclaimers).—*Asher—Young.*  
SUTTON & COMPANY, Defenders (Respondents).—*R. V. Campbell—Ure.*

June 21, 1889.\*  
Ciceri & Co. v.  
Sutton & Co.

*Contract—Carriage—"Statuary."*—C. & Co., Edinburgh, wrote to S. & Co., London,—“We have a large quantity of goods for shipment, both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra cotta busts, marble columns, wood frames, &c. Will you kindly let us know your rates for such goods from both the above ports to Glasgow by steamer, and the name of your agents at both places?” S. & Co. replied,—“We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot. Certain large terra cotta figures, of the value of £7, 10s. each, and small figures of men and animals, the property of C. & Co., were carried from Leghorn to Edinburgh on these terms through S. & Co., who contracted with steamship and railway companies for the carriage of goods, and charged through rates to

the owners of the goods. The goods having been damaged *in transitu*, C. & Co. brought an action against S. & Co. for damages as having failed to carry the goods in safety, in implement of their contract. S. & Co. defended the action on the grounds (1) that their contract with C. & Co. was not that of carriage but of agency, in contracting on C. & Co.'s behalf with the actual carriers of the goods, and that they had committed no breach of the contract of agency; (2) that the damaged goods were "statuary," and so not within the contract. *Held* (1) that the defenders were liable as carriers for the safety of goods within their contract, and (2) (*diss.* Lord Lee, *rev.* judgment of Lord Trayner), that the terra cotta busts did not fall within the exception of "statuary."

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ON 26th October 1887, Ciceri & Company, carvers and gilders, Edinburgh, wrote to Sutton & Company, general carriers and forwarding agents, London,—“We have a large quantity of goods for shipment, both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra cotta busts, marble columns, wood frames, &c. Will you kindly let us know your rate for such goods from both the above ports to Glasgow by steamer, and the name of your agents at both places?”

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C.

On 12th November (after some intermediate correspondence) Sutton & Company replied,—“Confirming our letter of the 5th inst., we have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot, plus the usual primage for freight Leghorn to Edinburgh *via* Glasgow. . . . These rates are for freight only. . . .”

On the 18th Ciceri & Company replied,—“You quote 1s. per cubic foot, but if steamer's option should be by weight, what then? You seem to make a difference between marble busts, and columns, and alabaster, while our other quotation is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this, and also what your usual primage is. . . .”

On the 21st Sutton & Company replied,—“. . . . If the goods would yield the steamship company more per 20 cwt. than per 40 cubic feet, then the charge will be 30s. per ton weight instead of per ton measurement. . . .”

On the 25th Ciceri & Company replied,—“Enclosed please find three orders signed on the understanding that the same are as per quotation last sent or at ship's option, as the case may be.”

Ciceri & Company's goods were accordingly dispatched by the steamer “Zena” from Leghorn to Liverpool, on a through bill of lading to Glasgow, and thence per rail to Edinburgh.

They consisted in all of twenty-three cases, eight of terra cotta goods from Pisa, and fifteen of alabaster goods from Florence.

On their arrival in Edinburgh the terra cotta goods were found to be more or less injured.

Ciceri & Company accordingly raised an action against Sutton & Company, concluding for £54, 3s. 4d., as the value of the injured goods.

Sutton & Company defended on the grounds *a*, (which need not be further considered here) that the injury was due to the improper packing of the goods; *b*, that the defenders not being common carriers were not liable for the faults of those who actually carried the goods, but only for their own fault, which they denied; *c*, that the injured goods were statuary, and so expressly excluded from the contract.

A proof was allowed. From the evidence it appeared that Sutton & Company, although they described themselves as “general carriers” as well as “forwarding agents,” did not themselves carry goods. They had agencies in most of the business centres of the world, through whom they

**No. 152.** contracted for the carriage of goods offered to them, arranging with railway and steamship companies and other carriers, and quoting through rates. Their agents at Leghorn were Alfred Lemon & Company, through whom the contracts for the carriage of Ciceri & Company's goods were made.\* The goods were described in the bill of lading as "twenty-three packages alabaster works, terra cotta, frames," &c., and in the waybill from Lemon & Company the eight cases were described as containing "terra cotta." The receipt granted by Lemon & Company to Gabbanini & Ghiloni, the makers of the goods, was in these terms:—"We, the undersigned, received from Messrs Gabbanini & Ghiloni, of Pisa, No. 8 (eight) cases of terra cotta bronzes consigned to be forwarded to Messrs Ciceri & Company of Edinburgh," and on the same day Lemon & Company sent this post-card to Ciceri & Company:—"We beg to advise you that to-day Messrs Gabbanini & Ghiloni, of Pisa, have consigned to us eight cases terra cotta, which we will ship to you by first steamer."

The goods were moulded figures in terra cotta, bronzed, and were in detail,—Four large figures, "Summer," "Winter," "A Lady," and "A Man Drinking Wine" (of the value of £7, 10s. each); four bas reliefs, "The Poulterer," "Hurrah for the Cook," "The Professor's Spectacles," and "The Dairy"; two groups, "After Dinner," and "In the Wine Cellar"; two small figures, "A figure petting a dog," and "A figure petting a cat."

The parole proof consisted mainly of the evidence of artists and of traders directed to the question whether such goods were or were not statuary. The evidence on this point was very conflicting; its general import sufficiently appears from the opinions of the Judges.

The excerpts quoted below from the publication issued by the railway clearing-house, entitled "General Classification of Goods by Merchandise Trains on Railways, January 1888," and having written thereon "Foreign Department," was also put in evidence.†

\* On 28th October 1887 Sutton & Company wrote to Lemon & Company, enclosing Ciceri & Company's letter of the 26th October, and asking Lemon & Company to quote a rate.

Lemon & Company replied on 2d November,—“We beg to inform you that the freights from this port to Liverpool and Glasgow for statuary, alabaster goods, furniture, and similar, are as follows, viz :—

To Glasgow by direct steamer (monthly)—

Statuary,	45s. and 15 per cent	} per ton or 40 cft.
Alabaster, furniture, &c.,	30s. and 15 per cent	

To Glasgow via Liverpool (transhipment)—

Statuary, alabaster, furniture, &c.,	40s. and 15 per cent	do.
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To Liverpool—

Statuary, alabaster, furniture, &c.,	30s. and 15 per cent	do."
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Sutton & Company replied on 5th November,—“Will you please look into the matter, and see if you have not made a mistake, as your rates should be lower rather than higher than those from Venice. You had better quote actual cost price, as we understand the quantity is considerable, and Ciceri & Company are exactly the people to get the lowest possible price.”

	Clas.	Page.
† “Alabaster,	4	5
Alabaster ornaments and figures, packed,	5	"
Bronze figures, packed,	5	13
Casts terra cotta,	2	16
Casts and figures, plaster (except plaster casts, common, for ornamenting ceilings or stucco) packed,	5	"
China in boxes or cases,	4	17
Earthenware in boxes or cases, import or export, foreign, direct from or to ship,	2	24

On 6th November 1888 the Lord Ordinary (Trayner) assoilzied the No. 152. defenders.\*

	Class.	Page.	June 21, 1889. Ciceri & Co. v. Sutton & Co.
Figures, bronze, packed, . . . . .	5	25	
Figures, terra cotta, packed, . . . . .	5	"	
Figures and casts, plaster or stucco, . . . . .	5	"	
Figures and ornaments, alabaster, packed, . . . . .	5	"	
Frames, picture, . . . . .	5	28	
Furniture packed in cases, . . . . .	5	"	
Marble in cases, . . . . .	3	45	
Ornaments and figures, alabaster, packed, . . . . .	5	50	
Porcelain (as china), . . . . .		55	
Statuary (including terra cotta statuary), as per agreement only,			
Terra cotta,—			
Casts, . . . . .	2	70	
Figures, packed, . . . . .	5	"	
Statuary, as per agreement only."			

\* "OPINION.—In October 1887 the pursuers wrote to the defenders informing them that they had a large quantity of goods for shipment, both at Venice and Leghorn, 'consisting of wooden figures, old cases, marble and terra cotta busts, marble columns, wood frames, &c.,' and adding, 'Will you kindly let us know your rate for such goods from both the above ports to Glasgow by steamer?' The defenders replied on 12th November following:—'We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot,' &c. Some correspondence followed, which I do not regard as very material: the contract between the parties as to the carriage of the goods is contained in the letters I have quoted. Following upon those letters, the pursuers granted orders on the sellers and holders of the goods to deliver the same to the defenders for shipment. Among other things, eight cases of goods were delivered by a firm in Pisa to the defenders' agents in Leghorn, Messrs Alfred Lemon & Co., who (under orders by or arrangement with the defenders) shipped these cases on board a steamer bound for Liverpool, where they were to be reshipped to Glasgow. When these cases were delivered to the pursuers in Edinburgh, it was found that the contents of several of them had been so seriously broken and damaged as to be practically worthless. For the loss and damage sustained by the pursuers through the breakage of their said goods they now seek decree; and they do so on the ground that the damage arose through the defenders' failure duly to implement the contract of carriage into which they had entered with the pursuers. The defenders resist the pursuers' claim on three grounds:—(1) That the damage arose, or was materially contributed to, by the defective and improper manner in which the goods had been packed, which was not discoverable from an examination of the exterior of the cases; (2) that the defenders, not being common carriers, are not liable for the faults of those who actually carried the goods, but only for *culpa* on their own part, which has not been proved; and (3) that the damaged goods were statuary, a class of goods which the defenders never contracted to carry, but, on the contrary, expressly excluded from their contract.

"My opinion is against the defenders on the first and second of these grounds of defence. I am prepared to hold it proved that the goods in question were packed in the ordinary way, and quite sufficiently packed for safe transit to this country if treated by the carrier with ordinary and reasonable care. Farther, I am of opinion that the defenders (dealing with them not as common carriers, but as special carriers) are responsible for the fault of those who, on their employment, actually carried the goods, as being their agents. But I do not think it necessary to do more than merely state these views, because I am of opinion that the defenders have made good the third ground of defence I have referred to, and that this affords a sufficient answer to the pursuers' claim.

"The defenders did not contract to carry statuary for the pursuers—it was, indeed, expressly excluded from the contract.

"Were the goods which were damaged 'statuary'? Conflicting opinions upon

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The pursuers reclaimed, and argued;—Statuary was sculptured work. It might have a wider signification, which would include the goods in question, but this would also include all terra cotta work except bricks and chimney-cans, and it was out of the question to suppose that the pursuers, whose trade was known to the defenders, were contracting for the carriage of bricks and chimney-cans from Italy. Neither in an artistic nor in a trade sense were the goods in question statuary. At all events, the correspondence made it perfectly plain that the defenders were fully informed as to the class of goods which the pursuers wished to have carried. The Railway Clearing-house List did not treat terra cotta work as being necessarily statuary, though it might be. The defenders were common carriers; at anyrate they had contracted with the pursuers to carry the goods in question, and were liable as such in a question with the pursuers for loss *in transitu*.

Argued for the defenders;—They were not common carriers, or carriers of any sort. Their contract with the pursuers was not that of carriage but of agency. They were the agents of the pursuers in contracting for the carriage of the goods by the various steamship and railway companies. They had committed no breach of the contract of agency: that at least was not the ground of action: they therefore were not liable. The goods in question were statuary, and so exempted from the contract. That was the fair result of the evidence.

At advising,—

LORD JUSTICE-CLERK.—The pursuers in this case, Messrs Ciceri, sue a firm of the name of Sutton & Company in respect of injury done to goods in transit from the Continent to Edinburgh. Messrs Sutton & Company undertook as agents to have the goods delivered to their agents abroad transmitted to this country at a certain rate, and they took delivery of the goods without objection, as being in good condition, at a particular place abroad to which they had been carted. After considering the evidence, I think there is no ground for holding that any objection could be made on their part with success on the allegation that the goods were not delivered to them properly packed. They seem to have been packed in the ordinary way suitable for such goods. On the arrival of the goods in Edinburgh, and on their being put down in front of the pursuers' premises, a certain number of cases were found to have received violent injury upon the outside. It is now disputed by the witnesses from the railway company.

this matter were expressed by the witnesses adduced by the parties respectively, but in my opinion the evidence in support of the defenders' view decidedly preponderates. The chief reason assigned by the pursuers' witnesses for their opinion that the goods in question are not statuary is, that the goods were cast or moulded, and not sculptured. That appears to me to be an inadequate reason or ground for their opinion. A plaster cast or a metal moulding may be, and is constantly, classed in art exhibitions as statuary, and the witness for the pursuers best able probably to give an opinion on this subject (Mr Hamilton) admits that such a classification is right. I find (in the best dictionaries I know) that statuary is defined as including figures which have been cast or moulded as well as sculptured. In addition to this, there is evidence to shew that the goods in question are what railway and other carriers regard as 'statuary,' which they only carry on special terms. The pursuers, on the other hand, have not attempted to shew that they ever got similar goods carried for them on ordinary terms as ordinary case goods, although they must frequently have had importations of the same kind of goods as those in question.

"The defenders not having contracted to carry statuary, it appears to me that they are not liable for the value of the statuary which was damaged."

which had them last in their custody, that they were damaged while in their hands; but I think the evidence is conclusive upon that matter. Both the pursuer and his manager say that when they were delivered one of them was badly injured at the corner, and that some of them had the end smashed in. I think it is not in the mouth of the railway company's servants to say that this was not the case, because we find that their own inspector reported to his superiors, "I find the cases in which the figures were packed all broken at ends, having evidently been roughly handled." Now he says himself in his evidence that that was the state of the boxes he saw himself at the door of Mr Ciceri's shop. He desired to alter his report upon that matter afterwards, because he thought he had been misinformed, but it is brought out conclusively in the evidence that he himself saw them in that state, and he states, in answer to a question put to him, that the report which he gave in was a true report. What the defenders endeavoured to make out at the proof was that he had been merely told by the pursuer that they were broken; but he himself admits in his evidence that he saw them broken there. It is put against this that the carters say they were not broken, but we know what evidence of that kind is worth. Carters, by their own account of themselves, always handle cases carefully. Whether they actually looked to see if the damage took place before they were delivered or not, it is not remarkable that they should deny having noticed any damage outside to the boxes. But it is sworn conclusively that they were injured, and it is unlikely that the ends of five or six boxes should have been smashed at Mr Ciceri's door if they were in perfectly sound condition when they arrived there. And as regards what was inside the cases, as I said before, I think it is conclusively proved that they were packed in the proper and ordinary manner. Well, the cases are opened, and Mr Ciceri very properly sends for Mr Bell, the representative of Messrs Sutton & Company in Edinburgh, in order that delivery may be taken of the goods when they are unpacked and taken out of their cases. When they are unpacked, several lots of terra cotta goods are found to be so seriously damaged that their value is practically reduced to a mere fraction of what it was originally.

The next thing which we have to consider is, what is the contract between the parties; because, in ordinary circumstances, if a carrier smashes goods in transit which he had received properly packed, there can be no question whatever about the liability for the damage. And therefore we must now go back to see what was the footing upon which these cases were in the hands of Sutton & Company and those whom they employed between the time that they got them at Leghorn and the time they were opened at Mr Ciceri's door.

It appears that Mr Ciceri, who is described in one of the letters as just the person to get the lowest possible price, had been endeavouring to get a quotation from different persons who undertook carrying, for the purpose of taking what was the lowest rate at which he could have his goods conveyed, and accordingly he asks for a quotation from the defenders. He asks for their quotation for wooden figures, old cases, marble and terra cotta busts, marble columns, wood frames, &c., and the answer that he gets is, "Confirming our letter"—they had written previously to 12th November—"of 5th inst., we have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." Now Ciceri in reply to that writes,—“You seem,”—and whether he is right in his judgment of what they seem to be doing does not matter,—“You seem to make a difference between

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**No. 152.** marble busts and columns and alabaster." Now, taking the two letters together, I think they can only be read as meaning,—“You seem to make a difference between marble busts and marble columns on the one hand, and alabaster goods upon the other,” “while our other quotation”—that is to say, the quotation from other people—“is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this” Now, it is quite plain from that letter that Ciceri wished to know what the difference was between goods described as marble busts and columns and other goods; and apparently in this view, that in addition to any question about safety of transit of such more expensive articles, marble being necessarily much heavier than either terra cotta or alabaster, he wished to know what was to be their rate, because shippers of such goods have a right either to charge per ton measurement or per ton weight, according to the different classes of goods. Now, Sutton & Company in their reply made no allusion whatever to the difference. They answer only as regards the difference of rate in respect of goods which, whatever they consist of, the shipper is entitled to charge according to a tonnage weight charge instead of a tonnage measurement charge; for they say—“If the goods would yield the steamship company more per 20 cwt. than per 40 cubic feet, then the charge will be 30s. per ton weight instead of per ton measurement”; but they give no answer to the question which he had asked about the difference between marble busts and columns and alabaster, in any other respect than that. Therefore I think, as regards all that had passed up to that time, there was no particularisation by either party to indicate clearly what fell under one rate or another, as regards the quality of the goods as distinguished from the weight. Well, what happens is this—The goods are handed to the defenders, distinctly described by the agent who delivers them to their representatives in Leghorn as eight cases of terra cotta bronzes; and those eight cases of terra cotta bronzes are received by the representatives of Sutton & Company in the knowledge of what they contain. Then the post-card which the defenders’ representatives in Leghorn sent to the pursuers is to the same effect—“We beg to advise you that to-day Messrs Gabbanini & Ghiloni, of Pisa, have consigned to us eight cases terra cotta.” And the bill of lading lumps the whole which were sent to Ciceri together, there being some from Pisa, which were terra cotta, and some from Florence, which were alabaster. They are lumped together in the bill of lading with this general description, “Twenty-three packages alabaster works, terra cotta, frames, &c.” Therefore, Messrs Sutton & Company are distinctly informed that there are terra cotta bronzes in the cases coming from Pisa. Information is distinctly given that the eight cases contain terra cotta, and the bill of lading makes no distinction of class whatever. And again in the way-bill from Leghorn the contents of these eight cases are stated as being terra cotta.

Now, the next question is, under which class does terra cotta fall, because if terra cotta, as such, falls into the broad class which requires to be notified in a particular way, then of course that would have a material bearing upon the question. And in regard to that we have some very extraordinary evidence indeed. In the first place, of course, we have the evidence of skilled persons upon the question of what is statuary, and we are referred back to the first letter of Messrs Sutton & Company, in which in quoting their rate they say, “Not for goods described as statuary.” Now, the word “described” rather suggests that it must be described definitely in some carrying list regulating

such matters in the business of carrying, because there cannot be the slightest doubt—and the evidence in this case has proved most conclusively—that you can get the most divergent descriptions of statuary from different people, and can get the most divergent descriptions of statuary from the same person within five minutes in the course of his examination. One gentleman tells us that all work in terra cotta is statuary practically, except chimney-pots and things of that kind. Another gentleman tells us that there is no statuary unless you have an entire figure life size. Some people say that statuary must always be sculptured with the hand. Other people maintain that although it is moulded it is still statuary. Some people say that statuary must be in the solid—a representative of the figure in the solid—and others, that bas-reliefs are statuary. Others think that either a plaque or a medallion which represents anything human is statuary also. I think it was even suggested in the debate that representations of leaves or branches of trees might be statuary. Ultimately it was confined to this, that any representation in any material of man, woman, beast, or animal of any kind was statuary. I am unable to accept any of these statements, because if I accept any of them I necessarily come into conflict with others. If you give an abstract literal definition of statuary, it is a thing standing by itself. A column, a simple marble column, or a marble column for the purpose of carrying a bust, is in that sense a statue. But when we come to examine the matter a little more closely we find that in the trade of carrying there is a distinction drawn between statuary made of different materials; and I think if we get to an understanding of what is generally understood in the trade upon that matter, we get at a means of solving this difficult question. I do not think it is a question at all for artists like Mr M'Bride or Mr Hamilton. It is a question of what carriers class as statuary, as distinguished from other goods which they will carry at ordinary rates, and not at a special rate.

Now, in looking at this evidence, I think the most practical thing I can go to for the purpose of testing what is the truth in this case, is the best publication I can find upon the subject, issued by the largest carrying establishment I suppose in the world; it is not indeed a carrying establishment in itself, but an establishment which issues a publication for the general guidance of the vast number of carriers with whom it has to do—the railway clearing-house in London. Now the railway clearing-house publication—upon which, be it observed, the defenders themselves found—I think gives us a practical solution of this matter. It first gives a number of articles and classes of material for which it gives certain specified and fixed rates, and then, after having given all these materials and classes of articles at certain fixed rates, it states this,—“Statuary (including terra cotta statuary) as per agreement only.” I think it is perfectly plain that “statuary” there does not mean every article that is made of the material of which statues are made. It would be a ridiculous interpretation of “statuary” to say that every manufactured article made of marble was statuary. In the same way I am quite clear that it would be a ridiculous interpretation of the word “terra cotta statuary” to hold that it meant every article that is made of terra cotta. That cannot be the meaning of it, even if there were nothing else than that. The word “statuary” must have some meaning attached to it to distinguish a material converted into statuary from other articles made of the same material. It is perfectly plain, I think, that “statuary (including terra cotta statuary) as per agreement only” applies to some special work, either in marble or in terra cotta, or in any other material,

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No. 152. out of which, according to certain conditions, statuary can be made. And therefore we must now look at the rest of the list to see whether it gives us any aid.

June 21, 1889. What I gather from the rest of the list is this, that ordinary figures in terra cotta  
Ciceri & Co. v. Sutton & Co. are not statuary. I find that "bronze figures packed" are classified in practically the same class as "terra cotta figures packed," "figures and casts, plaster or stucco," and "figures and ornaments in alabaster packed," and that "casts and figures, plaster (except plaster casts)," are in the same class, and that "alabaster ornaments and figures packed" are in the same class,—the same classification as regards carriage price. Now, what are figures in terra cotta? According to the defenders' contention through their witnesses of skill, figures in terra cotta must mean earthenware pots and chimney-pots, and things of that kind. Surely upon the face of it this description would never apply. Whatever may be the meaning of "statuary," the meaning of the word "figure" is well understood. A "figure" necessarily applies to a representation of some living creature or creature that has had life. It may represent dead figures, human or animal, but still it represents a creature which had animal life when alive. Now, where am I to draw the line between terra cotta statuary and terra cotta figures? The natural line to draw is that terra cotta statuary, like marble statuary, is statuary upon which the hand of the skilled workman or artist has been put to produce the kind of figure and the artistic effect which is desired; an original production, as distinguished from a mere moulded copy. Such are to be conveyed at a higher rate than others. And here it is to be observed that the case of statuary is a very different case from the case of pictures, as regards reproduction by copies. It is rather curious that in the bill of lading of the "Zena," shippers are not allowed to make a claim for greater value than £50 per package—"paintings, pictures, or statuary." In the case of pictures, if you wish to have a copy of a picture, you cannot take the picture and spread it over another piece of canvas, and so make a copy. You are obliged to have another artist's hand to make a copy, and therefore a copy of a picture may have a very high value as compared with a copy of a statue, for a cast copy of a statue is a mere mechanical production. Nobody doubts that these terra cotta figures sent to Mr Ciceri, and which arrived broken, were all of them mere copies of the original work of an artist, produced by the mechanical means of moulding only. They were not in themselves works of art, and the only claim they had to represent art was that they bore the same relation to a work of art as a photograph does to a picture. I think the reasonable interpretation of the clearing-house publication, upon which the defenders themselves found, is that "statuary, including terra cotta statuary," means real works of art. A marble statue that can only be made by another hand is a work of art, although it be a replica only, because it requires the finishing touch of an artist's hand to produce the artistic effect, which cannot be produced in marble without an artistic hand being applied. Of course, if a statue cut in marble is sent by an agent or carrier, and that statue becomes damaged, it is a far greater loss, even though it be only a copy of an original, than if it were merely a plaster cast. It is a greater loss, both in the material of which the statue is made, and also in the artistic finish which is given by the chisel of the artist. Now, I am unable to see what terra cotta articles of the nature of figures could be intended in class five in that publication of the railway clearing-house, if these which were sent to the pursuers are not. The tables making an express distinction between "terra cotta statuary" and "terra cotta figures," I am unable to see any ground for holding that the

articles to which this case relates, being, as they were, articles of an inferior kind, can be held to be included in the former definition, rather than in the latter.

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The conclusion I have come to on the whole matter is this—These articles are simply terra cotta bronzes and terra cotta figures, as described in the railway clearing-house list to be carried at the lower rates; and the pursuers having had their goods injured in transit, the carriers are liable for the loss. I am therefore for altering the interlocutor of the Lord Ordinary, and decerning in favour of the pursuers.

LORD YOUNG.—I arrive at the same conclusion. The question is upon a contract of carriage—as to the liability of the carriers for damage done to goods in transit. It is pointedly put before us in the record, and we had a good deal of argument upon the subject, that the defenders are not common carriers,—that they are not owners of steamships or other means of conveyance, and only undertake to act as agents for those who apply to them to make contracts as agents for behoof of their customers as principals—not common carriers for the carriage of goods. I cannot accept that view of the case. I think it is of no interest to inquire whether the word “common” is applicable to the defenders or not. They are certainly not common carriers with reference to this incident, that they shall be compelled to take any goods that are offered to them if they have room in their vehicles. They have no vehicles, and therefore that incident does not apply to them. It is probably practically the most uninteresting of all incidents touching the common carrier, for I suppose instances are rare of carriers with room in their vehicles refusing to carry goods at the ordinary rates. The incident, however—of no practical importance—is not applicable to the defenders. Whether the edict *nautæ, caupones, stabularii* is applicable or not, I think is equally uninteresting. They are carriers, whether common carriers or not; and I shall give them the benefit, if they think it any, of saying that they are not common carriers, but only carriers. They design themselves “general carriers,” which I suppose means that they are open to contract with the public for the carriage of goods, not between specified places only, but generally between all places between which goods are carried, or the convenience of the public requires that goods should be carried. They enter into contracts for the carriage of goods, not performing these services with their own vehicles, steamships, or horses, but by others who have vehicles and motive power, and who render their services to them upon terms agreed on. They contract for the carriage of goods, and make their own arrangements for fulfilling their undertaking by that contract.

Now, when anyone undertakes by contract to carry goods between two places, he is bound, as a common incident of the contract, if there be no stipulation to the contrary—for parties may lawfully bargain as they please—to carry them safely, and if he receives them in good order and condition, to deliver them in good order and condition at the place that he has contracted to carry them to; and if he fails in that, he is liable under his contract for the consequences. If a man who has never carried goods before, or contracted to carry goods before, contracts with me to carry my goods from this to London or anywhere else, he receiving them in good order and condition, he is bound by that contract to deliver them at the place of destination in the like good order and condition, unless he has guarded himself against that by a special contract.

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Now, I think it is proved that there was a contract between the pursuers and the defenders to carry certain goods from Italy (to be exported at Leghorn) to Edinburgh. I shall attend to the question raised immediately, whether that contract excluded all or any of the goods which were damaged in transit. The defenders knew very well the kind of goods which the pursuers imported from Italy. We find that before making the contract with them the defenders made inquiries as to what the carriage of such goods would cost themselves, for the profit of their business is just the charge which they make to their customers for carrying their goods beyond what it will cost them to have the goods carried. That is their profit on their business. And it appears from the documents before us that they made inquiry as to what it would cost them to carry just such goods as the pursuers here import from Italy. By no means exhausting the evidence in the matter, you will find that Lemon & Company write to them, in answer to their inquiries, on 2d November, just before their final answer to the pursuers as to their rates, sending their terms for statuary, alabaster, furniture, &c., and then, in asking a question to see whether the rates could not be reduced, the defenders say,—“Will you please look into the matter and see if you have not made a mistake, as your rates should be lower rather than higher than those from Venice. You had better quote actual cost price, as we understand the quantity is considerable,”—that is of such goods as the pursuers are going to import,—“and Ciceri & Company are exactly the people to get the lowest possible price,”—that is to say, “If your terms are not the lowest, Ciceri & Company are exactly the people to find out the lowest and to go elsewhere; and therefore you had better be as low as possible, as the quantity is considerable.” Well, having got that information, they write to the pursuer on the 12th November,—“We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot, plus” so and so. “These rates are for freight only.” Of course they were for freight only. There is no insurance. There is only the ordinary liability of carriers who undertake to carry goods without any express stipulation upon the subject. They would not be answerable for “perils of the sea, the act of God, and the Queen’s enemies”—carriers undertaking to carry in safety are not responsible for these consequences. You must resort to insurance in order to cover such risks. The contract was completed upon that footing. They got an answer on the 25th November,—“Enclosed please find three orders, signed on the understanding that the same are as per quotation last sent or at ship’s option, as the case may be.”

It is upon this that the goods are sent—twenty-three cases, including the ten particular articles which were damaged on the way, an inconsiderable part of the whole. Twenty-three cases were shipped, and these twenty-three cases were carried by the defenders, not in vehicles of their own, or ships of their own; but they were carried by them under their contract and upon their responsibility. They made such contracts as they saw fit with other people to perform the actual conveyance, but they were the contractors to the pursuers to convey them. And they did carry these twenty-three cases, and charged for the carriage of them. They sent in their bill as the carriers. They charge £39, 14s. 8d. for carrying these goods, and then they say they never contracted to carry them at all. They were sent to them in good order and condition,—properly packed, for I agree with the Lord Ordinary in that,—and were carried by them, and the account for the carriage was sent in, and they say,—“We were not carriers at all; we never contracted to carry them.” I quite understand the

contention, that under the contract which was made the pursuers were not at liberty to include in the packages these particular goods which were damaged, these being described as statuary; and that in including these in any of the boxes they were guilty of deception, and did not merely render themselves liable to the higher charge, but acted in such a manner that if the goods were smashed they were the wrongdoers anent them, and have no claim against the party who carried them and who charged for carrying them. I quite understand that statuary goods properly described as statuary are carried at a higher rate, because they require in the carriage more care and attention and involve greater liability, there being more damage to pay for if anything occurs, for which the carrier is liable, on the journey.

I have looked in vain in the evidence here for anything to suggest the notion that if these goods, with a full description of them such as we have in this record and in the evidence, had been delivered for carriage, the packages containing them would have been dealt with in any other way than they were. There is no case therefore, I think, of this kind,—“We were misled into not taking the care which we should have done if we had known the nature of the goods, and you who so misled us shall not be entitled to compensation for the damage done.” But I think, upon the evidence before us, and I must of course judge upon that, that the pursuers were in perfect good faith in including these goods in the packages. They might quite reasonably, although it might be matter for controversy, take the view that they were not statuary. The pursuer, examined as a witness, swears that in his opinion they were not of that character, and he is in the trade. Of course that might have been contradicted conclusively by other evidence, but I think it is not. I think it is doing him no more than justice to say that he caused these goods to be delivered well packed and in good order to the defenders as carriers, in the belief that they were under the contract for carriage at the specified rate, and that they were not to be properly described as statuary. The Lord Ordinary says in his note what is quite true,—“Conflicting opinions upon this matter were expressed by the witnesses adduced by the parties respectively.” His Lordship is of opinion that the evidence that the goods are statuary preponderates. Now, let me take the view—which I think is perhaps the moderate and reasonable view to take here—that the question whether they are statuary, properly described as such or not, is a question upon which there might reasonably be a difference of opinion,—upon which conflicting opinions may reasonably exist. Even in a question—which I am assuming this to be—where there may be an honest and reasonable conflict of opinion, there will be a preponderance one way or the other. The Lord Ordinary thinks that there is a preponderance in favour of the view that they are statuary. Your Lordship thinks that the preponderance is the other way. I incline to agree with your Lordship. Let us put it as a doubtful matter; what, then, is to be the result of that? No want of good faith on the part of the pursuer; no deception practised by him in order to get the goods carried at a cheaper rate than they would have been had he made a full disclosure; no suggestion that if any further information had been given, the goods would have been treated in a different way in transit. The pursuer honestly believes that the goods are shipped under the contract to carry them in the like good order in which they were received in Italy, and to be delivered in the like good order in Edinburgh. What is the result of their being damaged? According to the defenders, it is that the carriage is to be paid for, but there is no responsibility in respect of them. I am not able to assent to that view. I think if

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No. 152. there had been no damage done to them, and the only question before us was whether the carriers were entitled to a higher rate in respect of these goods, June 21, 1889. I should have thought the question doubtful; but to contend that a carrier Ciceri & Co. v. was under no liability for their safety at all is in my opinion not maintainable. Sutton & Co.

I shall not pursue this matter further. I think I have substantially exhausted all I desire to say. I may, however, notice the bill of lading which was granted by the master, I shall take it really of the defenders' ship, for the ship was the agency employed by them to perform their contract, and they are responsible for it. It is that these twenty-three cases were shipped in good order and condition, and they are described as "twenty-three packages alabaster works, terra cotta, frames, &c." I think that is an extremely applicable description of the very goods we have here in question. If the evidence were all one way, I might be bound to proceed upon it; but it is so contrary to common understanding and language that with the conflict of evidence I cannot accept that which goes to the result that bas-reliefs are statuary, that stucco busts are statuary, that all terra cotta goods are statuary, unless they are in the form of bricks or chimney-pots. It is extravagant to suggest that the pursuers here, whose trade was known to the defenders, were importing terra cotta bricks and chimney-pots, and that that was what was meant by terra cotta figures. They deal in this cheap sort of ornamentation, imitation bronze goods, which are imitation bronze busts, and figures of dogs and cats. A cast or moulding in terra cotta is bronzed over to be so like bronze, that except by lifting it and feeling its weight, or breaking it, and seeing the material, one would hardly know the difference. These are the kind of goods in which they deal,—alabaster ornaments too, just such as fall within the description in this bill of lading given to the defenders' own agents at Leghorn, upon the shipment of the goods.

My opinion upon the whole is in conformity with that which your Lordship has delivered, that there is liability here for not delivering these goods in Edinburgh, which the defenders received well packed, and in good order and condition, in the like good order and condition, but in the broken state which is described. Then there is the question of damages. We are told that the cost price of the goods was £38, the goods in their broken state being worth, the evidence varies, from £2 to £6. I should be disposed here—they are very common-place goods indeed, and can be got, I suppose, in any quantity—to give no more in the way of damages than the cost price, that is, £38; the defenders, if they will have them, getting the broken goods, which are said to be worth from £2 to £6.

LORD LEE.—The claim in this case is for the loss of certain goods which it is said the defenders undertook to carry at the rate of 1s. per cubic foot from Leghorn to Edinburgh, *via* Glasgow; and the first question is whether they ever undertook to carry any such goods at that rate; and the other question, and that which the Lord Ordinary has decided, is whether the goods in question were within the description of goods which they so undertook to carry. My opinion is that they were not within the description of goods which the defenders undertook to carry at 1s. per foot, and that they cannot be responsible for the loss of them, whether the pursuer was in good faith or not. I am rather disposed to assume that both parties may be in good faith; but one thing is perfectly clear to my mind, that unless these goods were within the description

of goods which they contracted to receive in Leghorn and deliver in Glasgow, No. 152. they cannot be responsible for the loss of them. Now the description of goods is contained in the evidence of Mr Ghiloni, Pisa, where the goods were furnished. They consisted of four large busts—"Summer," "Winter," a "Lady," a "Man drinking Wine," and various smaller articles, not very small, but certainly they were to a great extent large busts of the kind described. Now let us see for a moment what was the position of the contract. I must say I have difficulty in seeing that the carriers were made aware that when this contract was accepted there was anything of the nature of statuary—anything that could be described as statuary among them. The letter asks prices to be quoted for "marble and terra cotta busts." Now, if good faith is to be gone into, we must see the defence of Sutton & Company. Their letters to Lemon & Company are conclusive to my mind as to their understanding as to what was included in their offer of 1s. per cubic foot; because, although the letter of the pursuers specially mentions marble and terra cotta busts,—when the defenders come to inquire of Lemon & Company their rates, they deal with both marble and terra cotta busts as statuary:—"Please see enclosed" (*i.e.*, Ciceri's letter of inquiry), "and let us know the rates"; and the answer is, "We beg to inform you that the freights from this port to Liverpool and Glasgow, for statuary, alabaster goods, furniture, and similar, are," &c.—the word "statuary" there being plainly used as including terra cotta busts. There are separate rates for statuary—45s. and 15 per cent per ton or 40 cubic feet, and for alabaster, furniture, &c., 30s. and 15 per cent per ton or 40 cubic feet; accordingly, when the defenders quote 1s. per cubic foot for alabaster goods, they add, "but not for goods described as statuary." Now I agree with the Lord Ordinary that under this contract Messrs Sutton & Company did not undertake for 1s. per cubic foot to carry anything that fell fairly within the description of statuary. The question is whether the goods which are contained in the description are statuary or not.

There is undoubtedly a conflict of evidence upon that matter. I agree that it is not to be settled as a question of skill by artists; but as artists' evidence has been referred to, I think it may possibly be not improper to notice that the pursuers' artist, Mr Hamilton, expressly said that a plaster cast of a human figure is statuary as much as if it were cut out of marble. I rather agree with your Lordship that it is not a question for artists. The question is, what was the meaning of this contract as between a trader in such goods and a carrier. Here again I think the evidence is in favour of the Lord Ordinary's view. I think that even the clearing-house classification which your Lordship referred to is in favour of the Lord Ordinary's view. It distinctly mentions terra cotta as a subject of separate classification. It divides terra cotta into three heads—casts, figures, and statuary; and statuary has no class,—it is carried only per special agreement. The evidence of the pursuer upon the subject, I must say, is not very distinct, because it varies. Anybody who will read it will see that it is not by any means distinct. But his witness Wanda, who is a man who speaks in a carrier sense, says—"We would call them statuary." Palmer, says—"I would consider such goods statuary, but not in a literal sense," but "in a general sense," which I take to mean in a carrier's sense, and not in a trader's sense. The witness Bell says—"I call the broken goods in question statuary." The artist M'Bride, if the defenders' artist is to be considered at all, says—"I would describe the goods as terra cotta statuary"—that is, as falling within class 3 of the terra cotta class of the railway clearing-house classification.

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He says, "I have seen the articles damaged; they are unquestionably statutory." I must say I think the weight of the evidence—and in dealing with the weight of the evidence I have in view the letters of the parties, the list of the goods, and the evidence both of the skilled witnesses of the pursuer and of the trading witnesses—is that these four life size terra cotta busts can only be regarded as terra cotta statuary within the meaning of this contract.

What is the result? It has been suggested that as the goods were carried they must be paid for. I cannot agree with that. They were put into the defenders' custody as ordinary case goods falling under the class payable at the rate of 1s. per cubic foot. They were not ordinary case goods. The result in my opinion is that no liability can attach to the carrier, for there was no contract. I think the carriers, in that view, if they were statuary, ought to have had the opportunity of rejecting them, and I think it would have been prudent on the part of Ciceri and Company to give them an opportunity of rejecting them. I do not suggest that there is any want of good faith on the part of Ciceri and Company. I do not say they intended to cheat; but it was for them to shew that they made a contract of carriage with regard to these articles under which they can recover if the articles were broken. I think they have failed in that, and therefore, although I admit that there is a good deal of conflict, I think the weight of the evidence is in support of the Lord Ordinary's view of the proof, and also of the question of fact—were the goods injured "statuary" or not? I state my opinion with great diffidence. Your Lordships have decided otherwise. I entirely agree with the Lord Ordinary and your Lordship upon the other question upon which he has given an opinion, that the damage is not proved to have arisen from defective packing. I agree that the defenders are liable as carriers for injury under a contract of carriage with regard to goods of the class payable at 1s. per cubic foot.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Ordain the defenders to make payment to the pursuers of the sum of £38; declaring, with reference to the proportion of freight claimed by the pursuers as effeiring to damaged goods, that said proportion forms a proper deduction from the defenders' account for carriage: Find the pursuers entitled to expenses; remit, &c."

GORDON PETRIE & SHAND, S.S.C.—WYLIE & ROBERTSON, W.S.—Agents.

No. 153. LAMING & COMPANY, Pursuers (Reclaimers).—*Lord-Adv. Robertson—Murray.*

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JOHN WHITE SEATER AND OTHERS, Defenders (Respondents).—*C. S. Dickson—Salvesen.*

*Ship—Right of Mortgagees—Charter-party.*—The owner of a ship, over which he has granted a mortgage, is not entitled to deal with the ship as owner, in such way as may materially prejudice the mortgagee's security.

The owner of a ship, who had granted a mortgage and had agreed to insure the vessel, subsequently chartered her. In a question between the mortgagee and the charterer, *held* that the mortgagee was entitled to prevent her from sailing uninsured.

*Process—Amendment of Summons—Court of Session Act, 1868 (31 and 32 Vict. No. 153. cap. 100), sec. 29.*—An action was raised to have a steamship forthwith delivered to the pursuers, “or alternatively, in the event of the defender . . . failing so to deliver to the pursuers the said steamship,” to have the whole defenders found liable in damages. After evidence had been led, which dealt with damage sustained before the raising of the action as well as after, and judgment had been pronounced in the Outer-House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words “and in any event.” *Held* (1) (*diss.* Lord Lee) that the summons as laid did not conclude for damage from non-delivery prior to the date of the action, and (2) that as the effect of the amendment would be to include such damage, the amendment was incompetent.

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By charter-party dated 9th October 1886, William Hunter & Company, shipowners, 12 Waterloo Street, Glasgow, chartered the steamship “Mula,” of which William Hunter was the registered owner, to Alfred Laming & Company, steam-shipping agents, 8 Leadenhall Street, London, for a voyage from the United Kingdom to the Mediterranean and back, the voyage to commence on 25th October 1886. The ship was not delivered to the charterers in terms of the charter-party, but by agreement dated 15th April 1887, endorsed on the charter-party, the parties thereto agreed that it should remain in force for a further period.

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M.

Hunter & Company had in September 1886 mortgaged the ship to Thomas Barr, John Forrester, and David Inglis Urquhart, merchants in Glasgow, in security of a loan for £1350. In the following month (October 1886) she was put by her owners into the hands of Ramage & Ferguson, shipbuilders, Leith, for repair. Hunter & Company being unable to pay the shipbuilders' account, an agreement was in February 1887 entered into between Barr, Forrester, and Urquhart, of the first, second, and third parts respectively, Ramage & Ferguson of the fourth part, and Hunter of the fifth part, by which it was arranged that the first, second, and third parties should increase their total advances to £2650, and receive a first mortgage over the ship for that amount; that the fourth parties should receive £1300 in cash, and promissory-notes and a second mortgage for the balance of their account; and that the fifth party should keep the ship insured at Lloyd's for the sum of £4000 at least in name of the first, second, third, and fourth parties. The fourth parties further renounced and discharged “any claim for a lien present or future over the said vessel in connection with or arising out of said repairs, and undertake and bind and oblige themselves fully to execute and complete all repairs on said vessel which may be required to make her fit and ready for sea in every respect, and they further undertake and bind and oblige themselves that the said vessel shall, when said repairs are executed, pass the Board of Trade's Surveyor at Leith, and that all within the space of one month from the last date hereof (9th February). . . .”

Upon 22d April 1887 Barr, Forrester, and Urquhart entered into possession of the ship as mortgagees. Upon 28th April they obtained an interim interdict forbidding her removal, and on the following day they raised an action of payment, declarator, and sale in the Court of Session against Hunter.

Laming & Company were not called as parties to this action, but the first advertisement of the sale contained the following:—“ . . . The articles and conditions of sale, the inventory of the steamer and her stores, and a copy of the charter-party or contract betwixt the late managing owners and Alfred Laming & Co., can be seen. . . .”

The subsequent advertisements contained no reference to Laming & Company's charter-party.

The interdict was declared perpetual upon 9th May.



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Upon 14th June an agreement was entered into between Barr, Forrester, and Urquhart of the first part, and Ramage & Ferguson of the second part, to have the ship bought in if no one bid more than the upset price of £4500. By said agreement Messrs Ramage & Ferguson also undertook " (first) that they shall bear the whole maintenance, risk, and expense as aforesaid of the vessel in implementing the said charters entered into by the owner until after the completion of the first voyage under the charter-party with Laming & Company as aforesaid; and (second) that they shall bear and pay the whole claims against the ship, including as aforesaid up to the date of raising the said action (29th April 1887), and the expense of disputing such claims if they elect to do so, all charges and expenses subsequent to said 29th April being borne by the parties hereto, according to their respective interests as aforesaid, until the vessel sails on her first voyage from Leith: It being the meaning and intention of the parties that until the ship is freed from all obligations entered into by, or incurred on behalf of, the owner, in so far as enforceable against the vessel, as preferable to the mortgagees, under Laming & Company's charter up to the end of the first voyage and she is in a position to earn clear freight for the whole parties, any charges or expenses enforceable against the vessel preferably to the mortgagees shall be borne solely by the second party."

On 20th June the ship was sold under decree of the Court to John White Seater, shipbroker, Leith, who proved to be the nominee or agent of Ramage & Ferguson.

Laming & Company, after repeatedly pressing Hunter & Company for delivery of the "Mula," and after writing to them and to the mortgagees that they would hold them liable for any loss they might sustain through the ship not having been delivered in terms of the charter-party, on 27th June intimated that they would bring proceedings in Court, and then raised an action against J. W. Seater, Barr, Forrester, and Urquhart, and Ramage & Ferguson, and also against Hunter & Company and their sole partner William Hunter.

The summons, which was signeted upon 4th July 1887, concluded for declarator "that the defender John White Seater is bound forthwith to deliver to the pursuers the iron screw-steamship or vessel called the 'Mula,' of which he is now the registered owner, in the state, for the purposes, and under the terms and conditions expressed in a charter-party entered into between the defenders William Hunter & Company and the pursuers, dated the 9th day of October 1886, and agreement endorsed thereon between the defenders William Hunter & Company and the pursuers, dated the 15th day of April 1887, together with the bunker coals, belonging to the pursuers, on board of the said steamship or vessel, amounting to 215 tons or thereby: And it being so found and declared, the defender John White Seater ought and should be decerned and ordained, by decree foresaid, forthwith to deliver to the pursuers the said steamship or vessel in the state, for the purposes, and under the terms and conditions expressed in the said charter-party and agreement endorsed thereon, together with the said bunker coals belonging to the pursuers as aforesaid: Or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel, and coals therein, the whole defenders ought and should be decerned and ordained, by decree foresaid, conjunctly and severally, to make payment to the pursuers (1) of the sum of £1000 in name of damages; and (2) of the sum of £100 as the value of the said bunker coals, with interest on these two sums at the rate of five per centum per annum from the date of citation hereon until payment: Together with the sum of £100,

or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon. . . .” No. 153.

Delivery of the “Mula” was given to the pursuers in August 1887, and they, on 15th November 1887, by minute, restricted “the conclusions of the summons to a conclusion against the whole defenders, conjunctly and severally, for the sum of £500, in name of damages sustained by the pursuers prior to the delivery of the said vessel, with interest thereon and expenses as concluded for.” June 21, 1889.  
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The pursuers pleaded;—(1) The pursuers having suffered loss and damage to the extent sued for in consequence of the defenders’ failure to deliver to them the said steamship “Mula,” in terms of the charter-party and relative agreement founded on, decree should in the circumstances be pronounced against the whole defenders, in terms of the conclusions of the summons as amended, with expenses. (2) The defenders Barr, Forrester, and Urquhart having wrongfully taken possession of the vessel, and having unwarrantably refused to deliver her to the pursuers, and the pursuers having suffered thereby loss and damage to the extent concluded for, the said defenders are liable in damages therefor. (3) The defenders Seater and Ramage & Ferguson having purchased the said vessel subject to the pursuers’ rights, and having refused to deliver her to the pursuers for fulfilment of the said charter-party, are liable in damages for the loss which the pursuers have thereby sustained.

The defenders (other than Messrs William Hunter & Company and William Hunter, who did not appear in the action) pleaded—(1) The pursuers’ statements are irrelevant. (5) The pursuers having got delivery of the vessel from the defenders whenever she was ready for sea, the defenders are not liable for any loss or damage the pursuers may have suffered.

A proof was allowed. It appeared that the whole or almost the whole damage caused by the non-delivery of the “Mula” to the pursuers occurred between 27th June and the raising of the action. They had subchartered the vessel to a Mr Dasnieres, and he would have taken delivery up to the end of June 1887, but he had then to hire another steamer, and the pursuers had to pay him the increased freight which he had to pay for the new vessel.

There was evidence that the “Mula” was not fit for sea until August 1887. She never was insured in terms of the agreement of February 1887.

There was evidence (quoted in the opinion of Lord Lee) that the non-delivery of the “Mula” was due to the action of Ramage & Ferguson, and not to that of Barr, Forrester, and Urquhart.

On 17th July 1888 the Lord Ordinary (M’Laren) pronounced the following interlocutor:—“Finds that the mortgagees, Barr and others, when they entered into possession of the ship ‘Mula’ were not entitled to disaffirm the contract of affreightment into which the owners had entered while they were, with the mortgagees’ consent, retaining the possession of the ship, such contract being of a usual and reasonable description: Finds also that the said mortgagees were entitled to insist on the fulfilment of conditions necessary for their protection, and in particular that they were entitled to prevent the ‘Mula’ from sailing until a policy of marine insurance had been effected available for their protection against sea risks: Finds that the owners were not able to effect such an insurance and that the detention of the ship by the mortgagees was justifiable: Finds further, that the defenders Ramage & Ferguson were entitled to detain the said ship under their right of lien until their account for repairs should be paid or satisfied: Therefore assoilzies all the defenders who are parties to the closed record from the conclusions of

No. 153. the action, and decerns: Finds these defenders entitled to expenses," &c.\*

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\* "OPINION.—In this case the pursuers, the hirers, under a charter-party of the steamship 'Mula,' sue for damages for breach of charter-party, in respect that the vessel was not delivered to them as stipulated. The parties immediately interested as defenders are (1) Barr and others, mortgagees, and (2) Ramage & Ferguson, claiming on the customary shipbuilders' lien for repairs, by whose acts it is alleged the vessel was prevented from sailing. The question is as to the nature and limitations of the rights of a mortgagee and holder of a lien against a charterer or hirer. These are to be considered separately.

"First, As to the right of a mortgagee. This is to be determined with reference to the quality of the subject of the mortgage. It is not the same as that of a pledgee of ordinary corporeal moveables, because actual possession is not necessary to the efficacy of the mortgage of a ship. The mortgagee has civil possession of a qualified kind by the registration of his mortgage, and if it be necessary that he should enter into actual possession to secure his rights, he must use his rights with a due regard to the interests of the owners. Neither is the right of a mortgagee in all respects the same as that of a heritable creditor. The latter on entering into possession may by known methods secure that the rents shall be payable to himself, and he has no power to interfere with the tenant's right under an existing lease. But the mortgagee of a ship holds a security over a floating subject which in the very act of use is liable to be withdrawn from the jurisdiction of the Courts of the country in which the right of mortgage is constituted, and which also in the act of use is exposed to the perils of the sea.

"My general view of the mortgagee's rights may be stated under two heads—(1) As to the right of the mortgagee in a question with the owner—supposing he does not desire to bring the ship to sale, the mortgagee, if he finds the ship in a British port, may at once enter into actual possession, ousting the owner from the management. He may dismiss the master, and appoint another responsible to himself, or he may re-engage the master, making the master responsible to himself, and may thus acquire all the assurance which is possible in the nature of the case that the ship will be returned to him on the completion of her voyage. (2) As to the mortgagee's rights in a question with the charterer or hirer of the ship, it is evident that if the mortgagee does not enter into possession at the time of making the advance, he does, as a matter of fact, assent to the owner exercising all ordinary powers for the joint benefit of owner and mortgagee. Accordingly, if the owner enters into a reasonable charter-party for the purpose of enabling the ship to earn freight, this must be held to be done with the mortgagee's consent. One of the conditions of a reasonable charter-party is that the ship shall be insured against sea risks for the voyage by one of the parties to the contract, usually by the owner. From the point of view of the mortgagee's interest it is not enough that there shall be an agreement to insure. A suitable insurance must be effected, failing which the mortgagee is, as I conceive, entitled to prevent the ship from sailing. He is also entitled to prevent the ship from putting to sea in an unseaworthy condition. Generalising, the mortgagee must recognise existing contracts of affreightment, subject to this, that he can insist on the preliminary fulfilment of all conditions which are necessary for the safety of the subject and for his own indemnification against sea risks. He is not bound to advance money for such purposes.

"According to these conditions, the case against Messrs Barr and others will in my judgment entirely fail, and that for two reasons—(1) The mortgagees were not in possession at the date of the original charter-party, but possession was finally taken on 22d April, and the agreement was renewed on 27th May; (2) the ship was not in seaworthy condition at the time when the voyage ought to have commenced. She was in the hands of Messrs Ramage & Ferguson for repair, and the work of repairing had proceeded slowly because instalments of the cost were not forthcoming. Eventually certain of the mortgagees advanced a sum towards the completion of the repairs. They were not bound to do so, and

The pursuers reclaimed, and moved to be allowed to amend their summons under the Court of Session Act, 1868, section 29,\* by substituting for the words "or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel, and coals therein," the words "and in any event."

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Argued for the reclaimers ;—The proposed amendment was competent. The question under the statute was,—“What was the real question in controversy between the parties?” The purpose and result of the proposed amendment was—not to alter the question here in controversy, but merely to bring out that question more clearly. Not one word of the pursuers’ condescendence required to be altered, and the proof related almost exclusively to the loss which had accrued before the date of the action. The amendment was formal, not substantial.

Ramage & Ferguson had no right of lien. The ship never was in their private yard, but only in the public dock. Such possession therefore did not give rise to a right of lien. The right of lien must be proved to have been given.<sup>1</sup> But in any case Ramage & Ferguson could have no right of lien after the agreement of February 1887. The mortgagees were bound to

if they had not made the advance the ‘Mula’ would probably have remained in the shipwrights’ hands subject to their lien for repairs until she came to be sold under judicial authority in the action of sale referred to on record. When the ‘Mula’ was eventually got ready for a voyage the owners were not in a position to satisfy the mortgagees that the ship was covered by insurances. The owners had instructed their brokers to insure her, but the brokers would only insure subject to their own lien for a balance due to them on past transactions. Consequently any insurance that might be effected in this way would be valueless to the mortgagees as an indemnity to them against the loss of the ship. They accordingly took up the position that they would not allow the ‘Mula’ to proceed to sea until policies were delivered or assigned to them to the extent of their debt. This could not be done, and my opinion is that Barr and others were within their rights when they refused to allow the ‘Mula’ to commence her voyage.

“The case of Messrs Ramage & Ferguson is stronger. I consider that they had a lien for their repairs which was not lost by the ship going out of their yard to a pier or harbour where the work of repairing was continued, but which would have been lost if the ship had commenced her voyage. Their right then was to detain the ship until their account should be paid or provided for.

“It is true that through the exercise of the rights of the mortgagees and the builders the pursuers have lost money. But this is through the fault of the owners, and does not, as the case presents itself to me, render the parties who are responsible for the detention of the ship responsible in damages.

“It follows from this opinion that the defenders Barr and others, and the defenders Ramage & Ferguson, are entitled to be assolizied from the action. If a different view were taken I think that damage has been proved (approximately) to the extent claimed in the proof.”

\* The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 29, enacts, —“The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper ; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made : Provided always, that it shall not be competent, by amendment of the record or issues under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment.”

<sup>1</sup> Barr & Shearer v. Cooper, June 6, 1873, 11 Macph. 651, Feb. 26, 1875, 2 R. (H. L.) 14.

No. 153. respect the rights of the charterers.<sup>1</sup> They had no right to prevent the ship earning freight, at least on an ordinary charter-party, such as this was. Now, Barr, Forrester, and Urquhart, had no objection to allowing the ship to sail. The real opposition came from Ramage & Ferguson, whose mortgage was after the date of the charter-party, and who were not at that date in possession. They maintained that as mortgagees they had an interest to prevent the ship from sailing in an unseaworthy condition, and that might be so. But it was on Ramage & Ferguson that the duty lay of putting her into a seaworthy condition; and the evidence shewed plainly that they were in breach of that obligation. It was not in their mouths, therefore, to plead her unseaworthy condition. In so acting they were not respecting the rights of the charterer. As mortgagees they were not indeed bound to fulfil the contract of the mortgager, but they were bound to do all in their power to permit of its fulfilment, provided their own rights were not prejudiced. Then it was said that the owners had undertaken to insure, and had failed to do so. But that obligation was between the owners and the mortgagees; it did not affect the charterers. The fulfilment of a personal obligation by the owners to pay money could not be made a condition precedent of the charterer's being allowed to exercise his rights. Besides it was plain on the evidence that the failure to have the ship insured was not the cause of her detention.

Argued for the defenders;—The proposed amendment was incompetent. The summons as framed plainly contemplated damages only as an alternative to future non-delivery, *i.e.*, damages arising after the date of the summons. The effect of the amendment would be to include damages arising before the date of the summons. The only real damage, if any, arose before the date of the action.

The charterer of a ship had no higher rights than the owner.<sup>2</sup> Now, here the owner had undertaken to the mortgagees to insure, and certainly could not have withdrawn the ship from their possession without insuring; neither therefore could the charterer. Further, the rights of the mortgagees would be materially prejudiced if the ship were allowed to sail in an unseaworthy condition, and they were therefore entitled to prevent that. It was no answer that Ramage & Ferguson were under obligation to repair her. They were, in the first place, not the only mortgagees; but, even if they had been, their breach of their obligation to the owners to repair the vessel was no answer to their defence, as mortgagees, to the charterers, who had no title to enforce contracts between the owners and third parties. In short, the pursuers' remedy was against the owners, they had no privity of contract with the mortgagees.

At advising,—

The LORD JUSTICE-CLERK read the following opinion of LORD RUTHERFORD CLARK (with which he concurred):—

The pursuers entered into a charter-party with Messrs Hunter & Company, the owners of the steamship "Mula," dated 15th April 1887, and founding on that contract they have raised this action, which is directed against (1) John White Seater, who at the date of the action was the registered owner of the vessel; (2) Thomas Barr, John Forrester, and David Inglis Urquhart, who were

<sup>1</sup> Collins v. Lamport, Dec. 1864, 4 De G. J. and S. 500, 34 L. J. Chan. Div. 196 (Lord Chancellor Westbury); "The Maxima," June 18, 1878, 39 L. T. (N.S.) 112; "The Fanchon," April 21, 1880, L. R. 5 Prob. Div. 173; Cory & Company v. Stewart, April 7, 1886, Times L. R. vol. 2, 508; "The Innisfallen," June 15, 1866, L. R. 1 Ad. and Eccle. 72; Keith v. Burrows, July 1877, L. R. 2 Ap. Ca. 636.

<sup>2</sup> Collins v. Lamport, *supra*.

mortgagees; (3) Ramage & Ferguson, who were mortgagees, and had also been employed to repair the "Mula"; and (lastly) William Hunter, the sole partner of William Hunter & Company, the original owners. No appearance has been entered for Hunter, who is said to be insolvent, and it is admitted that Seater is no more than the nominee of the mortgagees, who are the real defenders in the case. No. 153.  
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The pursuers seek declarator that the defender Seater is bound forthwith to deliver to the pursuers the steamship "Mula" in the state, for the purposes, and under the terms and conditions of the above-mentioned charter-party, and decree to enforce the declarator. And after that conclusion the summons proceeds,— "Or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel and coals therein, the whole defenders ought and should be decreed and ordained by decree foresaid, conjunctly and severally, to make payment to the pursuers (1) of the sum of £1000 in name of damages, and (2) of the sum of £100 as the value of the said bunker coals." I omit any reference to the coals which are mentioned, because they were delivered to the pursuers, and no question arises in regard to them.

The steamer was delivered to the pursuers in August 1887, and on 15th November 1887 the pursuers lodged a minute of restriction of their summons, which is No. 8 of process. It restricts the conclusions of the summons to a conclusion for damages sustained by the pursuers prior to the delivery of the vessel.

The first question which presents itself for consideration is, what damages can be recovered under that conclusion? The conclusion for damages being expressly dependent on the failure of the defender Seater to deliver the ship, the result seems to be that if Seater delivered the ship in terms of the pursuers' demand there is no conclusion for damages. In other words, the damages concluded for are the damages which will result from the failure to deliver, which of course can only be damages arising after the date of the action. The pursuers proposed an amendment of the summons so as to enable them to recover the damages incurred by them between the date of the charter-party and the date of the action. The motion was made under the 29th section of the Act of 1868; but, in my opinion, we cannot sustain it, for if we did, we should, I think, be violating the express declaration of the statute to the effect that it shall not be competent by amendment "to subject to the adjudication of the Court any larger sum, or any other fund or property, than such as are specified in the summons or other original pleading." Under the summons, as it now stands, we can only, in my opinion, give a decree for such damages as arise after the date of the action. To allow the summons to be altered to the effect of enabling us to give a decree for damages which have arisen prior to the date of the action, would be to enlarge the subject-matter of the action, and would, in my opinion, be contrary to the provision of the statute which I have just quoted. The pursuers urged that the proof was, *inter alia*, led with a view to seeing the damages which had arisen prior to the action, and that it was led without objection on the part of the defenders. That is true; but I do not think that by reason of that fact we are the less bound to act in conformity with the statute, for I cannot hold that the failure of the defenders to object is equivalent to that consent which the statute requires before we can enlarge the conclusions of the summons. The case as it stands could not be disposed of without an inquiry into the conduct of the parties prior to the date of the action. If evidence as to damage arising before that date was introduced, all that can be said of it is that it

No. 153. was irrelevant. To admit irrelevant evidence is not the same thing as to consent that the Court shall adjudicate upon it. If I am right, so far there is an end, or almost an end, to the case. I think the greater part of the damage, if not the whole of it, arose prior to the date of the action. But various questions of importance have been argued to us, and I think it right to consider these, all the more as another view may be taken of the summons than that which I have adopted.

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As I have said, the pursuers' charter-party is dated 15th April 1887. They had a prior charter-party, which they cancelled in terms of a power therein contained. It is not necessary to refer to the prior charter-party further. The "Mula" was mortgaged to the defenders Barr & Forrester for £1350, conform to mortgages dated September 1886. In October of that year she was placed in the hands of the defenders Ramage & Ferguson for extensive repairs, which were proceeded with, but it became evident that Hunter & Company were unable to meet the cost. Ultimately an agreement was entered into between them and (1) Barr & Forrester and Urquhart, and (2) Ramage & Ferguson, dated February 1887, the effect of which was (1) that Barr & Forrester, in conjunction with Urquhart, advanced to Hunter & Company £1300, and obtained a mortgage for £2650, which included the sum contained in the prior mortgage for £1350; and (2) that Ramage & Ferguson obtained £1300 towards payment of their account and a mortgage for £500. These mortgages were dated in February 1887. Ramage & Ferguson further bound themselves to have the vessel fit for sea by 9th March, and they renounced all claim for lien for the repairs which they had made. By the same agreement Hunter, the owner, undertook to have the vessel insured in the name of the other parties to the agreement. It is admitted that no such insurance was ever effected. On 22d April 1887 Barr & Forrester and Urquhart entered into possession of the ship as mortgagees. On 28th April they raised a note of suspension and interdict to prevent its removal, and obtained interim interdict, which was declared perpetual on the 9th of May. Further, on 29th April they raised an action of declarator and sale, and under decree of the Court the ship was sold on 20th June to Seater, who, as I have already said, was the mere nominee of the mortgagees. The pursuers were not called to this action, as the raisers of it were not aware of the charter-party. But when they came to be aware of it, it was at first proposed that the sale should be made under burden of the charter-party, but this proposal was not carried out. The pursuers did not intervene in the proceedings, for the reason that they expected the sale to proceed under the burden of the charter-party as it stood. The ship was detained till August, when, as I have said, she was delivered to the pursuers.

It is in these circumstances that the pursuers bring their action of damages. It is to be observed that they do not maintain that the defenders were bound by the charter-party, or that they could sue the defenders in virtue of any contract. Their case is that the defenders were bound to respect the rights of the charterers, and to deliver the vessel to them in implement of the charter-party, that they wrongfully failed to do so, and that they are therefore liable in damages. The pursuers referred to the case of *Collins v. Lamport* as determining the rights of mortgagees in a question with the charterers. The defenders admit its authority. The passage in the judgment of the Lord Chancellor (Westbury) on which the pursuers rely is as follows:—"As long therefore as the dealings of the mortgagor with the ship are consistent with the mortgagee's security, so long as these dealings

do not materially prejudice and detract from or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long as there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner he has of necessity authority to enter into all these contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property." I accept that declaration of the law to its full extent. The limit of the owner's right to deal with the ship is to be found in the prejudice of the security of the mortgagees. So long as the mortgage is not materially prejudiced or detracted from, the owner may deal with the ship as he pleases. Where the security is prejudiced—or to keep to the language of the Lord Chancellor more closely, is materially prejudiced—he may not. It is, I think, obvious that the right of the charterer cannot be higher than the right of the owner. That right is to obtain delivery of the ship from the owner for implement of the charter-party. If the owner cannot in a question with the mortgagees legally give delivery, the charterer cannot claim it, and if the mortgagees have a right to withhold the use of the ship from the owner they have an equal right against the charterer.

We have thus to consider the position in which the mortgagees were placed in regard to the owners. It is plain enough that their mortgage was in jeopardy. The owners were in great pecuniary embarrassment, and could not meet the cost of repairing the ship. Further, the owners had become bound to effect an insurance over the ship in the name of the mortgagees, which they did not do, and which, so far as I judge from the evidence, they were never in a condition to do. The mortgagees thereupon took the ordinary steps for realising their security. They first prevented the removal of the ship by interdict, and thereafter proceeded with an action for a sale. In all this they were, I think, quite justified. But the pursuers demanded that the ship should be given to them in order to implement the charter-party. Could the owners have insisted on this? I do not think that they could. The conclusive answer of the mortgagees would be that their security would be thereby materially prejudiced. If the ship had been sent to sea without being insured, it is hardly necessary to say that the mortgagees would have been put into serious peril, and that a sale could only have been effected at great disadvantage. It is true that the charterer had nothing to do with the insurance of the ship, but that is in my opinion beside the question. The owners had undertaken to insure it in the name of the mortgagees, and they could not in a question with the mortgagees have insisted on sending the ship to sea while that obligation remained unfulfilled. The charterers are in the same position, and in my judgment they cannot have a higher right than the owners. For these reasons I am of opinion that the defenders did not act wrongfully in failing to deliver the ship to the pursuers.

But the defenders have a further defence. They say that the ship was not in a seaworthy condition up to the date of the action, and in my opinion that is proved. It is said that very little remained to be done, but I think it is proved that there were serious defects. The pursuers' witness, Jones, admits that it would not have been judicious to allow her to sail without the necessary alterations being made. I entirely agree with him, and I think that where it is judicious to have repairs made in port the mortgagees were not at all wrong in preventing the ship from going away till these repairs were made. It is true that Ramage & Ferguson undertook to have the repairs completed by the middle of

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No. 153. March. I do not think that that is material. This contract was with the owners. The pursuers as charterers were not in right of it. The owners could not have insisted to the prejudice of the mortgagees in sending the ship to sea in an unseaworthy condition, and it follows from what I have said that the charterers were under the same disability.

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It was urged that Ramage & Ferguson could not found on the breach of their obligation to complete the repairs; but as the charterers were not in right of their obligation they cannot, I think, found upon it, neither can the owners in this question. For beyond doubt Ramage & Ferguson have committed a breach of contract as shipwrights, but they could not compel them because of such a breach to surrender their rights as mortgagees. Besides, the other mortgagees were not affected by this breach, and they had an independent right to retain the ship.

I do not think that Ramage & Ferguson had any lien for the repairs, and I cannot concur with the Lord Ordinary on that point.

The result is, in my opinion, that the defenders should be assolized.

LORD LEE.—I have the misfortune to differ from the opinion which has been delivered, and from the Lord Ordinary; but I do not find it at all necessary to question the proposition in law upon which the Lord Ordinary proceeds, viz., that the first mortgagees were entitled to refuse to allow the ship to go without delivery of a policy of assurance. They did so in the month of April; but the ground upon which I arrive at the conclusion that there was a wrongful detention of the vessel, and that Ramage & Ferguson are responsible, is that the delay of the ship—the refusal to allow it to go when it was demanded ultimately—was not caused by Barr & Urquhart, the first mortgagees, I think, but was caused entirely by the conduct of Ramage & Ferguson. I think that they acted not only contrary to their legal rights, but contrary to their obligations, in refusing to allow the ship to go, as I shall endeavour to explain.

The action was originally an action for delivery of the ship. It was raised upon the 4th of July 1887, but it had been intimated on the 27th of June. It was subsequently converted into an action of damages by an arrangement to which Ramage & Ferguson were parties, and which is contained in a minute of the 15th November, as the ship had been given up, and the only question that was left was the question of damages. The conclusion for delivery was directed against Seater, as the registered owner. He had been put forward by Ramage & Ferguson as the purchaser of the ship at a public sale, as a person quite independent of them, as a person who held the ship by his judicial title, and under conditions fixed by the Court, and which freed him from the charter-party. That appears from the joint print, where they meet the demand which was made upon them by the pursuers at that time for delivery of the ship. They had on the 25th June put forward Seater as a person with whom they had nothing to do, saying,—“You are in error in supposing that the charter-party was referred to in the advertisement of the ship, or that she was sold subject to the fulfilment of any charter-party which her former owner had entered into,” and so on. Now, Seater admittedly turns out not to have been an independent party at all. He was a mere agent or trustee for Ramage & Ferguson. But the conclusion for delivery was quite properly and sufficiently directed against him as the registered owner. And the question of damages which is now alone in the case in my view depends upon this question, whether Ramage & Fer-

guson, and their nominee or agent Seater, were not bound to deliver the ship at the time when that action was raised. No. 153.

I say my view is, that the question of damages depends upon the question whether they were not bound to make delivery at that date, for this reason, that I hold it to be clearly proved that the whole damage which was actually suffered arose after the 27th of June and ended with the 4th of July. Even down to the 4th of July, when the summons was signeted, no damage would have been suffered if delivery had been made upon that day according to the evidence. I say that is proved, in the first place, because I think the oral testimony is clear upon that point. In the proof Mr Laming says distinctly that Dasnieres, the person who had chartered the "Mula" for a cargo of pitch out to the Mediterranean, "could still have taken the vessel up to the end of June." And he says No. 69 of process is the charter-party which he entered into; and I think it was explained that the charter-party is subsequent in date to the end of June. Further, there is real evidence in the correspondence at the time that the whole damage arose after 27th June,—in the letter written by the pursuers to Seater, Ramage & Ferguson's nominee,—and which is printed. For in that letter, or rather telegram, by the pursuers to Seater they say,—*"Charterers of 'Mula,' Dasnieres, pitch-merchant, just given us notice we must tender 'Mula' at once or he will charter steamer 'Greta' at 4s. increased freight, and claim difference, namely, £160. Says must decide immediately. Telegraph you will deliver 'Mula,' and when."* So that on the 27th of June Messrs Ramage & Ferguson had an opportunity to deliver the "Mula," and to avoid any damage. They refused to deliver the vessel in terms of their letter which follows, saying,—*"Our client, Mr J. W. Seater, has handed to us your telegram of date, and with reference thereto we beg to send annexed copy of a letter which we addressed to your representatives in Glasgow on Saturday on the same subject, and to which we beg to refer you. Our client is not in a position to take up the charter to which you refer, and the parties to whom you allude in your telegram must just take their own course."* That is followed by a letter upon the same day, which ends by the agents of the pursuers intimating that *"our clients, in the face of your clients' refusal to implement the charter-party, will now proceed with an action,"* and so on. So that the whole damage was suffered after the 27th of June, the date when the action was intimated. If delivery had been made even on the 4th of July, when the summons was signeted, there is little reason to doubt, so far as I can see, that the damage might have been avoided. Therefore the question of damage comes to depend, as I said, upon the question whether there was or was not incumbent upon Ramage & Ferguson an obligation to deliver that ship;—whether they were entitled to set at naught the charter-party altogether as they did?

Now, the position of the ship was this: The original charter-party was dated 9th October 1886. Under that charter-party it is unnecessary to notice the history of the delays which took place. I am disposed to think that these delays arose from the difficulties of Hunter, the owner of the ship. And I am clear that there is no claim in this action founded upon any delay under the original charter-party, nor, indeed, any claim under the amended charter-party of April 15th down to the 27th of June. No loss is alleged to have happened by the non-delivery of the ship prior to the 27th of June. But the delays which had arisen under the first charter-party are important in this respect as matter of history, for they resulted in an agreement in February 1887 between the owner,

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Hunter, and the first mortgagees, Barr & Company, and Messrs Ramage & Ferguson, and Mr Urquhart, as an individual partner, who also had a share of Barr's interest, the object on the part of the owner, and on the part of all concerned, being obviously to enable this ship to begin earning freight. On the narrative that whereas the fourth party (that is Ramage & Ferguson) were engaged in certain repairs for which they claim a lien "preferable to the claim of the first and second parties under the said mortgages, but which lien the whole other parties hereto refuse to recognise"; and on the further narrative that for the purpose of avoiding litigation, "and with the view of completing said repairs and making the said vessel ready for sea in every respect, the first and second and third parties have agreed to advance to the fifth party the further sum of £1300." Thereupon arrangements were made by which this advance and also a mortgage were to be given to Messrs Ramage & Ferguson. By the third article of that agreement Messrs Ramage & Ferguson, "in consideration of said payment of £1300, and promissory-notes and mortgages to be granted by the fifth party as aforesaid, renounce and discharge any claim for a lien, present or future, over the said vessel in connection with or arising out of said repairs, and undertake and bind and oblige themselves fully to execute and complete all repairs on said vessel which may be required to make her fit and ready for sea in every respect." And they bind themselves when the repairs are executed that the vessel shall "pass the Board of Trade's Surveyor, and that all within the space of one month from the last date hereof." They renounce their lien, and they agree to the owner of the ship at that time that they shall make all repairs "which may be required to make her fit and ready for sea in every respect." Now, what happened under this? I do not go over the correspondence. I think it appears that at first there was a temporary delay caused by Barr & Company requiring that a policy of insurance should be delivered. That was in the month of April, but the result was undoubtedly that on the 15th of April a new or rather an amended charter-party was given to Messrs Laming & Company, and although Messrs Barr & Company caused some delay by their demanding a policy of insurance it is quite plain upon the correspondence that the delay caused by the demand for delivery of a policy of insurance passed off, and was not the ultimate cause of the detention of the vessel at the time the final demand was made.

That appears to me to be quite plain by two letters which are contained in the print. The first is a letter dated 17th May 1887, in which Barr & Company's agents, writing to the pursuers, say they find it necessary to sell the ship, and they go on to say—"It is not correct to say that our clients have no intention of carrying out the arrangements of the ship in accordance with the terms of the charter. On the contrary, they have every intention of respecting your rights, and the sale will be carried out expressly under burden of the charter." So that they were ready to go on selling the ship under her arrangements. Moreover, there is another letter, which shews that they made Ramage & Ferguson acquainted with their willingness that the ship should fulfil her engagements. On the 21st May they write to Ramage & Ferguson saying—"Referring to Mr Barr's telegram to you of to-day, we again send you the draft agreement for approval as now altered. As it is of the utmost importance that we should be able to inform the charterers whether the charter is likely to be carried out or not, please wire us on Monday whether you agree to the terms now proposed, and that you will not defend the action." Now, that was the position

of Barr. It appears that the matter of the insurance had been arranged, and Barr was willing to sell the ship under her engagement. But Messrs Ramage & Ferguson's position from the correspondence—indeed from an early part of the correspondence, from the 20th of April—was that of insisting, contrary to their agreement of February, upon the right to take every step they could to detain the ship. No. 153.  
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The letter of 20th April, I am afraid, it may be necessary to notice, because really in my mind it comes to be one of the links by which Ramage & Ferguson's liability is clearly demonstrated. They apparently began negotiations with Barr for the purpose of what they call "protecting the joint interests." Upon the 20th of April they write to Messrs Boyd, Jamieson, & Kelly, who, I think, are Barr's agents, as follows:—"With reference to our interview with Mr Kelly we have just ascertained that this vessel is so situated that she cannot sail for a considerable time to come, and Messrs Ramage & Ferguson will do all in their power to prevent her getting away until the terms of the minute of agreement have been fulfilled." Now, were Ramage & Ferguson fulfilling the minute of agreement? The minute of agreement bound them to make all necessary repairs in consideration of the £1300 and the mortgage which they got to fit her for sea. They go on writing, making it still more plain that they are determined to make a stand against the ship being allowed to go. I do not need to read these letters, but Hunter & Company write on the 27th April,—“The steamer is now ready for sea, but stopped on that account.” That is the question about the policy of insurance which went off. But all through the correspondence it will be found that from the 20th of April Ramage & Ferguson's position was that of taking every step they could to have the vessel detained.

Now, I pointed out that Barr & Company's proposed sale was under the burden of the ship's engagements. Barr & Company's agents write to Ramage & Ferguson's agents on 4th June 1887 as follows:—"We to-day obtained a warrant to sell, the exposure being fixed for Monday the 20th current; there is therefore very little time to advertise. We enclose herewith for your approval proof of the advertisement." That is an advertisement which contained a clause bearing that the sale was under the burden of the charter-party. Then they go on to say,—“You will observe that we have inserted in it that the purchaser is bound to carry out the charter. We understand your clients are strongly averse to the vessel being exposed subject to such a burden. We enclose copy of a letter we have from our Glasgow correspondents, from which you will see that their clients are willing that the exposure should take place free of the charter, provided your clients undertake all responsibility of satisfying the charterers' claims.” That letter shewed that Barr & Company were willing, indeed desirous, to act upon their undertaking to the owner Hunter that the sale should be subject to the charter. But the answer by the agents of Ramage & Ferguson is this,—“We have your favour of Saturday. Our clients quite understand that they have to settle the matter with Laming under their arrangement with Messrs Barr & Forrester, and in these circumstances we have deleted the reference in the advertisement to Laming & Co.'s charter.” And accordingly the result is that by the action of Ramage & Ferguson, upon their own sole responsibility, the sale was effected, and effected by them without any reference to the charter-party. It set at naught the engagement of the ship. It was in substance a sale by Ramage & Ferguson to themselves, or to a person who is their mere

No. 153. nominee, for the purpose of ignoring and putting aside the charter-party which I have referred to.  
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Now, that is done by persons who in a question with the owner had undertaken within a month of the end of February to do everything that was necessary to make the vessel ready for sea in consideration of a sum of £1300. Now, were they entitled to do that? or were they not bound to allow Hunter to fulfil his engagement? It is perfectly clear that Hunter was bound to the charterers. It is equally clear that Ramage & Ferguson were bound to Hunter to do what was necessary to enable the ship to fulfil her charter. I fail to see how Ramage & Ferguson can justify what they did. I have not thought it necessary to notice the fact that their position as regards responsibility is made abundantly clear by the formal agreement between themselves and Barr & Company. I think it is dated in June, and by it they undertake all responsibility to the charterers. But apart from that altogether, being bound to Hunter, who was bound to the charterers—bound to Hunter in the way that I have mentioned—I entirely fail to see how they were entitled to take these steps for the purpose of defeating the charter. Therefore I am of opinion that on the 27th of June, when the action was intimated, before the damage had begun to arise, at the time when it was telegraphed to them by the pursuers that the charterer of the “Mula,” Mr Dasnieres, was still willing to take the vessel, they were under an obligation to make their nominee Seater give up the vessel, and they were altogether wrong in going on to hold out Seater as being a person entirely independent of them, holding under a decree of sale which had itself set aside the charter. But it now appears that the setting aside of the charter-party in the proceedings of sale was entirely the work of Ramage & Ferguson. I say, therefore, that they were bound to deliver on 27th June. I say, further, that if they had delivered on 27th June no damage would have arisen, because the vessel would have earned her freight under the pitch contract, and would have earned her coal freight, and no damage would have arisen. That being so, I think that under the agreement, after what had taken place, they must be held as responsible for the damage so arising. I think, in my view of the claim for damage, that no amendment is necessary. It is perfectly rightly concluded for as a substitute for a claim to the ship,—that is to say, the claim of damages arising out of the refusal to deliver the ship at the date when the action was intimated on 27th June.

I do not know that it is necessary to say more. Some importance has been thought to attach to the fact that Messrs Ramage & Ferguson had a lien for repairs. I concur entirely in the opinion of Lord Rutherford Clark that they had no such lien. Something has also been said about the ship being unseaworthy and unfit to go to sea down to the 27th of June. Well, let it be supposed for a moment that it was so, who is responsible for that? I say most clearly Ramage & Ferguson, for it was Ramage & Ferguson's breach of their engagement to the owner that prevented the ship being made ready for sea. Therefore, on the whole, I am sorry to say that I am obliged to differ from the proposed judgment.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—“Refuse the reclaiming note, and adhere to the interlocutor reclaimed against,” &c.

DAVID TURNBULL, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

W. & T. ADAMS, Pursuers (Reclaimers).—*R. Johnstone—Law.* No. 154.  
 GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Defenders (Respondents).  
 —*D.-F. Balfour—Ferguson.* June 21, 1889.

*Adams v. Great North of Scotland Railway Co.*  
*Arbitration—Contract—Reference—Disqualification.*—The arbitration clause in a contract for the making of a railway provided that the arbiter should not be disqualified from acting by being or becoming consulting engineer to the railway company. *Held* that he was not barred from acting as arbiter by the fact that he had revised the specifications and schedules upon which the work which formed the subject of the arbitration was performed.

*Process—Arbitration—Decree-arbitral—Reduction.*—In a reduction of a decree-arbitral on the ground that the arbiter had given decree for a larger sum in name of penalties than was claimed by the party in whose favour decree was granted, the latter offered to discharge the excess. *Held* that the proper remedy was to reduce the decree *quoad* the excess.

*Arbitration—Decree-arbitral—Reduction.*—By the arbitration clause in a contract for the making of a railway, it was provided that “all disputes and differences which have arisen or shall or may arise between the parties under or in reference to this contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, . . . or as to any other matter connected with, or arising out of, this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution of or failure to execute properly the works hereby contracted for or not,” should be submitted and referred to the final sentence and decree-arbitral of the arbiter named.

The contractor was bound to complete the line of railway on 30th March 1885 under a liquidate penalty of £20 for every day's delay, but it was stipulated by the railway company that 400 yards of embankment forming part of the line should not be formed until another contractor had completed the east abutment of a bridge and the diversion of a river, or until he had received the written instructions of the engineer to proceed with the embankment. The line was not completed till 1st May 1886.

The arbiter found that the contractor was liable in penalties for each day's delay (exclusive of Sundays) from 30th March 1885 to 1st May 1886.

In an action of reduction of the decree-arbitral brought by the contractor, it was proved that the contractor had not got access to the ground on which the 400 yards of embankment was to be formed until February 1886. The arbiter stated that he was satisfied that the contractor had not been ready to use the ground until he got it, and that his delay was not due to his not having had access to it until February 1886.

The Court *held* that, as the whole matter, including the construction of the contract, had been referred to the arbiter, the Act of Regulations prevented the Court from interfering with the arbiter's award, even on the ground of injustice.

By the Great North of Scotland (Buckie Extension) Railway Act, 1882, 1st DIVISION. the railway company were empowered to make a railway from Portsoy to Lord Fraser. Elgin, and in November 1882 they advertised for tenders for the work divided into four sections. Of these the first and second sections were M.  
 (1) from Portsoy to Portnockie, which was again subdivided into two sections—(a) from Portsoy to Tochieneal Station, and (b) from Tochieneal Station to Portnockie, and (2) from Portnockie to the river Spey, or the Buckie section.

Messrs W. & T. Adams, contractors, Callander, sent in tenders for both sections, which were accepted, the cost of the Portsoy section being £52,286, 19s. 7d., and of the Buckie section being £39,063, 17s. 9d. By the contracts for the construction of the two sections, dated in January 1883, which were entered into between the company as first party, and

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the Messrs Adams as second parties, the second parties bound themselves to complete the sections according to the specification, and the plans, sections, and drawings prepared by the company's engineer, or according to such altered or explanatory plans as might be furnished by the engineer during the progress of the works.

The contracts further provided,—“And further, the said second party hereby bind and oblige themselves to commence said works as soon as they shall have been put in or offered possession of land to the extent that the said engineer shall consider necessary, and within six days after written notice to them, or any of them, to do so; . . . And the said second party bind and oblige themselves and their foresaids to intimate to the said first party in writing when they are ready to commence said works, and any delay which may thereafter occur, if any, in giving the said second party possession of such lands as the engineer shall consider necessary for carrying on said works, shall not confer on the said second party a right to claim damages against the said first party, or to break this contract, but may be stated to the arbiter hereinafter named as a reason for not completing the said works within the time after specified, and if it shall appear to said arbiter that the said second party was prevented from completing the said works by that delay or by any stoppage from any cause not imputable to the said second party, the said arbiter shall be entitled to extend the time for completing the same for such period as he shall consider reasonable, but of the propriety of giving the said extension of time, and the length thereof, the said arbiter shall be sole judge.”

The Messrs Adams bound themselves under the contracts to carry on the works regularly and uniformly, and to have the railway ready for traffic,—the Portsoy to Tochieneal part of the Portsoy section on 30th September 1883, and the remainder of that section and the Buckie section on or before 30th September 1884, “or on or before such respective days thereafter as may be respectively fixed by the arbiter after named.” In the event of delay on the part of the Messrs Adams, or of their not employing a sufficient number of workmen, horses, &c., it was provided that the company might apply to the arbiter for authority to employ workmen, provide plant and materials, &c., or to take the works out of the contractors' hands, all at the expense of the Messrs Adams,—“And it is hereby further declared that the said second party shall be liable in all damages and extra expenses which may be incurred by, or occasioned to, the said first party by the said second party or their foresaids failing to complete the said works, or to have the same ready for opening by the times respectively hereinbefore stipulated; and as compensation for loss of profits to the company should the foresaid respective portions of the line not be in a state to be opened for public traffic by the times stipulated, it is hereby declared and agreed on that the said second party shall be bound to pay to the said first party the sum of £20 sterling as the liquidate and agreed on compensation for every day during which each of the foresaid respective portions of the line, or any part thereof, shall remain unfinished, or in a state not to admit of its being opened for public traffic, after the said 30th day of September 1883 and 30th day of September 1884 respectively, or such extended periods as the said arbiter may determine as aforesaid.”

The contracts also contained the following clause :—“And further, the said first and second parties hereto hereby submit and refer to the final sentence and decree-arbitral to be pronounced by Benjamin Hall Blyth, civil engineer in Edinburgh, whom failing by death or resignation, to George Cunningham, civil engineer in Edinburgh, whom they hereby mutually nominate and appoint to be sole arbiter, all disputes and differences which have arisen or shall or may arise between them under or

in reference to the contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, or regarding the nature of the materials used or the expense of any additional work or deduction from that specified, or any alteration which may be made as aforesaid in the works hereby contracted for, and which may make them more or less expensive than those specified, or regarding the proper maintenance of the works or the state and condition of the same, and the amount of the monthly payments to be made to account thereof, or as to any other matter connected with or arising out of this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution of or failure to execute properly the works hereby contracted for or not; . . . Declaring that this submission shall not fall by the lapse of year and day, or by the death of any of the parties hereto, and that neither the said Benjamin Hall Blyth nor the said George Cunningham shall be disqualified from acting as arbiter by his being or becoming the said first party's principal or consulting engineer, or a shareholder in said company, or by his holding or being appointed to any other office or employment under the said first party, or by their being partners or connected with each other in business or otherwise; and that the said arbiter shall have power to award the expenses (including those to be incurred by himself), either in whole or in part, which may be incurred under this submission, against such of the parties as he shall think fit."

The specification and conditions for the construction of the Buckie section contained the following clause:—"The portion of the embankment of the line, between pegs Nos. 892 and 899, shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of the bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant-engineer to proceed with the formation of the said portion of the embankment. . . ."

The contractors commenced operations, but they were somewhat dilatory in their proceedings, and complaints were made of this frequently to them. On 4th December 1883 the railway company, by their manager, applied to Mr Blyth, as arbiter, to authorise them to put on men and plant so as to carry out the works vigorously, all at the expense of the pursuers. In consequence of this appeal to him, Mr Blyth visited the works, and in a letter, dated 12th December 1883, addressed to the railway company's manager, he stated that no part of the work was completed, and he added that "it is evident from their present state that if they [the works] continue to be executed at the present rate of progress the first five miles cannot be finished before May 1884, and the remainder of the works until at least September 1885—or fully a year behind the contract time." Mr Blyth was very unwilling to authorise the company to put men on the works at the contractors' expense, and suggested, that as the pursuers had promised to put on an increased force of men and waggons, that it would be for the best interest of all parties that the directors should obtain from the contractors a formal undertaking to do this, and that if they failed in their promise the application of the railway company might again be taken up.

Nothing further was done upon this application; but on 2d December 1885 the railway company again made a formal application to the arbiter with complaint of delay, and calling upon him "forthwith to issue and

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pronounce the necessary order authorising and empowering them [the railway company] to provide, at the expense of the contractors, such additional workmen, horses, waggons, and other force, with all tools, implements, and materials requisite and necessary, and to continue to employ the same so as to ensure the completion of the whole of the works above referred to within the time above expressed." What the arbiter did upon this was to meet the parties, and, upon the urgent entreaty of the Messrs Adams, he was induced, upon their again giving an undertaking of greater diligence, to abstain from granting the prayer of the application of the railway company. The Messrs Adams accordingly wrote, on 8th December 1885, as follows:—"With reference to the application by the Great North of Scotland Railway Company to you as arbiter, dated 2d inst, discussed at the meeting before you to-day, we have now, as desired by you, to undertake to finish the works referred to in that application on or before 15th February next, unless prevented by some unforeseen occurrence. In order to do so we shall put and keep on the works as many men as can be practically done for the above end. In the event of our not, by these means, finishing at the above date, we will agree, if you deem it then necessary, to your giving effect to the application of the railway company." To which the clerk to the submission, by Mr Blyth's directions, replied as follows, by letter addressed to the Messrs Adams' agents, Messrs Campbell & Somervell, W.S.:—"9th December 1885.—I am instructed by the arbiter to acknowledge receipt of Messrs Adams' letter to him of yesterday. The arbiter still has the Great North of Scotland Railway Company's application under consideration, and the manner in which he will ultimately deal with it will to a great extent depend upon the information he may receive within the next eight or ten days as to what, if any, steps are being taken by your clients with the view to the completion of the works on or before 15th February next." The arbiter was not called upon by the railway company to issue the necessary order allowing them to put on additional men and plant.

Matters stood upon this footing until the works were completed. The first subsection of the Portsoy contract, which ought to have been completed on 30th September 1883, was not completed till 1st April 1884, and the second subsection was not completed within the time allowed, as extended by the arbiter to 30th March 1885, but only on 1st May 1886. The Buckie section was not completed within the time allowed, as extended by the arbiter to 30th March 1885, but only on 1st May 1886.

Thereafter, disputes having arisen between the Messrs Adams and the company with reference to the settlement of their accounts under the contracts, an appeal was made to Mr Blyth under the reference clause. After various procedure, and the taking of evidence at considerable length, and the intimation of a note of the proposed findings, against which no representations were lodged by either party, Mr Blyth issued two decrees—arbitral—the one applicable to the Portsoy and the other to the Buckie contract. Under the first he found that the Messrs Adams were due to the company the sum of £7109, 13s. 6d., with interest from 7th November 1887, and under the second he found that they were due the sum of £5103, 14s. 6d., with interest from the same date, and he gave decree for payment of the two sums. The larger portion of the items charged against the Messrs Adams consisted of penalties or liquidated damages at the rate of £20 per day for loss caused to the company through the delay in completing the works beyond the date of completion specified in the contract—being 837 days at £20 = £16,740.\* Of this sum £6800 was applicable

\* It appeared that in his original proposed findings the arbiter had fixed the

to the Buckie contract for the period from 30th March 1885 to 1st May 1886, 340 days (excluding Sundays), and the remainder to the two sections of the Portsoy contract,—156 days for section 1, and 341 days for section 2,—both excluding Sundays.

The Messrs Adams thereafter brought an action of reduction of the two decrees-arbitral against the company.

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The grounds of action appear from the following pleas for the pursuers:—“The decrees-arbitral specified in the summons ought to be reduced,—

1. Because the said Benjamin Hall Blyth, through the circumstances condescended on, was disabled from exercising an impartial judgment on the matters referred to him. 3. Because, prior to the date of the two contracts aforesaid, the said Benjamin Hall Blyth had, on the employment of the defenders, prepared for them the specifications and schedules forming part of the contracts, and containing statements as to the masonry of the bridges and viaducts calculated to mislead the pursuers, or having that effect, and the fact of his having been so employed was concealed by the defenders from the pursuers, and the pursuers were ignorant of it not only at the date of the contracts but also at the date when the decrees were pronounced. 4. Because the decrees are *ultra fines compromissi*, in respect, (a) that, on a sound construction of the two contracts between the pursuers and the defenders condescended on, the said Benjamin Hall Blyth was not empowered, after the dates specified therein for the completion of the works, to extend the time for such completion; (b) that the said Benjamin Hall Blyth has found the defenders entitled to sums in name of compensation or liquidated damages, but in reality penalties, enormously in excess of the sum they claimed; and these matters imply corruption on the part of the said Benjamin Hall Blyth, and are not separable from the other findings in the decrees. 6. Because the Buckie section of the railway could not be completed till the bridge at Garmouth was nearly finished, and possession of the land necessary for connecting the bridge and the railway was not given by the defenders to the pursuers till February 1886; and in the decree applicable to the Buckie contract the said Benjamin Hall Blyth has nevertheless found the pursuers liable in compensation or liquidated damages for not completing the said section at the rate of £20 per day from 30th March 1885. 9. Because, in the circumstances condescended on, the decrees are corrupt, unconscionable, and unjust.”

The pursuers stated, *inter alia*, that the amount allowed in name of penalty exceeded that claimed by the defenders to the extent of £5250. In regard to this matter the defenders stated,—“Explained further that under the clauses of reference in the contracts the parties referred to the arbiter all questions as to the true intent, meaning, and construction of the contracts, as well as all questions connected with the execution, or failure to execute, the works to be constructed, and constituted him the sole judge between them on all questions of fact or law arising upon the construction or execution of the said contracts. In particular, he was entitled and bound to decide a question which arose between the parties as to the true intent, meaning, and construction of the clause providing for payment of liquidate and agreed on compensation at the rate of £20 *per diem*, as compensation for loss of profits in event of failure by the contractors to have the works completed at the times specified in the contracts, or such other times as the arbiter might fix, in accordance with the power of extending the time conferred upon him. . . . The claims lodged by the defenders are referred to, and it is explained that

penalties at a sum of £10 per day, but that, in accordance with an opinion of counsel, he afterwards substituted a rate of £20 per day in the award.

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they have throughout maintained that compensation for loss of profits was due to them at the rate agreed on in the contracts for the whole period during which the contractors have been found to be in fault, although, desiring to treat the contractors with liberality, they, in accordance with the statements in their claim, were all along willing to accept a payment of compensation to the extent of one-half of the amount claimed as due under both contracts. The railway company do not propose, and have intimated to the pursuers that they do not intend, to enforce payment of the sums decerned for in name of liquidated and agreed on compensation to an extent exceeding the sum of £11,490, and they hereby offer to discharge their claims against the pursuers under the decrees-arbitral to the extent of the sum of £5250, being the amount decerned for as compensation for loss of profits in excess of the sum of £11,490 insisted upon in their claim, and to engross upon the said decrees minutes giving effect to this restriction."

In reference to their 6th plea, the pursuers stated ;—(Cond. 11) "The aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers, under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883 . . . Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this, and so complete the Buckie section of the defenders' contracts, till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886 the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week, provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. The material for the embankment had to be brought from Portgordon, a distance of three miles. It was thus impossible for the pursuers to have completed the works under their Buckie contract until two months or thereabouts after the said month of February 1886. . . . The said Benjamin Hall Blyth has, by the decree applicable to the Buckie contract, found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885." In answer the defenders, *inter alia*, denied that the completion of the works under the Buckie contract was in fact retarded or materially affected by the state of the works of the Spey Bridge, and explained that any question of delay so arising was by the contract submitted to the decision of the arbiter.

In reference to their third plea, the pursuers stated ;—(Cond. 12) "The said Benjamin Hall Blyth was employed by the defenders to prepare or revise the plans, specifications, and schedules of quantities upon which the pursuers tendered for the works, and to estimate the probable cost of the works for them. At the date when the pursuers entered into their contracts with the defenders they were ignorant of the fact of the said Benjamin Hall Blyth having been so employed, and they have only become aware of it since the said decrees-arbitral were pronounced . . . ." (Cond. 13) "The specifications and schedules prepared or revised by the said Benjamin Hall Blyth were in many material points inconsistent, contradictory, and misleading. In particular, after

the works were in progress, the pursuers were required by the defenders' engineers to construct of ashlar masonry the abutments and other parts of the various bridges and viaducts on the line, whilst the specifications and schedules, on a sound construction of them, prescribed only rubble, which is a cheaper kind of masonry.\* In all the cases in which these circumstances occur, the said Benjamin Hall Blyth has by the decrees-arbitral disallowed the pursuers' claims for the difference between ashlar and rubble prices, which amounts to £10,000 or thereby. From the said schedules it appears that the pursuers, in stating their rates of prices, had allowed for these works on the footing that the masonry was only to be rubble masonry. There was a great deal of evidence led before the said Benjamin Hall Blyth and argument submitted to him as to the meaning of the expressions used in the specifications and schedules to denote the masonry of which the bridges and viaducts were to be constructed. During the evidence and the argument the said Benjamin Hall Blyth concealed from the pursuers the fact that the expressions in question had been inserted in the specifications and schedules by himself, or had been revised and approved of by him. The pursuers have only discovered this since the said decrees-arbitral were pronounced. The question whether the pursuers were to be allowed ashlar prices or rubble prices for the masonry of the Cullen viaduct was the most important question in the reference; and if the pursuers had known that the said Benjamin Hall Blyth had prepared or revised for the defenders the specifications and schedules on the construction of the terms of which the question depended they would have declined to submit their claims to him. The pursuers further believe and aver that, in adjudicating upon their claims, the said Benjamin Hall Blyth has permitted himself to be biassed and corrupted by the desire to save the defenders from the consequences of his own negligence in preparing or revising the specifications and schedules." The defenders in answer stated that the fact that Mr Blyth's firm were consulting engineers to the defenders was well known to the pursuers when the contracts were entered into, but they denied that Mr Blyth had ever prepared any estimate of the line of railway as finally authorised by Parliament, or that he prepared or revised the schedules of quantities issued to intending contractors on which the pursuers tendered, and they further stated;—"Any difference as to the construction of the specifications and schedules was by the contract expressly and exclusively submitted to the judgment of the arbiter. Denied that the pursuers were required to construct, or did construct, the abutments, or any portion of any bridge or viaduct of ashlar masonry, except where ashlar masonry is expressly required by the specifications. Denied that the masonry referred to in the condescendence and described by the pursuers as ashlar is truly ashlar masonry, and explained that it is in fact rubble masonry, rather inferior than superior to the quality stipulated for in the specifications, and that the arbiter's findings upon the items of claim falling under this head give effect to the contract of parties expressed in the specifications and schedules of prices."

The defenders pleaded, *inter alia*;—(1) The action is incompetent, except in so far as founded on the cause or reason of corruption alleged against the arbiter, or upon any decerniture by him *ultra fines compromissi*. (2) The pursuers' statements are not relevant. (3) The defenders are entitled to absolvitor in respect that,—(a) The matters in dispute under the contracts in question were competently referred to the judgment of the said Benjamin Hall Blyth; (b) That nothing existed or has occurred

\* For terms of specification see Lord Fraser's note, *infra*, p. 853.

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to disqualify him from acting as arbiter therein; (c) That the allegations of corruption against the said arbiter are false and unfounded in fact. (4) The said decrees-arbital being in conformity with the contracts of submission, having fully exhausted and not having exceeded the matters submitted, the reasons of reduction ought to be repelled, and the defenders found entitled to absolver, with expenses. (5) *Separatim*, Even assuming the arbiter to have exceeded his powers in decerning for liquidate compensation to an amount exceeding the restricted sum of £11,490, the amount decerned for in excess of the said sum of £11,490 is separable from the remainder of the awards, and the said decrees-arbital should only be reduced *quoad excessum*.

The Lord Ordinary (Fraser) on 26th May 1888 allowed a proof, and in a reclaiming note by the defenders the Court on 27th June following disallowed a proof by the pursuers of their averments in the fourteenth article of their condescendence, and *quoad ultra* adhered.

After a proof, the import of which sufficiently appears from the opinion of the Lord Ordinary (Fraser), his Lordship, on 3d November 1888, pronounced this interlocutor:—"Having taken the proof, heard counsel thereon, and considered the cause, finds that under the decrees-arbital sought to be reduced the arbiter has found the pursuers liable in penalties to the amount of £16,740: Finds that this sum was larger by £5250 than the penalties claimed by the defenders, and that therefore the decrees-arbital are *ultra petita* to this extent: Reduces the same in so far as penalties are found due to the defenders more than £11,490: *Quoad ultra* assoilzies the defenders from the conclusions of the action: Finds no expenses due to or by either parties," &c.\*

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\* "OPINION.— . . . The objections stated by the pursuers will be noticed *seriatim*:—

"First, It is objected that Mr Blyth could not exercise an unbiassed judgment in the matter, because he was consulting engineer for the company. Now, it is settled law that the engineer of the company may be made the arbiter, and no objection can be taken to him because he is so. (*Mackay v. Parochial Board of Barry*, 22d June 1883, 10 Rettie, 1046, and cases there referred to.) And in this particular case it was specially stipulated that no objection was to be taken to Mr Blyth as arbiter because he was, or might become, consulting engineer for the company.

"Second, It is next objected that Mr Blyth could not be an impartial judge, because he revised the specifications and schedules forming part of the contracts. The pursuers knew perfectly well that Mr Blyth was consulting engineer. This was stated in the contracts which they signed. As consulting engineer his duty was to look over the specifications and plans of the work to be done, and knowing this the pursuers agreed to his being arbiter.

"Third, It is objected that the arbiter was not entitled after the time specified for the completion of the works to extend the time for such completion. In the interest of the pursuers this is not a very intelligible objection. The arbiter found them entitled to an extension of six months as regards the completion of the second part of the works. This was a concession in their favour, and why they should object to it is not very manifest.

"Fourth, It is objected that the arbiter has found the defenders entitled to damages in excess of the sums that they claimed, and this objection, to the extent of £5250, the Lord Ordinary holds to be well founded. The arbiter has given to the defenders damages *ultra petita*, and that is a good ground of reduction. Upon this point the railway company on the record make this statement: 'The railway company do not propose, and have intimated to the pursuers that they do not intend, to enforce payment of the sums decerned for in name of liquidated and agreed-on compensation to an extent exceeding the sum of £11,490, and they hereby offer to discharge their claims against the pursuers under the

The pursuers reclaimed, and argued;—(1) The first plea.—The letters No. 154.

decrees-arbitral to the extent of the sum of £5250, being the amount decerned for as compensation for loss of profits in excess of the sum of £11,490 insisted upon in their claim, and to engross upon the said decrees minutes giving effect to this restriction.' The Lord Ordinary does not think that this is the proper mode of getting rid of a decree-arbitral which decerns for more than is asked; the proper course is to reduce the decree *quoad* the excess.

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"Fifth, It is said that the arbiter, by his letter of 9th December 1885, extended the time for completion of the works until 15th February 1886, and that notwithstanding the extension of time he has awarded damages for the delay which had occurred, and which by such extension of time was condoned. The Lord Ordinary cannot read the correspondence which took place in this light. Delay had occurred, and the railway company had applied for power to put men and material on the work, and all the arbiter did was simply to abstain from granting the prayer of the application upon an undertaking that the works would be completed by the 15th of February 1886. He said nothing and did nothing as to the penalties already incurred under the contract for delay. There was here no extension of time, as might have been allowed by the contract, but a simple reservation not to issue an order authorising the railway company to put men and material on the works at the pursuers' expense. The penalties were still running on.

"Sixth, The only remaining objection worthy of any notice is one regarding which the Lord Ordinary has found some difficulty. In the specification for the railway from Portknockie to the river Spey it is provided that 'the portion of the embankment of the line between pegs Nos. 892 and 899 shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant engineer to proceed with the formation of the said portion of the embankment.' It is averred by the pursuers in regard to this matter that 'the aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers, under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883, and in which the said Benjamin Hall Blyth was named arbiter. Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this and so complete the Buckie section of the defenders' contracts till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886, the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. . . . Notwithstanding, the said Benjamin Hall Blyth has, by the decree applicable to the Buckie contract, found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885.' It does seem hard that when the pursuers were absolutely prohibited from meddling with the embankment of the line between the pegs Nos. 892 to 899 until the contractor of the bridge over the Spey had completed the works in connection with the erection of the east abutment of bridge, &c., they should be made liable in damages for non-construction of the Buckie portion of the line, seeing that these preliminary conditions were only fulfilled in February 1886. It is with some hesitation that the Lord Ordinary comes to the conclusion that this was a matter entirely within the competence of the arbiter. The Lord Ordinary

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does not say that he would have come to the same conclusion as the arbiter, but the arbiter had a right to decide as he did. His view was that the portion of the line joining on to the embankment was not forward, and therefore there was no delay caused by the non-completion of the Spey Bridge, but that the whole delay arose from the works for the line not being carried forward by the pursuers. If these works had been brought forward to the place for the embankment, and if a demand had been made for the diversion of the Spey, the case would have been different. As the matter stands, the Court have no right to interfere.\*

"Seventh, It is next objected that 'after the works were in progress, the

\* The following evidence was given on the point referred to by the Lord Ordinary. Mr Blyth deponed,—“In condescendence 11 there is a statement as to delay being caused by failure to give possession of the ground adjoining the Spey Bridge. That matter was mentioned in the course of the arbitration proceedings, but it certainly was not made a serious point of. Not only is that so, but I am satisfied there was no delay in consequence of their not getting that ground. My reasons for that opinion are these, that the contractors were not ready to use that ground until they got it. They never asked for the ground, and if they had asked for it and did not get it in time, it would have formed a ground for asking an extension of time, which they never did. (Q.) And there was a larger power which authorised certain things to be cut out of the contract, was there not? (A.) The engineer might have done that without asking me. Any remedies they had, however, were not taken advantage of. (Q.) If they had had that ground much sooner, would it have made any difference on the time when the line was opened? (A.) I don't believe they were ready to use it one day before they got it. They had the ground before they were ready to use it. . . . Cross.—I am not in a position to say whether if the Messrs Adams had the whole of the Portsoy and Buckie contract up to the side of the river by the 30th September 1884, the line could have been opened a day sooner than it was. I think the bridge could have been built very much sooner if there had been anticipation of the pursuers being ready to use it. The line throughout certainly could not have been opened until the bridge was built, but it could have been open to Fochabers Station. . . . I am aware that the pursuers were forbidden to use any portion of the ground between certain pegs until the contractor for the Spey Bridge had completed his works and of the other provisions in the contract bearing upon that matter. The contractors were obliged not to touch that matter until they got instructions to do so. They were not ready to use the ground and in point of fact they never asked for it. So long as the river was flowing in its bed undiverted it was quite impossible for the pursuers or any other person to form the embankment to connect with the bridge.”

Mr William Adams, one of the pursuers, deponed,—“The Buckie contract extended from Portknockie to Spey Bridge. The specification with respect to it contains a clause that we are not to form that line between certain pegs until we are put in possession of the land, and authorised by the engineer to go on with the work. The portion of the works to which that applied would extend to between 300 and 400 yards. The Spey Bridge was built not by us, but by Blaikie Brothers, and it was built on the west side of the river on dry land. After it was built, the river had to be diverted so as to flow below the newly made arch. Then the bed of the river had to be given to us for the purpose of forming an embankment, continuing the line on to the end of the bridge. (Q.) So long as the river was not diverted, was it possible for any man to form such an embankment to the bridge? (A.) No. The specification indeed provides that we should not attempt anything of the kind, and it was quite impossible to do it. The bridge had to be finished by 31st July 1884. If it had been finished then and we had got possession of the land, our work was to be finished by 30th September following, but the bridge was not finished in July 1884, and we did not get possession of the land until February 1886. . . . Cross.—

and the arbiter, and of which the pursuers were not cognisant, shewed that the arbiter approached the performance of his duties as arbiter with

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pursuers were required by the defender's engineers to construct of ashlar masonry the abutments and other parts of the various bridges and viaducts on the line, whilst the specifications and schedules on a sound construction of them prescribed only rubble, which is a cheaper kind of masonry. In all the cases in which these circumstances occur, the said Benjamin Hall Blyth has by the decree-arbital disallowed the pursuers' claims for the difference between ashlar and rubble prices, which amounts to £10,000 or thereby.' He was entitled to disallow them if such was his opinion on the construction of the specification, which is in the following terms:—'The exposed faces of abutments of all under-line bridges above the top of foundations to be built of coursed rubble stones from twelve to fifteen inches in height.' The contention of the pursuers is that this means that they could make a course of masonry fifteen inches in height, composed of little pieces of stone half-an-inch thick. The contention of the defenders was that every stone must be twelve to fifteen inches in height, and this latter contention the arbiter adopted, which he was entitled to do as being the judge appointed to construe the contract and specifications.

"The result of the whole matter is that the defenders must be assoilzied from the conclusions of the action, except that there must be a partial reduction of the decrees-arbital; but with regard to expenses the Lord Ordinary must discriminate. In the first place, the pursuers have got rid of a liability for £5250; in the second place, there was a useless discussion on the relevancy, which was carried to the Inner-House, and where the judgment of the Lord Ordinary was affirmed. Plainly the pursuers were entitled to expenses down to the interlocutor of the Inner-House, and after that date—seeing that they have been successful upon the proof—the defenders ought to be found entitled to expenses; but substantial justice will be done by finding neither of the parties entitled to expenses."

We were quite in time with our work at that end of the bridge. We had the banking run up and stopped up to the very end for nearly two years. (Q.) Did you ever ask to get possession of the ground at the bridge to get on with the work? (A.) The river was running in it in full flow, and the bridge was not getting on at all, and it would have been perfectly absurd to ask for that. We were there daily, and saw how the thing stood. They would have laughed at us if we had asked for that. I cannot say whether we asked for the ground or not, but it is not likely we would do a ridiculous thing. I did not ask the engineer or anybody representing the engineer to dispense with the execution of this bit of work at Spey Bridge as the arbiters had power to do, for that would have been in my opinion a strange request. Suppose we had got possession of the ground at Spey Bridge earlier, it is not the case that the position of our other works was such that we could not possibly have finished the contract before the time when it actually was finished. The work to be done on that ground of which we desired possession was the last work that was done. . . . Re-examined.—I have explained that the portion of the line we had to build up to the Spey Bridge was the last work done under our contract, all the rest of the line being ready to be open. It had to stand ready to be open until the intervening little bit was finished. We had to pay £20 of penalty on each contract, that is £40 a-day, until the work was finished. (Q.) The stipulation in the clause says that you were not to go on with that bit of the work until ordered to do so by the engineer, until you were given possession of the ground, and until the river was diverted, but no time is specified. Did you understand you were agreeing to pay £20 a-day of penalty for about two years, except about three months before the finishing of the contract, if you did not get possession of the ground on which you were to do the work? (A.) No. (Q.) The complaint is that they broke the contract, but that you have been subjected to the penalty for that period during which it was impossible for you to prevent delay? (A.) Exactly."



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Argued for the defenders;—(1) The pursuers' first plea.—There was no concealment on the part of the arbiter. Before making his visit to the ground, on being called upon by the respondents to take up the reference, the arbiter sent the pursuers a copy of the application which had been made to him. They knew that the arbiter was the consulting engineer of the railway company, and that as engineer it was part of his duty to revise the specifications and schedules which formed part of the contract. (2) The fourth plea.—The construction put upon the contract by the pursuers was very far fetched. It was not an extension of time that was allowed by the arbiter for the completion of the work. The sole object was to get an undertaking from the contractor that the work would be

\* These letters were (1) from Mr Moffat, the general manager of the railway company, to Mr Blyth, dated 20th November 1883, intimating that the pursuers were getting on very slowly with their contracts, and asking advice as to the course they should take, and (2) from Mr Blyth in answer, dated 30th November,—“I quite appreciate the unwillingness of your directors to make a formal application to me, but I do not see how I can advise them in any other capacity than that of arbiter without disqualifying myself from hereafter acting as such.

“I would, therefore, suggest that you should send me the contract, at the same time requesting me formally to accept the submission and to call a meeting of parties on the line.

“This I should at once do, and I am hopeful that I might be able to make Messrs Adams understand the necessity for conducting their works more energetically, and might induce them to do so without any further proceedings under the submission being required.”

<sup>1</sup> *M'Elroy & Sons v. Tharsis Sulphur and Copper Co.*, Nov. 17, 1877, 5 R. 161, *per* Lord Justice-Clerk (Moncreiff), 167; *Robertson v. Driver's Trustees*, March 2, 1881, 8 R. 555.

<sup>2</sup> *Cf. Napier v. Wood*, Nov. 29, 1844, 7 D. 166.

<sup>3</sup> *Edinburgh and Glasgow Railway Co. v. Hill*, Jan. 28, 1840, 2 D. 486, Lord Gillies, p. 494; *Alexander v. Bridge of Allan Water Company*, Feb. 5, 1869, 7 Macph. 492.

<sup>4</sup> *Robertson v. Driver's Trustees*, March 2, 1881, 8 R. 555.

finished by a particular time, in order that the necessity for stronger measures might so be obviated. The idea of reforming the contract never occurred to anyone, and there was nothing in the proof to support such a view. The procedure throughout was perfectly regular and judicial. The cases of *M'Elroy* and *Robertson* were very different. No doubt, in order to find a right to penalties under the contract, there must be full implement by the person who sought to have it enforced, because the Court would not allow the integrity of the contract to be broken. In *Robertson's* case it was held that the integrity of the contract had been broken, and the Court had no power to interfere to enforce it. In *M'Elroy's* case it was held that the fault alleged on the part of the person seeking to enforce the contract, which was said to debar him from pleading it, must be material and contributory to the result complained of. But the substitution of one date for another for the completion of the contracts was not such a bar. In *M'Elroy's* case there was no provision, as in this case, for an extension of time. Besides, that case was decided upon English precedents, and there was a later case decided in England which displaced the authority of these precedents.<sup>1</sup> The evidence given by the pursuers—as to the grounds on which the arbiter had proceeded in making the award—must be laid aside, as these grounds could be ascertained only from the arbiter himself.<sup>2</sup> (3) The sixth plea.—The arbiter had acted within his powers in all that he had done, and his judgment was quite competent. It was also right. The bridge at Garmouth over the Spey, and the term of its completion, were not alluded to in the pursuers' contract. The sole question for the arbiter was what compensation was to be given for the delay, and in dealing with that, he could not look at the contract for the building of the bridge. Cases where the implement by one party of a condition material to the fulfilment of a contract was rendered impossible by the actings of the other party were not in point.<sup>3</sup>

At advising,—

LORD PRESIDENT.—The Lord Ordinary in this case has reduced Mr Blyth's decree-arbitral in so far as he has decerned for penalties beyond the sum of £11,490, upon the ground that to that extent the award is *ultra vires*, and I do not understand it to be seriously disputed that he was quite right in taking that course. But there are a number of other objections to the decree-arbitral which he has not given effect to, and I think the only one that has created even an appearance of difficulty is that which is called the 6th objection. With regard to the others, I do not think it necessary to take particular notice of them. I quite agree with the Lord Ordinary in the view that he has taken of all of them.

As regards the 6th, there is this great peculiarity that the arbiter has found penalties due for not executing works by the contractors in circumstances where it is alleged that they were absolutely prohibited by the contract from executing these very works. Now, that objection depends upon a consideration of two things—in the first place, the evidence in regard to the execution or non-execution of that work, and in the second place, the construction of the contract.

<sup>1</sup> *Jones v. President and Fellows of St John's College, Cambridge*, 1870, L. R., 6 Q. B. 115.

<sup>2</sup> *City of Glasgow District Railway Co. v. M'George, Cowan, & Galloway*, Feb. 25, 1886, 13 R. 609.

<sup>3</sup> *Cf. Mackintosh v. Midland Counties Railway Co.*, July 9, 1845, 14 Meeson & Welsby, 548; *Dick & Stevenson v. Mackay*, May 21, 1880, 7 R. 788, affd. H. L., 8 R. 37.

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It is on the construction of the contract that it is alleged that the contractors were not only not bound to go on with their works in the circumstances in which they were placed, but were absolutely prohibited from doing so; and evidence has been led for the purpose of shewing that that was the position in which the contractors stood. The proposition that they are to be mulcted in penalties for a period when they not only could not execute the works, but when they were prohibited from executing the works, is a very startling one undoubtedly. The Lord Ordinary seems to indicate an opinion that if he had been the arbiter he would have taken a different view from that which the arbiter has actually taken, but he feels himself constrained to refuse effect to the objection, because he considers that the whole of that matter is absolutely within the power of the arbiter, and in that I agree with him. The arbiter is by the terms of the arbitration clause in the contract made absolutely master of the whole affair. He is not only to take evidence in so far as that is necessary for satisfying himself of the facts of the case, but the construction of the contract is left to him. That is one of the things expressly left to the arbiter by the contract; and he has construed the contract in such a way with regard to the facts as to satisfy his own mind that these penalties are due. The ground of the objection is nothing else than this, that the decree-arbital to this extent is unjust. It is said to be very unjust, grossly unjust, manifestly unjust; but these are degrees of injustice, and the adverbs do not add very much to the importance of the objection, as being a complaint of injustice. Now, nothing can be clearer in the law of Scotland than that according to the Act of Regulations injustice, or iniquity as the Act calls it, is not a ground for reducing a decree-arbital. The parties choose their own tribunal, they determine what matters shall be submitted to the arbiter, and by his award they are bound. In this respect we know that the law of Scotland differs very materially from that of England, in which the Courts review decrees-arbital or awards much more readily than we do. And the same kind of rule prevailed in this Court prior to the Act of Regulations. But certainly the practice at that time was such as fully to justify, I think, the enactment of these Regulations, because anything more loose or indefinite than the rules according to which the Court interfered or did not interfere with awards of arbiters can hardly be conceived, as I think some of us had occasion to point out in a case not very long ago. But be that as it may, we are bound by the Act of Regulations, and injustice or iniquity, although very glaring, very serious, and very hard upon the party who suffers, is no ground for interfering with the award of an arbiter. And therefore upon this particular part of the case I agree with the Lord Ordinary also. The result is that I am for adhering to his interlocutor.

LORD MURE.—I am obliged to come to the same conclusion. The terms of the clause of reference in this contract are very broad and general, and everything is referred to the arbiter selected by the parties, including the construction of the provisions of the contract. Now, he has construed the clause applicable to compensation or penalties for delay in the execution of the works in a way which has led him to the conclusion that there had been such delays as warranted him in awarding the penalties. That was a matter of which he was made sole judge according to the terms of the contract, and I agree with your Lordship that the mere fact that it is unjust, as the contractors allege it to

be, is not a ground on which we, as a Court, can review or alter the judgment of the arbiter. We have no right to do so. And upon that ground I agree that the Lord Ordinary has come to a right conclusion, and that the contractors here are not entitled to any further deduction from the sum that has been fixed by the arbiter.

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LORD SHAND.—I agree with your Lordship in thinking, with reference to the points other than head sixth, which formed the subject of discussion, that the argument maintained on behalf of the reclaimer does not require to be specially dealt with. I think the Lord Ordinary has disposed of all of these points satisfactorily.

The only question which I think attended with some difficulty is that under head six, and we had a very full argument with reference to the subject there dealt with. It was maintained that the Court should look at the contract itself, and should determine its meaning. I am bound to say, as the result of the argument, that if the construction of the contract lay with the Court I should have had the utmost difficulty in adopting the view that the arbiter has taken. On the contrary, I should have been clearly of opinion that the meaning of the contract would not justify the award that he has given. But parties have excluded the Court from considering the meaning of the contract. It has been left to the arbiter expressly to decide all questions regarding the true intent, meaning, and construction of the contract with reference to the settlement of all these claims; and that being so, I am of opinion with your Lordships that we cannot get behind that award; and on that ground I agree in thinking that we must adhere to the Lord Ordinary's judgment.

LORD ADAM.—I am of the same opinion.

THE COURT adhered.

ALEXANDER CAMPBELL, S.S.C.—GORDON, PRINGLE, DALLAS, & Co., W.S.—Agents.

SIR ARCHIBALD DOUGLAS STEWART, Bart., Pursuer (Reclaimer).—

*D.-F. Balfour—Asher—Dundas.*

JOHN STEWART KENNEDY, Defender (Respondent).—*Lord-Adv. Robertson*  
—*Murray—C. S. Dickson.*

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Kennedy.

*Error—Issues—Reduction.*—S., an heir of entail in possession, sent to K. a holograph offer to sell the entailed estate at a specified price, containing these words,—“In the event of your acceptance the sale is made subject to the ratification of the Court.” The offer was accepted in writing.

In an action of declarator and implement brought by K. he contended that S. was bound to execute a disposition in favour of the purchaser at the price stated in the offer, and thereafter to obtain a ratification of the sale from the Court under the Entail Amendment Act, 1853, as amended by the 13th section of the Entail Act, 1882. In granting such ratification it was not open to the Court to consider the adequacy of the price except as affecting the interest of creditors. On the other hand S. contended that by the contract he was bound only to apply for an order of sale under the Act of 1882 whereby an entailed estate might be converted into entailed money, and the adequacy of the price would fall to be considered by the Court in the interest of the heirs of entail. The Court gave effect to the pursuer's contention.

S. subsequently brought an action of reduction of the missives against K., averring, *inter alia*, that throughout the negotiations for a sale he had had in his mind a sale under the Entail Act, 1882, and the conversion of the estates into

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entailed money—conditionally upon the Court approving of the whole terms of the bargain as fair and reasonable,—which was a mode of selling an entailed estate of which he had himself had experience, and the only mode of which he was aware,—and that he had never thought of committing himself to a sale on the footing of paying compensation to the next heir under the Act of 1853, and he proposed an issue of essential error on his part as to the “import and effect of the contract.” *Held* that as the error alleged was not in the essentials of the contract, which were complete, but concerned only its import and effect, there was no relevant ground for an issue of essential error,—*diss.* Lord Shand, who held that, assuming the defender’s averments to be proved, there had been no *consensus in idem placitum* between the parties, the pursuer by the words “subject to the ratification of the Court” having meant that the sale should be subject to the suspensive condition that the Court after inquiry should be satisfied that the transaction was advantageous to the heirs of entail generally, and that there should be no sale unless the Court considered the price adequate, while the defender intended an absolute sale with a potestative condition.

1st DIVISION.  
Lord Kinnear.  
C.

(*VIDE Kennedy v. Stewart*, Feb. 8, 1889, *ante*, p. 421.)

On 19th September 1888, Sir Archibald Douglas Stewart of Grandtully, Baronet, heir of entail in possession of the estates of Grandtully, Murtly, Strathbraan, and others, sent to Mr John Stewart Kennedy, banker in New York, then in Scotland, the following holograph letter:—“Murtly Castle, 19th Sept. 1888. Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years’ purchase of the present, or even an appraised valuation, of the nett rental thereof, as may be ascertained by an agreed appraisalment, you appointing one, and me the other, and if the two cannot agree, a third party to be chosen by the two.

“Payment to be made in cash unless it be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889.

“This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me.

“In the event of your acceptance the sale is made subject to the ratification of the Court.—Yours truly,

A. D. STEWART.

“J. S. Kennedy, Esq.

“Of course the above does not include pictures, furniture, and furnishings, &c.

A. D. S.”

Mr Kennedy sent the following answer:—“Elmpark, Ettrick Road, Edinburgh, 20th Sept. 1888. Sir A. Douglas Stewart, Bart., Murtly Castle, Murtly. Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday’s date, and I agree to purchase said estate, &c., at twenty-five years’ purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.—Yours faithfully,

“JOHN S. KENNEDY.

“P.S.—I have acted more promptly than I would otherwise have liked to do, as I must return to the Continent at once to join my wife. I leave here to-night or to-morrow morning.

J. S. K.”

In November following Mr Kennedy raised an action of declarator and implement against Sir Douglas (reported *supra*, p. 421). In this action

Sir Douglas contended that under the missives he was bound to apply for an order of sale under the Entail Act of 1882 for the purpose of converting the entailed estate into entailed money, under which procedure it would have fallen upon the Court to consider the adequacy of the price in the interest of future heirs of entail. On 8th February 1889, the Court, however, in accordance with Mr Kennedy's contention, found that according to the true construction of the contract Sir Douglas was bound to proceed under the Entail Act of 1853, and to obtain a ratification by the Court of a sale made and a disposition granted before their interposition was asked.

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In March following Sir Douglas raised the present action, concluding for reduction of the letters above quoted.

The pursuer averred, *inter alia*;—(Cond. 2) "Early in the month of July 1888, the pursuer received a letter from Mr Peter Glendinning, of The Leuchold, Dalmeny Park, desiring to know, 'in the interest of an American gentleman,' whose name he did not disclose, whether the pursuer entertained any idea of selling all or any of his estates, and if so, at what price. The pursuer was not unwilling, if a price should be offered of which he and his legal advisers approved, to convert his entailed estates into entailed money, according to the procedure authorised by the Entail (Scotland) Act, 1882. He had presented to the Court in the year 1885 a petition for an order of sale of the said estates under the said Act, in which sundry procedure had been taken, including a remit on 7th May 1885 to two valuers to report upon the time, place, and manner of sale of said estates, and to suggest the upset price or prices, and a report by them, in which they recommended £404,000 as the minimum upset price for said estates. Nothing further had been done in the petition, and the pursuer, while willing, for reasons of private convenience, to sell, as above explained, was at no time eager or desirous to achieve a sale, unless upon unexceptionable terms. . . ."

(Cond. 3) "The pursuer replied to Mr Glendinning that he would be glad to see him when he was in the neighbourhood. Mr Glendinning came to Murtly, and saw the pursuer on 13th July, and he thereafter continued to write in the interests of the American gentleman, whose name, however, he did not disclose (though the pursuer requested that he should do so), stating that his client had peculiar reasons for concealment, of which Mr Glendinning was kept in ignorance. On 31st August, it was announced that the American gentleman was Mr Kennedy, the defender, and Mr Glendinning shortly afterwards wrote that he would bring him to see the Castle and grounds of Murtly, on an early day, accompanied by a special friend, whose name was not at first disclosed, but who was afterwards stated to be 'Mr Duncan, a private friend of his, by whom he is to be guided.' The pursuer assented to the visit of Mr Kennedy, though he pointed out that the intervention of friends or advisers was unnecessary at that stage of negotiations, and repeatedly intimated that, on his own side, any negotiations for sale must be made with his Edinburgh law-agents. The statements in answer are denied, except that the pursuer attached importance to privacy in the negotiations, as did also Mr Glendinning." (Cond. 4) "On 18th September 1888, the defender, Mr Kennedy (whom the pursuer then saw for the first time), and Mr Glendinning came to Murtly, and were shewn over the Castle and grounds partly by the pursuer, and partly by his servants. The pursuer had also given a written order to enable them to visit Rohallion, Strathbraan, and Grandtully, and to see the various objects of interest, which, it is believed, they did on the same day. . . ." (Cond. 5) "On the forenoon of the next day, 19th September, Mr Glendinning unexpectedly arrived at Murtly Castle, where the pursuer and Lady Stewart were alone. The pursuer was at and about

No. 155. this time a frail and infirm old man, suffering from illness, and in a nervous and excitable condition. Owing to his physical and nervous state, as well as to his advanced age, his mind and will were not in a good state of control. He was in a weak and facile state of mind, and easily imposed upon, unfit to conduct business or to make a bargain, and unable, from his physical and mental conditions, to resist pressure, or to endure flurry or excitement. Mr Glendinning, taking advantage of these circumstances, and acting as agent for, or on behalf of, Mr Kennedy, did, by undue pressure and solicitation, and by fraud or circumvention, impose upon the pursuer, and did obtain or procure from him the said pretended letter first set forth in the summons, to his lesion, as after mentioned." (Cond. 6) "Mr Glendinning, after expressing regret on his own part and that of Mr Duncan that Mr Kennedy had been disappointed with the estates, and had not made an offer to purchase them, and enlarging on the advantages to the pursuer of such a sale, suddenly produced from his pocket a draft letter, which he earnestly pressed the pursuer to copy in his own handwriting, and sign as his own letter. He represented to the pursuer that the matter was urgent, and would brook no delay, and hurried and pressed him to copy and sign it immediately. The pursuer was unwilling to do so, but ultimately, being ill, nervous, and excited, and weak and facile, as above mentioned, he yielded to the pressure put upon him by Mr Glendinning, and copied out the draft letter and signed it. The letter thus written and signed by the pursuer is that first set out in the summons. As soon as the pursuer had copied and signed the letter, Mr Glendinning put it in his pocket, and left Murtly." (Cond. 7) "Throughout the negotiations for a sale of the estates above described, and in his interview with Mr Glendinning, the pursuer had in his mind the method of sale with which, as already explained, he was acquainted, viz., the conversion of the estates into a fund of entailed money, under the procedure prescribed by the Act of 1882. Mr Glendinning was well aware that the pursuer had presented a petition under that Act, as already mentioned, and that he was thus acquainted with its general scope and purpose. The pursuer was not aware of any other mode of selling an entailed estate, and it never entered his thought that he might be committing himself to sell the estates, on the footing of paying compensation to the next heir or heirs of entail. Mr Glendinning at the said interview represented to the pursuer that the effect of writing the said letter would be merely to give the pursuer a little hold on Mr Kennedy, in the event of his accepting its terms. Mr Glendinning thereby induced the pursuer to believe that the result of the acceptance by Mr Kennedy of the offer contained in the said letter would be a conditional bargain; that the pursuer would be bound to go to the Court for authority to sell the estates, under the procedure which he knew of, to Mr Kennedy, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr Kennedy would be bound to purchase on the same terms; but that, if the Court should hold that the price was inadequate, the pursuer would not be bound to sell at the price proposed. The pursuer was induced to believe, and did believe, that the whole matter would, on Mr Kennedy's acceptance, be still open for investigation and consideration in the application to the Court, and that he might obtain the advice of his law-agents as well as the protection of the Court, as above mentioned. The pursuer believes and avers that the said price was an inadequate one, and would not have been sanctioned by the Court." (Cond. 8) "The pursuer, when he wrote out and signed the said letter, was under essential error as to its meaning and effect as above set forth, and said error was induced by the represen-

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tations made to him by Mr Glendinning. The said representations were false and fraudulent. Or otherwise, Mr Glendinning believed that the meaning and effect of the said letter were such as the pursuer believed, and was induced by Mr Glendinning, as above stated, to believe them to be, in which case the pursuer avers that the contract embodied in the said letter, and the defender's reply thereto, was entered into under mutual essential error on the part both of the pursuer and defender as to its tenor and effect, as above set forth." (Cond. 9) "The pursuer further stipulated, for reasons which he stated to Mr Glendinning, that in any transaction to be entered into with Mr Kennedy, the latter should not be represented by Messrs Tods, Murray, & Jamieson, Writers to the Signet, but that the bargain should be adjusted and carried through either by the pursuer's law-agents, or by another firm of Writers to the Signet, whose names were voluntarily suggested by Mr Glendinning. Mr Glendinning assented to and promised this. If the pursuer had understood that the letter which he copied out and signed would, if accepted by Mr Kennedy, bind him absolutely, without any opportunity of advice or assistance, and without any investigation into or approval of the terms of the sale by the Court, as being fair and reasonable, to sell the estates to Mr Kennedy on the footing of compensating the next heir, he would not have consented to copy and sign the letter. He was induced, by the false and fraudulent misrepresentations of Mr Glendinning to believe, and did believe, that the bargain would not be enforced against him unless the Court thought it a fair and proper one, and that the entailed estates would in any event remain entire to him in the form of entailed money, to which, if he should survive the next heir, he would become absolutely entitled in fee-simple. Further, the pursuer would not have made any offer of sale to Mr Kennedy, except upon Mr Glendinning's assurance and promise, which turned out to be false and fraudulent, as before mentioned, that Messrs Tods, Murray, & Jamieson should not be agents in the matter."

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The pursuer pleaded;—1. The pursuer is entitled to decree of reduction as concluded for, in respect that the said letter dated 19th September 1888 was impetrated from him to his lesion by Mr Glendinning, as agent for or on behalf of Mr Kennedy, by undue pressure and solicitation, and by fraud or circumvention, he being in a weak and facile condition, and easily imposed upon, as set forth in the condescendence. 2. The pursuer is entitled to decree of reduction as concluded for, (1) because the said letter of 19th September 1888 was signed by him under essential error; (2) because in signing the said letter the pursuer was under essential error induced by the said Mr Glendinning; (3) because in signing the said letter the pursuer was under essential error, induced by false and fraudulent representations made by Mr Glendinning. 3. The pursuer is entitled to decree of reduction as concluded for, because the contract in the letters noted in the summons was entered into under mutual essential error on the part both of the pursuer and defender.

The defender denied the whole material averments of the pursuer.

The pursuer proposed the following issues:—"1. Whether, on or about 9th September 1888, the pursuer was weak and facile in mind, and easily imposed upon; and whether Mr Peter Glendinning, of The Leuchold, Dalmeny Park, taking advantage of the said weakness and facility, did, by fraud or circumvention, impetrate and obtain from the pursuer the letter dated 19th September 1888 to his lesion? 2. Whether in granting the said letter the pursuer was under essential error as to its import and effect? 3. Whether in granting the said letter the pursuer was under essential error as to its import and effect, induced by the said Peter Glen-



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dinning? 4. Whether in granting the said letter the pursuer was under essential error as to its import and effect, induced by false and fraudulent representations made by the said Peter Glendinning? 5. Whether the said letter and the acceptance were granted by the pursuer and defender under mutual essential error as to their import and effect?"

The Lord Ordinary (Kinnear), on 28th May 1889, approved of the first only of the above issues for the trial of the cause.\*

The pursuer reclaimed, and argued;—1. The second proposed issue of essential error ought to be allowed. It was said that the error on Sir Douglas' part, as set forth on record, was one of law and not of fact, and that it did not therefore afford ground for reduction. But the error was as to Sir Douglas' own legal rights, and was therefore one more of fact than of law. Besides, the plea that the error alleged was an error in law was no answer to the reduction of a discharge of legal rights.<sup>1</sup> The error alleged here was *in substantialibus*. It had to do (1) with the price, and (2) with the nature of the contract, and therefore afforded a good ground of reduction.<sup>2</sup> As to the price, the pursuer understood he was to have a *surrogatum* of entailed money under the Act of 1882 in place of the estates, and instead of that he found he would have to make provisions for the next heir, &c. In this way the *quantum* of the price would be much reduced below what he had intended. In regard to the nature of the contract, the pursuer knew only of the Entail Act of 1882,—having presented a petition for an order for sale under that Act,—and he knew further that under that Act the Court had to be satisfied of the fairness of the transaction before they granted the order; and this was what he meant when he said "the sale is made subject to the ratification of the Court." The effect of the maxim *fortius contra proferentem* flew off in a case like the present, where the letter or document to which it might apply was under reduction. Further, the true *proferens* here was not Sir Douglas but Mr Kennedy and his representative. None of the cases cited on the other side were opposed to the doctrine that both the price and the nature of the contract were *inter essentialia*. There was authority for the proposed issue, and although none of the cases was exactly in point, that of *Johnston*<sup>3</sup> came very near the circumstances of the present case. The deed in the case of *M'Laurin v. Stafford* was no doubt a voluntary one—but so also was the letter written by Sir Douglas. 2. There was good ground for the third and fourth

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\* "NOTE.—The averments appear to me to be sufficient to support the first issue, but the remaining issues proceed on the assumption that the issue of facility and fraud or circumvention has been negatived, and on that assumption there is, in my judgment, no relevant averment of error.

"It is not alleged that the parties were under error as to any of the essential terms of the contract, but only that the pursuer did not know at the time that he could be required to execute the contract in the manner determined by the judgment of the Court. But a contract deliberately executed in the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by their contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him."

<sup>1</sup> *Mercer v. Anstruther's Trustees*, March 6, 1871, 9 Macph. 618, Lord Kinloch, p. 652, 43 Scot. Jur. 285.

<sup>2</sup> *Bell's Principles*, 11; *Cooper v. Phibbs*, May 1867, L. R., 2 E. and I. App. 149 (Lord Westbury, p. 170); *Earl Beauchamp v. Winn*, 1873, L. R., 6 E. and I. App. 223 (Lord Chelmsford, p. 234).

<sup>3</sup> *Johnston v. Smellie's Trustees*, July 15, 1856, 18 D. 1234; *McConehy v. McIndoe*, Dec. 23, 1853, 16 D. 315, 26 Scot. Jur. 145; *Earl of Wemyss v. Campbell*, June 6, 1858, 20 D. 1090; *M'Laurin v. Stafford*, Dec. 17, 1875, 3 R. 265.

issues. It had been held that the elements of misrepresentation and No. 155.  
essential error might be combined so as to make one ground of action.<sup>1</sup>  
3. There was no case in the books where an issue of mutual error had June 25, 1889.  
been approved. But there was no reason why there should not be such Stewart v.  
an issue. 4. This was one of the appropriated causes, and must be sent Kennedy.  
to jury trial.<sup>2</sup>

Argued for the respondent;—1. In order to found an issue of essential error, the error must be *in substantialibus*.<sup>3</sup> It did not extend to the qualitative incidents of the contract and their effect. Here the alleged error was not as to the price or the nature of the contract; it rather had reference to the application and disposal of the price, a question which was very remote from the defender. As to the stipulation by the pursuer in his letter that the sale should be "subject to the ratification of the Court," the Court had already held in the previous case that the pursuer's construction of it was wrong, and that the qualification therein referred to was no part of the transaction. It must therefore be taken for the purposes of the present question that a valid contract of sale had been entered into. Further, there was no authority to support the proposition that a misunderstanding of the legal effect of a contract was *inter essentialia*. In *Mercer's* case<sup>4</sup> the pursuer did not know what she was selling, and the error was clearly *in essentialibus*. In *Cooper v. Phibbs*<sup>5</sup> the error was as to the subject-matter of the transaction, which was supposed to belong to one person when in reality it belonged to another. [LORD PRESIDENT.—I must say that I think Lord Chelmsford's statement of the law which is to be found in that case is inadequate. There are cases which carry the law further.] *Earl Beauchamp's* case<sup>6</sup> was similar. So in *Lord Wemyss's* case,<sup>7</sup> the mistake was that what was thought to be a deer forest turned out not to be one. The case of *Johnston*<sup>8</sup> was only reported upon the question of expenses. The point now urged was either not taken there, or, if taken, the decision was bad law. These were all the cases of mutual contract where the error related to the subject-matter of the sale. In *M'Laurin's* case<sup>9</sup> the deed was a purely gratuitous one, and it could not therefore apply here. The cases in which an issue of essential error had been refused<sup>10</sup> were instructive. In the case of *Munro*<sup>11</sup> an issue of essential error, pure and simple, was disallowed, and it was held that the nature of the misrepresentation must be specifically set forth in the issue. No one could avail himself of his own misunderstanding to get rid of a contract.<sup>12</sup> 2. The pursuer was not entitled to an issue of essential error

<sup>1</sup> *Adamson v. Glasgow Water-Works Commissioners*, June 23, 1859, 21 D. 1012, 31 Scot. Jur. 558.

<sup>2</sup> *Trotter v. Happer*, Nov. 24, 1888, 16 R. 141.

<sup>3</sup> *Erskine's Insts.* iii. 1, 16; *Stair* i. 9, 9, and iv. 24, 40; *Pollock on Contracts* viii. 390, 403; *Bentley v. Mackay*, 1862, 4 De Gex, Fisher, and Jones 279, Lord Justice Knight Bruce, p. 285; *Bell's Princ.* 11.

<sup>4</sup> *Mercer v. Anstruther's Trustees*, March 6, 1871, 9 Macph. 618.

<sup>5</sup> L. R., 2 E. and I. Apps. 149.

<sup>6</sup> L. R., 6 E. and I. Apps. 223.

<sup>7</sup> *Lord Wemyss v. Campbell*, 20 D. 1090.

<sup>8</sup> *Johnston v. Smellie's Trustees*, 18 D. 1234.

<sup>9</sup> *M'Laurin v. Stafford*, 3 R. 265.

<sup>10</sup> *Yeatman v. Proctor*, Nov. 17, 1877, 5 R. 179; *Hogg v. Campbell*, March 12, 1864, 2 Macph. 848, 36 Scot. Jur. 428; *Beresford's Trustees v. Gardner*, Jan. 27, 1877, 4 R. 363.

<sup>11</sup> *Munro v. Strain*, Feb. 14, 1874, 1 R. 522.

<sup>12</sup> *Birrell v. Dryer*, Feb. 8, 1883, 10 R. 585, revd. H. L., March 17, 1884, 11 R. 41.

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induced by misrepresentation, because there was no sufficient averment of the misrepresentation to support it. The only misrepresentation alleged was that Mr Glendinning had said to the pursuer that the effect of his writing the letter would be merely to give him "a little hold on Mr Kennedy." The other alleged misrepresentations were purely hypothetical. 3. As to the issue of mutual error, there was no error alleged on the part of Mr Kennedy. 4. This was eminently a case for proof before the Lord Ordinary, as provided in the Evidence Act, 1866.<sup>1</sup> The Court had a complete discretion in the matter.

At advising,—

LORD PRESIDENT.—There are some matters in this case upon which I think none of your Lordships have ever entertained any doubt. The first of these is as to the right of the pursuer to obtain the first issue. I am very clearly of opinion that there is a relevant case presented on record in support of it. The other matter to which I refer is that there is no relevant averment on record of misrepresentation or fraudulent concealment inducing the essential error alleged upon the part of the pursuer. There remains only the pursuer's case under the second proposed issue, which must be taken on the assumption that the pursuer fails on his first issue, and also on the assumption that he was not led into the supposed error by misrepresentation, or undue or fraudulent concealment.

I am of opinion that there is no relevant averment of essential error on record, and that the proposed issue faithfully reflects the irrelevant averment. The error alleged and proposed to be submitted to the jury is error as to the import and effect of the contract sought to be reduced. But a contract cannot be reduced on the ground of error unless the error be in the essentials of the contract. In innominate contracts it is sometimes difficult to ascertain or define what are the essentials; but it is not so in nominate contracts, such as the contract of sale with which we are here concerned. The essentials of this contract are the identification of the parties contracting, the subject sold, and the amount of the price; and as regards these in the present case there is no room for doubt. The parties are certainly ascertained, the lands are sufficiently described in the missives, and the price is twenty-five years' purchase of the existing rental. As to the application of the price the purchaser has no interest or concern; and nothing can be an essential of a contract which does not concern both parties. Neither is there any error as to the nature of the contract, as in the case of a person signing a disposition believing it to be a lease, or a bond for borrowed money believing it to be a testament. The parties well knew they were making a contract of sale, and nothing else.

The error which the pursuer says he laboured under when he signed his letter of offer was, that, according to its terms, he believed he would sufficiently fulfil his obligation as an entail proprietor by selling under the authority of the Statute of 1882, and thereby converting the entailed lands into entailed money. It has been found by our judgment in the previous action that if he entertained this belief he was wrong as to the construction of the offer which he made and which was accepted; and that according to its true construction he was bound to proceed under the Act of 1853 to obtain the ratification by the Court of a sale made and a disposition granted before the Court's interposition is asked.

<sup>1</sup> Mackay's Practice i. 35; Hume v. Trotter & Co., Jan. 14, 1875, 2 R. 338; Trotter v. Happer, Nov. 24, 1888, 16 R. 141; Evidence Act, 1866 (29 and 30 Vict. cap. 112), sec. 2.

The condition thus introduced into the contract of sale was a potestative condition, which the seller was bound to fulfil to the utmost of his power, and the Court upon an application under the Act of 1853 cannot alter the terms of the contract of sale made by the parties. The Court is no doubt bound to see that the pecuniary interests of creditors and heirs of entail are not prejudiced by the contract; and if they are, it will be the duty of the Court to refuse the application before them on the ground that the sale was, for that reason, *ultra vires* of the seller. But there is no middle course between ratifying and refusing to ratify the sale according to its terms and conditions.

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The pursuer made a contract of sale complete in all its essential parts, but a question arose between the parties as to the construction of one of its clauses not affecting the *essentialia*. That question has been decided against the pursuer by this Court acting as a Court of construction, and the pursuer now demands that because he was wrong in his construction he shall be entitled to set aside the contract. If this plea were listened to, every litigant who is unsuccessful in a question as to the construction and effect, or, to use the pursuer's own words, the "import and effect," of a contract would at once have the remedy of reducing the contract which he had deliberately made, and afterwards persistently misconstrued.

**LORD MURE**.—I agree in the opinion which your Lordship has so very clearly expressed, as to the second issue of essential error. I think there is no mistake here as to the nature of the contract. The contract is a simple contract of sale, and, as I read the letter of the pursuer, the subject-matter of that contract, the parties to it, and the price at which the property is to be disposed of, are all fixed; and these are the essentials of a contract of sale. Now, that being so, I am unable to see that what the pursuer here alleges as to his mistake in the matter is an error of a description that is relevant to reduce that contract. The error alleged is simply that he misunderstood or mistook the effect of the stipulation that the sale should be subject to ratification by the Court; that he thought that would have a particular effect, and he finds he is now mistaken as to what that effect would be, upon the application being made. Now, I do not think that is such an error as a party can be allowed to propound as a good ground for reducing a contract; and on that ground, and for the reasons stated by your Lordship, I agree that the interlocutor of the Lord Ordinary should be affirmed.

**LORD SHAND**.—I agree with all of your Lordships in holding that the pursuer is entitled to have an issue for the trial of the cause founded on his averments of facility and lesion in entering into the contract which he seeks to reduce. I am also of opinion that there is no relevant statement of misrepresentation by Mr Glendinning as an inducing cause to lead the pursuer to enter into the contract. The single averment of misrepresentation is made in these terms:—"Mr Glendinning represented to the pursuer that the effect of writing the said letter" (meaning the letter of offer to sell the estates) "would be merely to give the pursuer a little hold on Mr Kennedy"; and I do not think that on any reasonable construction of the effect of these words, even in the circumstances in which they are said to have been used, they will bear the meaning which the pursuer has affixed to them in article 7 of the condescendence.

I am further of opinion that no good cause has been shewn for having the trial of the cause before a Judge whose verdict is subject to an appeal in place

No. 155. induced by misrepresentation, because there was no sufficient averment of the misrepresentation to support it. The only misrepresentation alleged was that Mr Glendinning had said to the pursuer that the effect of his writing the letter would be merely to give him "a little hold on Mr Kennedy." The other alleged misrepresentations were purely hypothetical. 3. As to the issue of mutual error, there was no error alleged on the part of Mr Kennedy. 4. This was eminently a case for proof before the Lord Ordinary, as provided in the Evidence Act, 1866.<sup>1</sup> The Court had a complete discretion in the matter.

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At advising,—

LORD PRESIDENT.—There are some matters in this case upon which I think none of your Lordships have ever entertained any doubt. The first of these is as to the right of the pursuer to obtain the first issue. I am very clearly of opinion that there is a relevant case presented on record in support of it. The other matter to which I refer is that there is no relevant averment on record of misrepresentation or fraudulent concealment inducing the essential error alleged upon the part of the pursuer. There remains only the pursuer's case under the second proposed issue, which must be taken on the assumption that the pursuer fails on his first issue, and also on the assumption that he was not led into the supposed error by misrepresentation, or undue or fraudulent concealment.

I am of opinion that there is no relevant averment of essential error on record, and that the proposed issue faithfully reflects the irrelevant averment. The error alleged and proposed to be submitted to the jury is error as to the import and effect of the contract sought to be reduced. But a contract cannot be reduced on the ground of error unless the error be in the essentials of the contract. In innominate contracts it is sometimes difficult to ascertain or define what are the essentials; but it is not so in nominate contracts, such as the contract of sale with which we are here concerned. The essentials of this contract are the identification of the parties contracting, the subject sold, and the amount of the price; and as regards these in the present case there is no room for doubt. The parties are certainly ascertained, the lands are sufficiently described in the missives, and the price is twenty-five years' purchase of the existing rental. As to the application of the price the purchaser has no interest or concern; and nothing can be an essential of a contract which does not concern both parties. Neither is there any error as to the nature of the contract, as in the case of a person signing a disposition believing it to be a lease, or a bond for borrowed money believing it to be a testament. The parties well knew they were making a contract of sale, and nothing else.

The error which the pursuer says he laboured under when he signed his letter of offer was, that, according to its terms, he believed he would sufficiently fulfil his obligation as an entail proprietor by selling under the authority of the Statute of 1882, and thereby converting the entailed lands into entailed money. It has been found by our judgment in the previous action that if he entertained this belief he was wrong as to the construction of the offer which he made and which was accepted; and that according to its true construction he was bound to proceed under the Act of 1853 to obtain the ratification by the Court of a sale made and a disposition granted before the Court's interposition is asked.

<sup>1</sup> Mackay's Practice i. 35; Hume v. Trotter & Co., Jan. 14, 1875, 2 R. 338; Trotter v. Happer, Nov. 24, 1888, 16 R. 141; Evidence Act, 1866 (29 and 30 Vict. cap. 112), sec. 2.

The condition thus introduced into the contract of sale was a potestative condition, which the seller was bound to fulfil to the utmost of his power, and the Court upon an application under the Act of 1853 cannot alter the terms of the contract of sale made by the parties. The Court is no doubt bound to see that the pecuniary interests of creditors and heirs of entail are not prejudiced by the contract; and if they are, it will be the duty of the Court to refuse the application before them on the ground that the sale was, for that reason, *ultra vires* of the seller. But there is no middle course between ratifying and refusing to ratify the sale according to its terms and conditions.

The pursuer made a contract of sale complete in all its essential parts, but a question arose between the parties as to the construction of one of its clauses not affecting the *essentialia*. That question has been decided against the pursuer by this Court acting as a Court of construction, and the pursuer now demands that because he was wrong in his construction he shall be entitled to set aside the contract. If this plea were listened to, every litigant who is unsuccessful in a question as to the construction and effect, or, to use the pursuer's own words, the "import and effect," of a contract would at once have the remedy of reducing the contract which he had deliberately made, and afterwards persistently misconstrued.

LORD MURK.—I agree in the opinion which your Lordship has so very clearly expressed, as to the second issue of essential error. I think there is no mistake here as to the nature of the contract. The contract is a simple contract of sale, and, as I read the letter of the pursuer, the subject-matter of that contract, the parties to it, and the price at which the property is to be disposed of, are all fixed; and these are the essentials of a contract of sale. Now, that being so, I am unable to see that what the pursuer here alleges as to his mistake in the matter is an error of a description that is relevant to reduce that contract. The error alleged is simply that he misunderstood or mistook the effect of the stipulation that the sale should be subject to ratification by the Court; that he thought that would have a particular effect, and he finds he is now mistaken as to what that effect would be, upon the application being made. Now, I do not think that is such an error as a party can be allowed to propound as a good ground for reducing a contract; and on that ground, and for the reasons stated by your Lordship, I agree that the interlocutor of the Lord Ordinary should be affirmed.

LORD SHAND.—I agree with all of your Lordships in holding that the pursuer is entitled to have an issue for the trial of the cause founded on his averments of facility and lesion in entering into the contract which he seeks to reduce. I am also of opinion that there is no relevant statement of misrepresentation by Mr Glendinning as an inducing cause to lead the pursuer to enter into the contract. The single averment of misrepresentation is made in these terms:—"Mr Glendinning represented to the pursuer that the effect of writing the said letter" (meaning the letter of offer to sell the estates) "would be merely to give the pursuer a little hold on Mr Kennedy"; and I do not think that on any reasonable construction of the effect of these words, even in the circumstances in which they are said to have been used, they will bear the meaning which the pursuer has affixed to them in article 7 of the condescendence.

I am further of opinion that no good cause has been shewn for having the trial of the cause before a Judge whose verdict is subject to an appeal in place

No. 155. of a jury. On the contrary, it appears to me to be extremely desirable that the tribunal, whose verdict will be final on the facts in this case, where so much must depend on the manner in which the evidence of the pursuer and Mr Glendinning is given, as well as on the substance of that evidence, should themselves see and hear the witnesses.

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But with all anxiety to avoid any difference of opinion as to the issues to be sent to trial, I have, after the best consideration I could give to the matter, come to the conclusion that the pursuer has stated a case which entitles him to an issue of essential error on his part in entering into the contract.

The former action between the parties related exclusively to the meaning of the contract and the mode of enforcing it. Of the two meanings which were presented by the parties the Court were of opinion that the construction for which the present defender contended was the true construction according to the proper and legal meaning of the terms used.

The pursuer, accepting this decision as conclusive, as indeed he is bound to do, says, however, in the present case, that if that be the true construction and legal meaning of the words employed in his letter of offer, then he was under essential error—for in using the language he did, and which indeed was a transcript of a paper brought to him by Mr Glendinning, he never intended to make the contract to which he has been held bound; and the difference between that contract and the bargain which by the terms of his offer he intended to enter into is so material in regard to the substance and effect of the contract itself as to amount to an error in the essentials of the contract, against which the law will give redress—though it may be there will be liability on his part at least for the expense which has been thus caused to the other contracting party. The question for determination is—Taking the decision of the Court as settling the true meaning of the pursuer's offer of sale, was there ever really *in idem placitum consensus et conventio*—or were the parties making a contract as to the meaning of which there was an essential difference—a difference *in essentialibus* between them?

The important words of the offer in the present question, without which indeed the question could scarcely have arisen, are these:—"In the event of your acceptance the sale is made subject to the ratification of the Court." These words, it must I think be conceded, admit of construction—by which I mean it may be fairly said of them that they might in the minds of the contracting parties respectively be used and taken in a different sense—in one sense by the proposed seller, in another sense by the purchaser.

Both parties knew they were dealing with an entailed estate. By a sale "subject to the ratification of the Court" might be meant (as the pursuer says he understood the words) a sale subject to a ratification which inferred examination and inquiry by the Court into the transaction, in the interest of the heirs of entail, and therefore the consideration and approval by the Court of the price as an adequate one in the view that the entailed estate was to become entailed money in which the future heirs of entail were interested. Or the language used might mean, as the defender understood it, and the Court has held it did mean, that the Court was to give its approval of the sale and proceedings as a matter of course, without any inquiry as to the future interest of heirs of entail, and on the footing that the estate was to be disentailed without any substitution of entailed money, in which case all that the Court had to regard was that present interests affecting the estate were duly provided for, without any con-

sideration of the question whether the price was adequate or not. It is clear on No. 155. his statement that whether the difference was vital and essential or not, it was one of great importance to the pursuer. The difference was so great, as I think June 25, 1889. I shall immediately shew, that in the pursuer's view the contract was made sub- Stewart v. Kennedy. ject to an important suspensive condition which might never be purified, while according to the meaning to which the Court has given effect there was no such suspensive condition.

It was partly in the view of this material difference which might exist in the understanding of the parties of the meaning of the language which they used, that in the outset of my opinion in the former case I expressed myself thus:— "I concur with Lord Mure in thinking that the only question to be determined in this case is in regard to the meaning of the words, 'in the event of your acceptance the sale is made subject to the ratification of the Court,' and I think in determining the meaning of these words we must have regard to what the purchaser was entitled to take to be their meaning. It is not a question entirely of what was in the mind of the seller when these words were used, but the question is, how was the purchaser entitled to read these words when he gave a written acceptance of the offer."

Now, what the pursuer in this action states is, that being quite aware that the Entail Statutes enabled him to sell the estate of Murtly and to convert the price into entailed money, and believing that this could be effected by a private sale, he entered into the contract of sale with that view. He knew by his previous experience in an application which he had formerly presented to the Court that the Court itself made independent inquiry into the propriety of the bargain, and particularly as to price, in the interest of future heirs of entail, and that the Court would only ratify or approve of the sale if fully satisfied as to the advantage to be gained by the sale; and he therefore stipulated as a condition of his contract that the sale should be "subject to the ratification of the Court." He states in article 7 of the condescendence that he understood that he was entering into "a conditional bargain," "that he would be bound to go to the Court for authority to sell the estates, under the procedure which he knew of, to the defender, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr Kennedy would be bound to purchase on the same terms, but that if the Court should hold that the price was inadequate, the pursuer would not be bound to sell at the price proposed."

The present question is to be decided on the assumption that this statement is true, and that the pursuer is prepared to prove it. It is clear, in this view, that the pursuer, who was concluding a bargain involving the sale of an estate admittedly worth nearly £400,000 without the intervention of any law-agent, and with a certain degree of haste, was stipulating for a means of completely guarding himself against any improvidence in the bargain which he agreed to in such circumstances. But I apprehend, as I have already indicated, that he was, in his view, and as he believed by the very language of his offer, stipulating for a ratification by the Court which operated as a suspensive condition of the sale, and not a mere potestative condition only—for if the result of independent inquiry by the Court was that the price agreed on was inadequate, as the pursuer now avers it to be, then there would be no ratification or approval, and consequently no sale.

Now, what, on the other hand, was the contract which the defender meant to



No. 155. parties. It is only because "judgment has been given against him," and he consequently finds that the contract has been construed as an absolute sale on his part at a price finally fixed, that the pursuer has brought this action on the ground that there was never any real consent on his part to such a bargain. The same thing might occur, and no doubt has occurred, where a loose or ambiguous description of lands, the subject of a contract of lease or sale, has been given in the deed or correspondence between the parties. Each will properly in the first instance maintain his construction of the contract as creating the greater or lesser right. But the defeated party will surely not be precluded from setting aside the contract altogether, on the ground of error in its inception and absence of *consensus in idem* as to the subject of the contract, because the construction of the language used has been determined against him.

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I do not see that it forms any ground for refusing the remedy of reduction on the head of essential error that on the question of construction judgment has been given against the pursuer. And on the grounds I have stated I think the pursuer is entitled to an issue putting the question whether in entering into the contract he was under essential error as to its nature and effect, which is, I believe, the form of issues under which questions of essential error have been in use to be tried.

LORD ADAM.—I do not understand that there is any dispute that the pursuer and defender entered into a contract, and that that contract is contained in a letter from the pursuer addressed to the defender, dated 19th September 1888, and the defender's answer of the 20th of September.

That the parties entered into a contract by that letter and answer, I do not think there is any doubt. Nor do I think there is any doubt as to the nature of the contract which they thereby entered into. It was a contract of sale, and not a contract of lease, or anything of that sort. The meaning of error as to the nature of a contract is that the parties have been in error as to the kind of contract,—contract of sale or contract of lease, or any other contract that they meant to enter into. If there is error as to that, then a party may have relief, but not otherwise. If there is no error as to the nature of the contract, I have always understood that no averment of error is relevant to reduction, unless it is an averment of error as to the essentials of the contract; and I have always understood that the essentials of a contract of sale are three, viz., the person, the subject, and the price. If there is no error on these three points, then I understand there can be no relief against such a contract, however much in point of pecuniary value one of the parties may be prejudiced by the contract which he has entered into. If the error does not enter into one of these three essentials, he can have no redress. Now here, as I understand, there is no mistake as to the person. The pursuer and defender made the contract with each other. There is no mistake as to the subject. The estates of Murtly and Grandtully were the subject of the contract. There is no mistake as to the price. The price is distinctly fixed by the written contract between the parties, viz., twenty-five years' purchase of the nett rental. These three essentials of a contract of sale are embodied in the offer and acceptance, and I do not find any error as to these essentials at all. But the error which the pursuer says he fell into was this; he says,—When I used the words in my letter, "In the event of your acceptance, the sale is made subject to the ratification of the Court," I mistook the meaning of the word ratification; what I had in my mind was that proceedings must be

taken under the Entail Act of 1882, the effect of which is that the Court would order a sale of the subjects, and would determine the price, and further, that when the price was determined, it should just be a substitution of entailed money for entailed land. That, he says, is what he meant by ratification. Whereas he says the Court have found that the meaning of it is this, that you shall prepare a disposition, and the Court (as they have the power to do on being satisfied that the interests of the creditors and of the next heir of entail are secured) will approve and must approve of that disposition; and so the sale will be carried out. That is the error which he avers, and from which he wants relief. Now, that is not an error which to my mind goes to the essentials of the contract at all. It appears to me to be simply this, that Sir Douglas Stewart understood that the price of from £300,000 to £400,000 should be disposed of in a particular way. Now, Mr Kennedy, the defender, the other party to the contract, has no concern with the application of the price, and therefore I cannot see how that can be an essential of the contract. Nor do I see that the magnitude of the pecuniary or other result arising from the construction put upon the contract by the Court can make that an error in *essentialibus*. That occurs every day. We had a case lately in which the error of the parties as regards amount was very considerable. I refer to the case of *The Steel Company of Scotland v. Tancred, Arrol, & Company*, February 8, 1889, *supra*, p. 440, where the pecuniary difference arising from one or other reading of the contract amounted to many thousand pounds. Yet the magnitude of the result of a certain construction of the contract did not affect the question of the essentiality, simply because it did not go to one of the essentials of the contract itself. Now, what is there more in this contract than that? The contract is in writing, and the Court have construed it, bringing out certain results. But this does not affect the essentials of the contract. The price is the same as before, the subject is the same, and the persons are the same. All Sir Douglas Stewart can say is this,—I entered into a contract, and when I used the word ratification I used a word with the meaning of which, as the result has shewn, I was not fully acquainted. That is all. But in my humble opinion that does not go to the essentials of the contract. If Sir Douglas Stewart has used language which the Court has been forced to construe to his prejudice, I do not see that the defender has anything to do with that. It does not in my mind go to the essentials of the contract, and therefore I think with your Lordship that there is no relevant averment of essential error on this record. On these grounds I concur with your Lordship.

THE COURT adhered, and remitted the case to the Lord Ordinary to proceed.

DUNDAS & WILSON, C.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

HUGH ROSS, Pursuer.

JOHN MACKENZIE, Defender.—*John Wilson*.

No. 156.

*Process—Jury trial—Abandonment—Decree of absolvitor—Judicature Act, 1825 (6 Geo. IV. c. 120), sec. 10—A. S., 16th Feb. 1841, sec. 46.*—The pursuer *Mac-ross v. Mackenzie*, in an action lodged a minute of abandonment, in terms of sec. 10 of the Judicature Act, 1825,\* after issues were adjusted, but before the trial. Thereafter

\* By sec. 10 of the Judicature Act, 1825, the pursuer has it in his power after the closing of the record "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent."

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No. 156. the Court allowed the defender to lodge an account of his expenses. The pursuer failed to pay the account as taxed. The defender moved for absolvitor. The Court, being satisfied that the pursuer had abandoned the suit, and having regard to sec. 46 of the A. S., 16th Feb. 1841,\* *assoilzied* the defender.

June 26, 1889.  
Ross v. Mackenzie.

1st Division. C. HUGH ROSS, Balchaggan, raised an action of damages against John Mackenzie, Milltown.

Issues in the cause were adjusted by the Lord Ordinary (Wellwood) on 25th January 1889, and the cause was set down for trial at the Spring Sittings 1889.

Shortly before the date of the trial the pursuer by minute abandoned the cause in terms of the statute.

Thereafter the Court allowed the defender to lodge an account of his expenses, and remitted the account to the Auditor.

On 26th June the defender stated to the Court that the pursuer had failed to pay the account of expenses as taxed, and that his agent had intimated that he was not in a position to do so. He therefore moved the Court to *assoilzie* him from the conclusions of the summons.<sup>1</sup>

LORD PRESIDENT.—It seems to me that the failure to pay expenses after the minute of abandonment was lodged merely deprived the pursuer of his privilege of abandonment. I do not see how in the ordinary case any other consequence could follow. But here, I think the argument founded on sec. 46 of the A. S., Feb. 16, 1841, is quite unanswerable. That Act of Sederunt applies only to procedure in jury trials, and sec. 46 only to cases after the adjustment of issues. That section provides that “if it shall be made to appear to the Court that a party has abandoned his suit, or if the pursuer . . . shall not proceed to trial within twelve months after issues have been finally engrossed and signed the Court shall proceed therein as in cases in which parties are held as confessed,”—that is to say, decree of absolvitor shall follow. That section applies directly to the present case, and therefore, I think, the defender must be *assoilzied*.

LORD MURE.—I concur. The 46th section of the Act of Sederunt is precisely applicable to this case.

LORD SHAND.—I see no difficulty in this case. The Act of Sederunt to which we have been referred provides that if a defender satisfies the Court that the pursuer has abandoned the action then he shall be entitled to absolvitor.

The fact that the pursuer has abandoned the suit in this case is perfectly clear, and therefore I have no doubt that the Act of Sederunt applies, and that we must *assoilzie* the defender.

LORD ADAM.—I am satisfied on the evidence that the pursuer here has abandoned his suit, and, if that be so, I am further clearly of opinion that, whether under the A. S., 16th Feb. 1841, or under the innate powers of the Court, the defender is entitled to decree of absolvitor.

THE COURT pronounced this interlocutor:—“In respect the pursuer

\* A. S., 16th Feb. 1841, regulating proceedings in jury causes, sec. 46, enacts,—“If it shall be made to appear to the Court that a party has abandoned his suit, or if the pursuer . . . shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed . . .”

<sup>1</sup> Lawson v. Low, July 1, 1845, 7 D. 960, 17 Scot. Jur. 492.

has abandoned the cause, assoilzie the defender from the conclusions of the summons, and decern : Approve of the Auditor's report on the defender's account of expenses, No. 25 of process, and decern against the pursuer for the sum of £50, 14s. 11d., the taxed amount thereof." No. 156.  
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Ross v. Mackenzie.

ROBERT CUNNINGHAM, S.S.C., Defender's Agent.

JAMES HOGARTH AND ANOTHER (Fotheringham's Trustees), First Parties. No. 157.

—Jameson—Hay.

JOHN FOTHERINGHAM, Second Party.—Low—Cook.

June 27, 1889.  
Fotheringham's Trustees v. Fotheringham.

*Husband and Wife—Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), sec. 6—Marriage prior to Act—Right of surviving husband to share of wife's estate—Exclusion of jus mariti by antenuptial marriage-contract.*—Section 6 of the Married Women's Property Act, 1881,\* applies to marriages whether contracted prior or subsequent to the date of the Act.

By an antenuptial marriage-contract entered into prior to the passing of the Married Women's Property Act, 1881, which dealt exclusively with the wife's estate, the wife conveyed to trustees her moveable estate with directions to them to hold the same "for behoof of herself, whom failing, then for behoof of her own representatives, . . . excluding always the *jus mariti* and right of administration of her said intended husband, and the debts and diligence of his creditors," and "in order that this trust and arrangement may receive effect" the husband renounced his *jus mariti* and right of administration over the estate so conveyed. The wife died leaving children of the marriage, but without having executed any further writing disposing of her estate. In a special case between the marriage-contract trustees and the husband of the deceased, held that the husband was entitled, under section 6 of the Act of 1881, to one-third of his wife's estate.

*Poe v. Paterson*, Dec. 13, 1882, 10 R. 356, affd. July 16, 1883, 10 R. (H. L.) 73, followed.

ON 20th March 1877 John Fotheringham, Orrock, near Burntisland, entered into an antenuptial marriage-contract with Miss Isabella Hogarth, and the marriage took place on the same day. 1ST DIVISION. C.

By the contract, which dealt entirely with the wife's estate, it was provided :—"Therefore the said Isabella Hogarth, with the special advice and consent of the said John Fotheringham, hereby assigns, disposes, conveys, and makes over to and in favour of James Hogarth, her brother, residing at West Mills, and James Cook, baker, Lochgelly, and acceptor and survivor of them, in trust, for behoof of herself, whom failing, then for behoof of her own representatives, or other parties that may be hereafter named by her, excluding always the *jus mariti* and right of administration of her said intended husband, and the debts and diligence of his creditors, All and Sundry her whole means and estate presently belonging to her, or which she may hereafter acquire or succeed to from any source whatever, which she, with advice and consent foresaid, directs her said trustees to hold and apply for behoof foresaid, in such manner as to them shall seem equitable and right; and, in order that this trust and arrangement may receive due effect, the said John Fotheringham hereby re-

\* Section 6 of the Married Women's Property Act, 1881, enacts,—“After the passing of this Act, the husband of any woman, who may die domiciled in Scotland, shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.”

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ingham.

Mrs Fotheringham died domiciled in Scotland on 7th February 1883, without having executed any writing disposing of her estate (which consisted entirely of personal property), except the contract of marriage above referred to. She was survived by her husband and by five children of the marriage.

Questions having arisen as to Mr Fotheringham's right to a share of his wife's estate, a special case was presented for the opinion and judgment of the Court. The trustees under the marriage-contract were the first parties to the case, and Mr Fotheringham was the second party thereto.

The question submitted to the Court was,—“Is the second party entitled to receive, and are the first parties bound to pay to him, one-third of the free moveable means and estate of the late Mrs Isabella Hogarth or Fotheringham?”

The second party maintained that he was entitled to one-third of his wife's property under the provisions of section 6 of the Married Women's Property Act, 1881. It was decided by the case of *Poë v. Paterson*<sup>1</sup> that section 6 of that Act applied to the case of marriages whether contracted before or after the date of the Act. The object of the deed here was to protect the estate from the husband and his creditors *stante matrimonio*. There was no burden of any kind placed on the estate by the contract, and the wife was therefore left absolute proprietor of her property, and could do what she liked with it. The Act, therefore, applied to the case if its operation was not expressly excluded, or unless there was such a provision in favour of the husband as to infer exclusion. Now, there was no provision at all for the husband, and all that was excluded was the *jus mariti*. The 6th section of the Act could only apply to cases where *jus mariti* was excluded, for if it was not excluded a wife could have no moveable property of her own during the marriage. Further, the *jus mariti* ceased at the dissolution of the marriage, and the exclusion of that right could not affect his claim under the Act.

The first parties maintained that by the antenuptial contract Mr Fotheringham had discharged all his rights of every kind in his wife's estate, and that they were bound to hold the whole estate for behoof of the children of the marriage, as being Mrs Fotheringham's representatives. If the view of the second party were given effect to, the decision would be contrary to the provisions of section 8 of the Act, which enacted that the Act should “not affect any contracts made or to be made between married persons before or during marriage,” because the contract would be affected to this extent, that the children of the marriage would only get two-thirds of the estate instead of the whole.

LORD PRESIDENT.—It is important to observe that it has already been decided in the case of *Poë v. Paterson* (10 R. 356, and *ibid.* (H. L.) 73) that section 6 of the Married Women's Property Act, 1881, applies to marriages entered into before the date of the Act, as well as to those entered into subsequent to that date. In that case the Court and the House of Lords gave the husband of a deceased wife one-half of her moveable estate, the division being bipartite because there were no children of the marriage.

That being so, it appears to me that section 6 never can come into operation

<sup>1</sup> *Poë v. Paterson*, Dec. 13, 1882, 10 R. 356, aff. July 16, 1883, *ibid.* (H. L.) 73.

except where the *jus mariti* has been excluded from the moveable estate of the wife, for if it had not been excluded then the wife could have no moveable estate of which she could die possessed. Therefore, so far as marriages contracted before the Act were concerned, in every case where the section applies there must be this element, that the wife must have held her moveable estate exclusive of the *jus mariti*, whether in virtue of her marriage-contract, or of the settlement of some other person. Now, that is exactly the state of matters here, and it appears to me that there is nothing more in the case. The wife possessed her estate exclusive of her husband's *jus mariti*, and notwithstanding the trust she was absolute owner of it; there was no burden or liferent to which it was subject,—in short, there was nothing which stood between her and her right of absolute disposal of her property. That being so, she died with the property vested in her, and the question is whether her husband is entitled to one-third of it under the 6th section of the Act.

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There are two propositions which the second party has to make out, first, that the estate was the absolute property of the wife; and second, that there was nothing done by him to discharge the right which would otherwise have belonged to him. From what I have already said, it is clear that he has made out both these propositions. There is no doubt that the estate was the absolute property of the wife, and it is equally clear that the only right excluded by the contract is the *jus mariti*, and, as I said before, if the exclusion of that right is to prevent the 6th section from taking effect, then that section could never apply to any marriage entered into before the Act. I think, therefore, that the second party is entitled to prevail.

LORD MURE.—I concur. The main object of the contract was to secure the wife's right of property in her estate to the exclusion of her husband's *jus mariti* and the debts and diligence of his creditors. In that object the wife has succeeded. Now, the property existed intact at the date of the wife's death, and in those circumstances we have a section of an Act which provides that the husband of any woman who may die domiciled in Scotland shall take the same share in his wife's moveable estate which is taken by a widow in her deceased husband's moveable estate. Looking to the construction which has been given to that section by this Court, and by the House of Lords, in the case of *Poe v. Paterson*, I am of opinion that the husband in this case is entitled to a third part of his wife's moveable estate.

LORD ADAM.—I agree with the observation made by Mr Low that, so far as this is a marriage-contract, its object was to exclude the husband's rights *stante matrimonio*, and that, so long as the marriage subsisted, the wife was the sole mistress of her moveable property. If that be so, the result is that the 6th section of the Act of 1881 applies, unless it is expressly excluded. Now, the only thing excluded by the contract is the *jus mariti* and right of administration. But those are rights which come to an end with the marriage, just when the *jus relictæ*, as it has been called, comes into operation. I think, therefore, that we must answer the question in favour of the second party to the case.

LORD SHAND was absent.

THE COURT answered the question in the affirmative.

JAMES SKINNER, S.S.C.—WISHART & MACNAUGHTON, W.S.—Agents.

No. 158. MRS HAMILTON DUNBAR TENNENT, Pursuer (Respondent).—*Asher—Loc.*

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Tennent's  
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RALPH DALYELL WELCH (Tennent's Executor), Defender (Reclaimant).—*Gloag—H. Johnston.*

*Husband and Wife—Foreign—Sale of English heritage belonging to wife—Surrogatum—Donation inter virum et uxorem.*—The wife of a domiciled Scotsman, with her husband's concurrence, sold the estate of X, in England, belonging to her, and acknowledged the conveyance before two commissioners in terms of the Act 3 and 4 Will. IV. cap. 74, for the Abolition of Fines and Recoveries, declaring at the same time that she intended to give up her interest in the estate without having any provision made for her in lieu thereof. Her husband received the price and applied it to his own uses. The spouses afterwards separated by mutual consent, and the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action against him for declarator that the £18,000 in his hands was either (1) a *surrogatum* for her heritage, and not subject to the *ius mariti*, or (2) was a donation to him which she had validly revoked.

The Court—after obtaining the opinion of the English Court to the effect that by the law of England, the law of the *situs*, (1) the estate of X, after the marriage, continued to belong to the wife in fee-simple, subject to a freehold estate in the husband during coverture (which entitled him to the rents); and (2) by the wife's conveyance, and her refusal of any provision, her interest in the estate was converted into personalty, and became the property of the husband—*held* (1) that on the wife's interest being converted into personalty the respective rights of the spouses fell to be determined by the law of Scotland, the law of their domicile; and (2) that the price of the wife's interest in the estate belonged to her as a *surrogatum* for her heritage, exclusive of the *ius mariti*.

*Opinion per curiam* that the gift of the price of the subjects to the husband, assuming it to have been made, was a donation *inter virum et uxorem*, and had been competently recalled by the wife's deed of revocation.

*Husband and Wife—Wife's English heritage—Husband's rights after sale of heritage.*—A married woman sold certain heritage belonging to her in England, of which according to English law her husband had right to the rents during coverture, his right being a freehold. The husband received the price and applied it to his own uses during the marriage. In an action against his executor for recovery of the price without interest, the latter contended that the proportion of the price corresponding to the husband's freehold belonged to him. *Held* that although the husband might have been entitled to have the purchase money apportioned according to the value of the respective rights of husband and wife as at the date of the sale, he having enjoyed the interest of the whole price subsequently thereto, had received an equivalent for the rents of the heritage, and had no further claim.

1st DIVISION.  
Lord Fraser.  
M.

MR CHARLES WELCH TENNENT and Mrs Hamilton Dunbar Tennent were married in London on 24th March 1877. There was no marriage-contract between the spouses. After their marriage they lived together until the month of May or June 1881, when they separated. There was no issue of the marriage.

At the date of the marriage and down to his death, which took place on 8th October 1884, Mr Tennent was a domiciled Scotsman.

Prior to her marriage Mrs Tennent was owner in fee-simple in possession of the estate of Overton, in the county of Salop, being possessed of considerable other means and estate besides. In 1876 she had entered into negotiations for a sale of Overton to Lord Boyne, but at the date of her marriage the sale had not been carried through. It was subsequently to the marriage sold to Lord Boyne's marriage-contract trustees for £23,500, the deed of conveyance being executed by the pursuer and her husband in July 1877. On the day of the sale Mrs Tennent appeared before two of the commissioners appointed under the Act 3 and 4 Will

IV. cap. 74 (an Act for the Abolition of Fines and Recoveries, &c.), for the county of Middlesex, and acknowledged the conveyance to be her act and deed, and in terms thereof the commissioners executed the required certificate.\*

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Out of the purchase price of £23,500, £18,000 was paid to Mr Welch Tennent, and the remaining £5500 was consigned in the joint names of the seller and purchaser for the purpose of meeting an annuity of £200 which was charged upon the estate.

After the separation of the spouses, Mrs Tennent, by deed of revocation dated 20th and 21st December 1882, revoked all donations or provisions which she had made in favour of her husband and declared them to be of no effect.

On 1st June 1883 Mrs Tennent brought an action against her husband in which she concluded for declarator, "that the defender is in possession of and holds—First, the sum of £18,000 sterling, and, second, the sum of £950 sterling" (being the price of certain subjects other than the estate of Overton), "as *surrogata* for the heritable estate of the pursuer, free from and unaffected by the *jus mariti* of the defender, or otherwise that the said sums possessed and held by the defender constituted a donation from the pursuer to the defender which has been validly recalled by the pursuer," and for payment. There was a further conclusion for declarator that the £5500 (the balance of the price of Overton) was also the property of the pursuer, subject to the burden of the annuity, or that it consti-

\* By section 77 of 3 and 4 William IV. chapter 74, a married woman was enabled by deed to dispose of her heritable estate as fully and effectually as she could do if she were a *femme sole*, "save and except that no such disposition shall be valid and effectual unless the husband concur in the deed by which the sale shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." By section 79 the deed, upon her executing the same or afterwards, is to be "produced and acknowledged by her as her act and deed before a Judge, Master in Chancery, or a Commissioner," who by section 80, before they receive such acknowledgment are to examine her apart from her husband touching her knowledge of such deed, and to ascertain whether she freely and voluntarily consents to such deed: otherwise they are not to permit the acknowledgment, and the deed as to her execution is void. Section 84 gives forms for the memorandum and certificate of acknowledgment: and section 89 provides that the Court of Common Pleas shall make orders and regulations touching the mode of examination by the Commissioners.

The second of the rules made by the Court of Common Pleas was,—(2) "Before a Commissioner shall receive an acknowledgment he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her, and where the married woman answers in the affirmative, and the Commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment."

The affidavit made by one of the Commissioners bore, *inter alia*:—"That previous to the said Hamilton Dunbar Tennent making the said acknowledgment, I inquired of her, the said Hamilton Dunbar Tennent, whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate, and that in answer to such inquiry the said Hamilton Dunbar Tennent declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said Hamilton Dunbar Tennent I have no reason to doubt the truth, and I verily believe the same to be true."



**No. 158.** **June 28, 1889.** **Tennent v. Tennent's Executor.** tuted a donation in favour of the defender which had been validly recalled by the pursuer, and that on its ceasing to be chargeable the pursuer was entitled to payment of it.

The defender having died, as above stated, on 8th October 1884, the cause was transferred against Ralph Dalyell Welch, as his executor and general dispoinee. The record was also, on 16th December 1885, opened up and amendments allowed.

The pursuer stated;—"The said sums were either *surrogata* for the said heritable estates which belonged to the pursuer, or were a donation by her to the said defender. The said balance of £5500, consigned as aforesaid, was never reduced into the possession of the said defender, and the right thereto remained vested in the pursuer; or in any event, it was *surrogata pro tanto* for the said estate or a donation by the pursuer to the defender which was cancelled by the deed of revocation."

The defender stated, *inter alia*;—(Stat. 1) "Prior to the marriage of the pursuer and the original defender the pursuer . . . had entered into a contract of sale . . . of her manor of Overton, . . . to Viscount Boyne, but the said sale had not been carried into effect by actual conveyance. After their marriage the said defender concurred, as he was bound to do, with the pursuer, in fulfilling her contract of sale by granting the necessary conveyance. The price of the said estate contracted to be paid to the pursuer by Viscount Boyne was by the law of England personalty at the date of their marriage and passed to the said defender *jure mariti* as his own absolute property upon the marriage taking place." (Stat. 2) "At least if the said contract of sale was not complete and binding on the pursuer prior to her marriage, or if the original defender was not bound to fulfil, or to join with her in fulfilling it after their marriage, then the pursuer being, at the date of her marriage with the said defender, seized of the said manor of Overton and other hereditaments for an estate of inheritance in fee-simple in possession, and no settlement of the pursuer's estate having been executed prior to the pursuer's marriage to the said defender, by the law of England the said defender, on his marriage with the pursuer, *ipso facto* acquired a freehold interest in the said manor of Overton and hereditaments aforesaid, which entitled him to the rents and profits thereof during the joint lives of himself and wife, and which, in the event of there being issue of the marriage who could inherit, entitled him to such rents and profits during the remainder of his life. This freehold interest it was competent for him to alienate at pleasure. The pursuer retained the property or fee-simple, subject to her husband's right therein, but without power to dispose of the same by will or (except as hereinafter mentioned) by deed." (Stat. 3) "The pursuer was entitled to dispose of her said fee-simple estate by deed, provided only her husband concurred therein, and such deed was duly executed and acknowledged by the pursuer before two commissioners, in terms of law, according to the Act for the Abolition of Fines and Recoveries, 3 and 4 Will. IV. cap. 74. In the event of her duly acknowledging the deed of conveyance in terms of law, the whole purchase price of the fee-simple, and not merely of his own freehold interest therein, passed by the law of England to her husband, the original defender, as his own absolute property *jure mariti*." There was a further statement (stat. 8) to the effect that the £18,000, although admittedly received by Mr Tennent, had been spent with the knowledge of the pursuer upon their joint establishment and for their joint uses and purposes.

The defender, after setting forth the execution of the conveyance by Mrs Tennent to Lord Boyne's marriage-contract trustees on 24th July 1877, and relative procedure, stated:—"The pursuer having thus duly

executed and acknowledged the said deed of conveyance in terms of law, No. 158.  
the whole purchase price of the said property of Overton became by the  
law of England the absolute property *jure mariti* of the said defender." June 28, 1889.

The pursuer pleaded, *inter alia*;—1. The said sum of £18,000, Tennent v.  
being *surrogatum* for the heritable property of the pursuer, did not fall Tennent's  
under the *jus mariti* of the said Charles Welch Tennent, and the defender Executor.  
is bound to make payment thereof to the pursuer. 2. The said sum of  
£5500 being *surrogatum* for the heritable property of the pursuer, did not  
fall within the *jus mariti* of the said Charles Welch Tennant. 3. The  
pursuer is not barred from claiming right to the said sums of £18,000  
and £5500 by the acknowledgment of the deed of conveyance executed  
by her in respect (1) that the said acknowledgment did not affect the  
rights of the pursuer and the said Charles Welch Tennent *inter se*; and  
(2) that their rights in the premises fell to be determined by the law of  
Scotland. 4. At all events the said sum of £5500 not having been  
reduced into the possession of the said defender, the right thereto  
remained vested in the pursuer as the owner of the said estate, and she is  
entitled to payment thereof, on the foresaid annuity ceasing to be charge-  
able, as concluded for. 5. Assuming the said defender to have acquired  
right to the foresaid several sums, the same formed a donation by the  
pursuer to him, which was revoked by the pursuer, and she is entitled to  
decree therefor in terms of the conclusions of the summons.

The defender pleaded, *inter alia*;—2. The pursuer having entered into  
a contract of sale of the said estate of Overton prior to her marriage, and  
the price stipulated to be paid therefor being personalty at the date of  
her marriage, fell to the original defender *jure mariti* as his absolute pro-  
perty on the marriage taking place. 4. By the law of England the manor  
and estate of Overton having been sold, and the conveyance thereof exe-  
cuted and acknowledged, . . . the whole price thereof belonged to the  
original defender as his own absolute property *jure mariti*. 5. The rights  
of parties in the said manor and estate of Overton, and the price thereof,  
and *separatim*, in the said leasehold property, No. 10 Grove End Road,  
St John's Wood, and the price thereof, falling to be determined by the  
law of England, which does not confer upon the pursuer any right to  
insist that the said price, or any part thereof, shall be paid to her, the  
defender should be assoilzied. 6. The said sum of £5500 being part of  
the price of the said manor and estate of Overton, belonged, by the law  
of England, to the original defender, and now belongs to the present  
defender, as his executor, absolutely, subject to the purposes for which it  
is held in trust, and the pursuer is therefore not entitled to decree as con-  
cluded for thereanent. 7. The Scots law of donation *inter virum et*  
*uxorem* does not apply, and the deed of revocation alleged to have been  
executed by the pursuer on 20th December 1882 cannot affect the con-  
veyance of the Overton estate and Grove End Road property, and their  
consequences, which are regulated by the law of England. 8. Also  
*separatim*, The defender ought to be assoilzied from the conclusions of the  
summons, in respect that, assuming the Scots law of donation to apply, the  
money sought now to be recovered as a donation was spent during the  
subsistence of the marriage by the spouses, or with the knowledge and  
consent of the pursuer, for the joint uses and purposes of the spouses.

Proof, both oral and documentary, was afterwards led before the Lord  
Ordinary (Fraser) as to the averments contained in the first article of the  
defender's statement of facts, and thereafter a case under the Law Ascertain-  
ment Act (22 and 23 Vict. cap. 63) was adjusted at the sight of the  
Court in which the facts were set forth, and the opinion of the High  
Court of Justice was requested upon it. The questions put were "(1)

No. 158. Whether at the date of her marriage to the original defender, viz., 24th March 1877, a valid and binding contract of sale of Overton had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers, enforceable by an action for specific performance at the suit of Lord Boyne or his trustees as purchasers, or of the pursuer as vendor, or of either of them? (2) Whether such contract operated as a conversion of said estate of Overton into personalty in the person of the pursuer, so as to vest the proceeds in her husband absolutely at the date of the said marriage? (3) Whether such contract was by English law a chose in action, and consequently did not become the property of her husband until the reduction of the same into his possession? In the event of the Court deciding that no valid and binding contract for the sale of Overton had been entered into before the marriage of the pursuer, and that the original defender took no interest in the price thereof,—(4) What, after their marriage, were the respective rights or interests of the pursuer and the original defender, as the husband of the pursuer, by the law of England, in the estate of Overton; and were these rights or interests, or either of them, saleable by them or either of them, and on what conditions? (5) On the conveyance of the estate, what were the original defender's right and interest by the law of England in the price thereof; and did such right and interest in the price pass to the original defender by the said conveyance or by his *jus mariti*? (6) Whether under the trusts of the indenture, set out in par. 15\* herein, the pursuer is entitled absolutely to the said sum of £5500, she having survived her husband, or whether she is otherwise entitled to it as a chose in action not reduced into possession by the husband during his coverture?"

In answer the following order was pronounced in the High Court of Justice, Chancery Division, by Mr Justice Kay,—“This Court is of opinion that at the date of the marriage of the pursuer to the original defender, namely, the 24th March 1877, no valid or binding contract of sale of Overton in the said special case mentioned had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers; and that after the said marriage the said estate of Overton belonged to the pursuer in fee-simple, subject to a freehold estate of the original defender therein during the continuance of the coverture, and that those rights and interests were saleable by them, as to the original defender's estate, without the concurrence of the pursuer, and as to the pursuer's estate, only with the concurrence of the original defender in an acknowledged deed, and under the conditions imposed by the Statute 3 and 4 William IV. chapter 74, and the rules thereunder: And that on the conveyance of the estate, . . . the original defender, by the law of England, became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*; and that under the trusts of the indenture, set forth in paragraph 15 of the said special case, the pursuer is not entitled by the law of England, to the sum of £5500 therein also mentioned, either as having survived the original defender, or as a chose in action not reduced into possession by the original defender during his coverture.”—(L. R. 37 Chanc. Div. 622.)

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\* The trusts were to hold the fund “for the purpose of indemnifying the purchasers against the charge of £200 per annum charged on the estate of Overton, as set forth in the said indenture. Further trusts were declared by the said indenture of the said sum of £5500 after the determination of the said annuity for the benefit of the pursuer and the original defender.”

On 20th October 1888 the Lord Ordinary (Fraser) pronounced this No. 158.  
interlocutor:—"Finds that the domicile of the deceased Charles Welch  
Tennent was at the date of his marriage on 24th March 1877, and con- June 28, 1889.  
tinued to be till his death, in Scotland: Finds that the pursuer, his wife, Tennent v.  
acquired, on her marriage, the domicile of her husband: Finds that the Tennent's  
rights of parties as to the price of the Overton estate, so far as paid to the Executor.  
husband, and of the £5500 now held in trust, must be determined accord-  
ing to the law of Scotland: Further, allows to the defender a proof of  
the averment contained in the 8th statement of facts by him, and to the  
pursuer a conjunct probation: Appoints the proof to be led before the  
Lord Ordinary on a day to be afterwards fixed. . . ."

\* "OPINION.—The law of England was invoked in this action in order to ascertain what was the character, as heritable or moveable, of certain English property which at the date of the marriage belonged to the pursuer.

"By a series of decisions it has been determined that the character of the subject, as heritable or moveable, shall be ascertained according to the law of the place where it is situated—(See *Egerton v. Forbes*, 27th November 1812, F. C.; *Newlands v. Chalmers's Trustees*, 22d November 1832, 11 S. 65; *Clarke v. Newmarsh*, 16th February 1836, 14 S. 488; *Downie v. Christie and Others*, 14th July 1866, 4 Macph. 1067). It was upon this footing that the case was sent for the opinion of the Court of Chancery, and that has now been returned. Mr Justice Kay has held that the Overton estate was converted into personalty.

"Then comes the question what law shall determine as to the right to such personal estate. The late Charles Welch Tennent and the pursuer of this action were domiciled in Scotland, and the contention on the part of the pursuer is that her rights must be determined according to Scots law. If the English property had remained unconverted, then the interests of the husband and wife in it would have been determined by the law of the *situs*; but as soon as it is changed into personalty the law of the domicile steps in and declares the rights of the spouses in it. Mr Justice Kay, in his opinion,† assumes this doctrine as correct. 'Supposing the parties to have been domiciled in England, it would follow from the mere fact of such conversion that the husband, by his marital rights, would have become entitled at once to whatever interest the wife might have in such personal property.' With regard to the £5500 held in trust he expresses himself as follows:—"I am of opinion that under the circumstances in this case the £5500 cannot be treated as a chose in action to which the wife is entitled, but that if the domicile of the husband and wife had been English the whole would now belong to the executor of the husband.' But if the domicile of the husband and wife were not English, but Scottish, then the opinion of the learned Judge evidently is that resort must be had to the Scots law to ascertain the rights of the parties. There can be no doubt that the operation of the *jus mariti* is regulated by the law of the domicile. Lord Glenlee, in the case of *Newlands v. Chalmers's Trustees*, 22d November 1832, 11 S. 65, stated the rule as follows:—"The English lawyers having given an opinion that the right was vested by the law of England, then we held that it transmitted *jure mariti* by the law of Scotland. As to the effect of the *jus mariti*, therefore, that judgment [*Egerton v. Forbes*, 27th November 1812, F. C.] settles that it is the law of Scotland which rules between husband and wife, if there domiciled. But again, on the other hand, it is the law of the country where the subject is situated that must regulate the character of the subject as heritable or moveable. . . . By the law of Scotland, bonds bearing interest are held to be heritable, and this has only been relaxed as to succession by positive statute; but, by the law of Jamaica, they are held strictly moveable. Although, therefore, the law of Scotland regulates the *jus mariti*, yet we must go to the *lex rei sitæ* to ascertain what is heritable and what is moveable.' And again, Lord Mackenzie, in *Clarke v. Newmarsh*,

† The opinion of Mr Justice Kay will be found reported of date Feb. 6, 1888, L. R. 37 Chanc. Div. 622.

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The defender having stated that he could not undertake to prove that the moneys in question had been spent on household and family expendi-

16th February 1836, 14 S. 488, said,—‘It is enough for the law of Scotland, if the subject be moveable, and vests as such in the wife. That being the case, the law of Scotland immediately applies to the effect of bringing it under the *jus mariti*. I decided the case of *Newlands* on this principle, and I perceive that it was on this precise ground that Lord Glenlee gave his opinion when concurring with the Inner-House in adhering to my judgment. The English law is to be referred to for the purpose of determining whether the character of a particular subject was heritable or moveable; but so soon as that is fixed, the law of Scotland decides what is the right of a husband under a Scottish contract of marriage in moveable effects which have accrued during the marriage to his wife.’ In a subsequent case these principles were held settled. The property in dispute was English mortgages, which, if secured over property in Scotland, would have been considered heritable; but being by the English law moveable, it was decided that they were in all respects to be regulated according to the law applicable to moveables in settling the rights of widow, heir, and executor in this country (*Downie v. Christie and Others*, 14th July 1866, 4 Macph. 1067).

‘Therefore, dealing with this case as one to which the Scottish law applies, then the husband’s *jus mariti* carried the price of the Overton property, including the £5500. But granting that, the pursuer, the widow, maintains two propositions—first, that a wife who converts her heritable estate into moveable is not presumed thereby to intend anything more than to perform an act of administration, and is assumed to be waiting for another investment of a heritable character; far less is she presumed to convert it into moveables so as to fall under the *jus mariti*. The money is regarded as the legal surrogate of the heritable estate, even although the husband has manipulated it and embarked it in his business. To this effect there are many decisions, the whole of which will be found collected in *Fraser on Husband and Wife*, vol. i. p. 703, *et seq.*, and *Cuthill v. Burns* (20th March 1862, 24 D. 849). But these decisions must be taken with a qualification which is thus stated by Erskine (ii. 2, 16)—‘Thus also a sum belonging to the wife not falling under *jus mariti*, e.g., a bond bearing interest, continues heritable as to the husband, notwithstanding a demand of payment from the debtor. Nay, though the wife should not only demand, but actually recover payment, there is no alteration in the heritable nature of the bond *quoad maritum*, unless a presumption shall arise, from her allowing the husband to apply the sum to his own use, or from other circumstances, that she truly intended a donation to him.’ The defender has a special averment upon record that the prices of the Overton estate and of the leasehold property at Grove End Road, St John’s Wood, London, were not invested by the husband, ‘or otherwise applied to his own purposes. They were lodged in bank and afterwards entirely spent by the pursuer and the said defender, or by the said defender with the knowledge and consent of the pursuer, upon their joint establishment, and for their joint uses and purposes. The said prices form no part of the said defender’s executry estate.’ If this be true, then, it would bring the case within the qualification stated by Erskine.

‘Then there arises, secondly, another point. Erskine says that in such circumstances it would be considered a donation. If so, is it a donation revocable, and has it been revoked by the deed of revocation mentioned in the 5th article of the condescendence? Now, it has been determined, that if a wife allow the rents and profits of her separate estate to be employed in maintaining the family, she is debarred from insisting for repayment. Such a claim was made after the husband’s death, and the judgment of the Court met it in a very specific manner. It was found that, as to any portions of the annual proceeds and profits of the wife’s separate estate invested for her separate use in her own name, which the husband was from time to time allowed by her to draw, it was incumbent on the wife, by whom no demand was proved to have been made against the husband himself, to prove that the same or corresponding sums were

ture, the Lord Ordinary, on 10th November following, pronounced the following interlocutor:—"Decerns against the defender for payment of

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applied by him to increase his own estates and funds, or to some specific purposes of his own, and were not applied and consumed from time to time as they were drawn in the expenses of the family or other occasional purposes; and that, in the event of the wife failing in such proof, the legal presumption as to portions of the annual proceeds of her estate so received by the husband was that they were used and consumed by the husband with the wife's sanction and concurrence for objects and purposes of the spouses known to her, and that she obtained the benefit or enjoyment of such use and consumption during the marriage; and that, in the event of the wife failing to prove all this, there was no ground in law on which she could insist in her action against the representatives of her husband (*Allan or Hutchison v. Hutchison's Trustees*, 1st February 1843, 5 D. 469; and see *Williams v. Williams*, 15th November 1844, 7 D. 112, opinion of Lord Cuninghame).

"The wife did not go on with her proof in the case of *Allan or Hutchison*, and the case must be taken as deciding the general point, that where a wife's money has been applied in family expenditure in the benefit of which she has participated, it must be held to have been so done with her sanction and concurrence, and all right of revocation on the ground of donation is barred. This view of the decision was accepted in the House of Lords in the subsequent case of *Edward v. Cheyne* (L. R. 13 App. Cases, p. 393), in which Lord Watson is found expressing himself as follows:—'The Second Division decided that it was incumbent upon the widow to prove that the money was applied by the husband to increase his own funds, and was not used for family expenditure. Their Lordships also decided that if the widow failed in such proof, effect must be given to the presumption that all sums received by him had been used and consumed by her sanction and concurrence.' This case of *Edward v. Cheyne* (reported in 13 *Rettie*, p. 1209, under the name of *Baxter's Executor v. Baxter's Trustees*, and in the House of Lords under the name of *Edward v. Cheyne*, L. R. 13 App. Cases, p. 385, and in 25 S. L. R. p. 424) was a case which presented not two questions but only one, and in this respect it differs from the present case. The claim for accounting was made not by the wife against the husband's representatives but by the wife's executor, and the only question there was one of fact, viz., whether or not the wife did gift or donate her separate estate to her husband. By the law of Scotland she is entitled to deal with that separate estate as she thinks fit, and she may give the whole of it to a stranger on the streets or to her husband without consideration, and that gift will remain irrevocable by her representatives. The only person who can revoke it from the husband (though not from a stranger donee) is herself; and if she dies without doing so, her representatives have no ground of complaint and no right of action as against the stranger donee or the husband, and they cannot exercise any right of revocation. Accordingly, the case was treated in the Court of Session as one of fact—as to whether she did donate. There was no second question as to whether, supposing there was a donation, there was a revocation. In the House of Lords the learned Judges, besides so treating the case, also referred largely to the English law as to the propriety of upholding such gifts, which law, however, is widely distinguishable from the law of Scotland, inasmuch as a gift once granted is not by English law subject to revocation by the donor. For example, the statement by Lord Macnaghten of the English law cannot be accepted as the law of Scotland when he says that 'where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises immediately on each receipt' [of the wife's income] 'by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to shew that the wife's separate income has accumulated in the husband's hands, and remains unspent.' On the other hand, the law of Scotland is, that if the wife's money can be traced and earmarked, and has not been spent in carrying on the household, it still may be reclaimed by her—though not by her representatives—as a donation. The last

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the sum of £18,000 sterling; and, secondly, finds that the sum of £5500 sterling, which was part of the price of the heritable estate of Overton, formerly belonging to the pursuer, and which is now held in trust to meet a liferent annuity chargeable on the said heritable estate, is, subject to the burden of the said annuity, the property of the pursuer, and upon the said annuity ceasing to be chargeable the pursuer is entitled to payment of the said sum, and all interest accruing thereon or income derivable therefrom, from the 8th day of October 1884, being the date of the death of the pursuer's husband, Charles Welch Tennent, after payment of the said annuity, and decerns: Finds the defender liable in expenses subsequent to 16th December 1885," &c.\*

illustration of this doctrine by decision was *Cuthill v. Burns*, already referred to. This rule bears very materially on the right as to the £5500 now held in trust, and which was the price of the wife's real estate.

"It is necessary, before any operative judgment can be given, to ascertain the facts as to how the money was spent, for it is admitted that it was received by the late Charles Welch Tennent. The £5500 is still extant, and judgment could now be given in regard to it, finding that it was or was not a donation revocable and revoked. But it is desirable to keep the whole case together, so that one interlocutor will suffice. . . ."

\* "OPINION.—The Lord Ordinary has explained in the opinion which he delivered on 20th October 1888 the grounds upon which he holds that the rights of the parties in this cause as to the £18,000 and £5500 concluded for must be determined according to the law of Scotland. A proof was allowed, however, to the defender to shew that the £18,000, of which repetition was asked, was spent in household and family expenditure, and if this had been established the Lord Ordinary was prepared to find that that £18,000 could not be claimed by the pursuer. It has, however, been intimated to the Lord Ordinary by the defender that he is unable to undertake such a proof. It is admitted upon the record that the original defender, Charles Welch Tennent, did receive the said sum of £18,000, part of the price of the estate of Overton, which belonged to the pursuer, but it is denied that that sum was retained by him and forms part of his estate; and it is averred that that sum never was invested by said defender, but was lodged in bank and afterwards spent by the spouses, or by Welch Tennent, with the knowledge and consent of the pursuer, on their joint establishment. It was this latter averment that was sent to proof, and which the defender now admits he cannot prove. The admission that the money was received by Charles Welch Tennent, the husband, throws the *onus* of proof upon him, so as to shew to the Court in what way he disposed of the money.

"The £18,000 being thus traced into the husband's possession, and the right to that money being to be determined by the law of Scotland, according to the interlocutor already pronounced, the question comes to be, whether it fell under the *jus mariti*. It is quite settled, according to Scottish law, that the transmutation of the wife's heritage into money does not transfer to the husband *jure mariti* the price into which the heritage has been transmuted; and further, if such were the legal result of such a change from heritage to personalty, the wife was entitled to revoke the gift so made in favour of the husband, and this revocation she has in the present case done by express deed.

"There is thus, therefore, no defence against the wife's demand for payment of this £18,000. But, according to Mr Justice Kay, it is the law of England that, 'After the marriage the estate of Overton belonged to Mrs Tennent in fee-simple, subject to a freehold estate of the husband therein during the continuance of the coverture. Those rights and interests were saleable by them—as to the husband's estate without the concurrence of the wife, as to the wife's estate only with the concurrence of the husband in an acknowledged deed.' This legal right of the husband, called a 'freehold estate,' is more clearly explained in the record by the defender in these words:—'The pursuer being, at the date of her marriage with

The defender reclaimed, and argued;—1. The answers given by the English Court to the questions submitted to them were categorically in favour of the reclaimer. A married woman could sell heritage in England only under the provisions of the Act 3 and 4 Will. IV. cap. 74, and the sale of Overton had been carried through by Mrs Tennent under that Act with the concurrence of her husband. In the opinion of the English Court, the husband then “became absolutely entitled to the price thereof.” That was simply the effect of the English law upon the subject, and there was not necessarily any conversion of the heritage into moveables such as invoked and involved the operation of the Scottish doctrine of *jus mariti*.<sup>1</sup> Mr Justice Kay’s grounds of judgment could not be looked at, and the order said nothing more. Accordingly, the law of the *rei sitæ* must regulate the right to the price of the subjects. It must determine whether the price was heritable or moveable, and whether it was *surrogatum* for the heritage or not. The Lord Ordinary’s judgment was not supported by the authorities he cited. In the cases of *Egerton*<sup>2</sup> and of *Newlands*<sup>3</sup> the judgments proceeded upon the ground that marriage operated a constructive assignment to the husband of the wife’s property, the English law of the *situs* determining what the nature of the subject was, while

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the said defender, seized of the said manor of Overton and other hereditaments for an estate of inheritance in fee-simple in possession, and no settlement of the pursuer’s estate having been executed prior to the pursuer’s marriage to the said defender, by the law of England the said defender, on his marriage with the pursuer, *ipso facto* acquired a freehold interest in the said manor of Overton and hereditaments foresaid, which entitled him to the rents and profits thereof during the joint lives of himself and wife, and which, in the event of there being issue of the marriage who could inherit, entitled him to such rents and profits during the remainder of his life. This freehold interest it was competent for him to alienate at pleasure.’ This is a kind of right similar to the courtesy of the law of Scotland, with this difference, that instead of commencing at the wife’s death it commences at the date of the marriage; and this right the Lord Ordinary is of opinion must be given effect to; and it is given effect to by the interlocutor which he has pronounced, whereby no interest is made payable to the pursuer upon the £18,000. Charles Welch Tennent obtained the money and used it for his own purposes, in consequence of his freehold right thus explained, and apparently upon this ground no interest is asked upon the £18,000. If he was entitled to the rents and profits of the estate before it was sold, he was entitled to the interest upon the price during his life. No interest has been asked by the pursuer upon this money since Charles Welch Tennent’s death in 1884, and the Lord Ordinary is therefore not called upon to pronounce any judgment as to whether such a claim could be effectually made.

“The next point has reference to the sum of £5500 which has been set apart and is now held in trust to answer an annuity payable out of the estate of Overton. Mr Justice Kay says in regard to this sum,—‘The trusts of this were declared by a deed, dated the 24th July 1877,’ &c. He examines this question with reference to the law of England, and he states his opinion,—‘That under the circumstances in this case, the £5500 cannot be treated as a chose in action to which the wife is entitled, but that if the domicile of the husband and wife had been English, the whole would now belong to the executor of the husband.’

“The domicile of the husband and the wife being however Scotland, and the law of the domicile being that which must be applied here, this sum of £5500 must be held for the pursuer. It never was mingled amongst the husband’s funds, but was set apart and earmarked, and was part of the price of her heritable estate, and was therefore, according to the authorities referred to by the Lord Ordinary in his former opinion, the property of the wife.”

<sup>1</sup> Erskine’s Inst. ii. 2, 16.

<sup>2</sup> *Egerton v. Forbes*, Nov. 27, 1812, F. C.

<sup>3</sup> *Newlands, &c. v. Chalmers’ Trustees*, Nov. 22, 1832, 11 S. 65.



**No. 158.** the Scots law of the domicile determined the effect of the *jus mariti*. But in the present case the moveable property never belonged to Mrs Tennent. She had from the first made up her mind that it should be moveable, as appeared at the time of the sale from the affidavit when the certificate was granted by the commissioners, and it was accordingly impossible to say that it must be held to be the *surrogatum* for the heritage, and therefore hers. The case of *Hall*<sup>1</sup> was apparently an authority against the view that the law of the *situs* must decide as between husband and wife what the nature of a fund was, and seemed to shew that it was for the law of the domicile to say whether, in the present case, the price was *surrogatum* or not. Lord Fraser had commented doubtfully upon the authority of that case.<sup>2</sup> Further, the price of the estate here could not be both *surrogatum* and moveable. If it was *surrogatum*, it passed to the husband as heritage under the English law; if it was moveable, it passed to the husband *jure mariti*. The whole law of *surrogatum* was special. The doctrine was based upon the presumption that where a married woman sold heritable estate she did so with the intention of changing the investment of it, and not with that of converting it into cash. The intention to convert might be proved by facts and circumstances.<sup>3</sup> Here it was proved by the terms of the certificate and affidavit above mentioned. 2. If there was donation it was a donation of heritable property; the price never belonged to the wife. Donation of heritable property by a wife was not revocable in England.<sup>4</sup> Supposing, on the other hand, the question of the revocation of the donation fell to be decided by the law of Scotland, could it be said that there was any donation here? Donation was not to be implied from the fact of a spouse having sold her heritage, and there was nothing more here. If it was to be so implied, it would cover the case of a sale by a husband equally with that of a sale by a wife; but the case of *Lees* was opposed to that doctrine.<sup>5</sup> The true view was that the husband got the price as personal property by the law of England, and that the case was in no sense one of donation. 3. If the reclamer were held to be wrong on the two first points, the price of the heritage fell to be apportioned between the spouses as at the date of the sale, and the actuarial value of the husband's interest as at that date fell to be deducted from the sum sued for. The expenses of the sale ought also to be deducted.<sup>6</sup> Further, in any view, the Lord Ordinary had gone wrong in decerning against the defender personally.

Argued for the pursuer and respondent;—1. At the date of the marriage the estate of Overton was heritable property belonging to the pursuer. During the marriage it was converted into money, and by the law of Scotland, which was the law of the domicile of the spouses, the price of the estate was held to be *surrogatum* for the estate itself. It did not matter that the wife did not handle the money and that the transaction was carried through by the husband. It was not the sale which brought the subject within the *jus mariti* of the husband. The effect of the sale was clearly separable from the transaction of sale itself, and was to be decided by Scots law. When the price thereafter passed into the hands of the husband the law of Scotland held it to be a donation *inter virum et uxorem*, and therefore revocable.<sup>6</sup> *Hall's* case was the converse of the

<sup>1</sup> *Hall's Trustees v. Hall*, July 13, 1854, 16 D. 1057.

<sup>2</sup> *Fraser on Husband and Wife*, i. 703, 743.

<sup>3</sup> *Rollo v. Forrest*, 1685, M. 5795.

<sup>4</sup> *Fraser on Husband and Wife*, 1322; *Burge's Comma* i. 639.

<sup>5</sup> *Lees v. Wilson*, Feb. 17, 1808, Hume, 191.

<sup>6</sup> *Fraser on Husband and Wife*, i. 703; *M'Lennan v. Hathorn*, 1758, M. 6098; *Hall's Trustees v. Hall*, July 13, 1854, 16 D. 1057; *Cuthill v. Burns*, March 30, 1862, 24 D. 849.

present; the judgment there assumed the doctrine of *surrogatum*, otherwise the question in that case would not have arisen. The doctrine applied even where the husband was employed to sell his wife's estate; it had been introduced as an exception to the generality of the rule of the *jus mariti*. It was true that if it could be shewn that the wife intended to convert, the price would not be held to be *surrogatum*. The presumption that she did not intend to convert was not rebutted here. The defender had shrunk from attempting to prove that the price was spent upon the expenses of the household. The proceedings under the Act 3 and 4 Will. IV., which were appealed to in support of the defender's contention, had reference only to the title to be given to a purchaser. They were introduced in order to facilitate the transfer of married women's property. 2. If it were held that the wife intended to convert, the price came to the husband as a donation, and it had subsequently been revoked by the wife. The law of England relating to the donation of an immoveable subject had been appealed to. An opposite view to that stated by Burge had been taken by another commentator.<sup>1</sup> But, further, it was impossible to say that, if there was a donation here, it was a donation of an immoveable subject. 3. It was said that the price should be apportioned between the spouses as at the date of the sale. No doubt Mr Tennent might have asserted his right to capitalise his share of the price. But he had elected to keep the whole fund and enjoy the interest of it. He could get no more, and it was impossible after his death to enter upon an actuarial investigation of his interest. The pursuer was willing to allow the defender the expenses of the sale.

At advising,—

LORD ADAM.—The pursuer, Mrs Tennent, was married to the late Mr Welch Tennent on the 24th March 1877.

At the date of the marriage Mr Welch Tennent was a domiciled Scotsman. No marriage-contract was entered into between the spouses.

At the date of the marriage Mrs Tennent was possessed of a large amount of property both heritable and moveable, the heritable property being situated partly in England and partly in Scotland. In particular she was possessed of the estate of Overton, in the county of Salop in England.

On the 24th July 1877 Mrs Tennent, with concurrence of her husband, conveyed this estate to the marriage-contract trustees of Lord Boyne. The price was £23,500, and of this sum £18,000 was received by Mr Tennent, and the balance of £5500 was vested in trustees to meet a liferent annuity charged on the estate. This sum still remains in the hands of the trustees.

On the 21st December 1882 Mrs Tennent executed a deed of revocation by which she revoked all donations, provisions, deeds, writings or things whatsoever, made, executed, or done by her, in favour of her husband.

On the 1st June 1883 she raised this action against her husband, by which, in so far as now insisted in, she seeks (first) to recover payment of the said sum of £18,000, and (second) as regards the said sum of £5500 to have it found and declared that it is her property, and that, on the foresaid liferent annuity ceasing she is entitled to payment of it.

Mr Welch Tennent died on 8th October 1884, but the action has been transferred against the present defender, who is his executor and general disponee.

It appears that, prior to the conveyance of the estate of Overton, as before

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<sup>1</sup> Barr's International Law (Gillespie's edn.), 404, sec. 97.

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mentioned, and prior to the marriage of Mr and Mrs Tennent, certain negotiations had been going on with Lord Boyne as to the purchase by him of the estate, and it was pleaded by the defender, in answer to the pursuer's claims, that these negotiations had resulted in a binding contract of sale, and that, although the sale had not been carried into effect by actual conveyance, the effect of this contract was to convert the heritable estate into moveable—that, accordingly, the price, being personalty at the date of the marriage, by the law of England, passed *jure mariti* to her husband. This and various other questions as to the respective rights of the parties according to the law of England in the estate of Overton and the price thereof having thus arisen, a case for the opinion of the High Court of Justice in England was prepared and laid before that Court in terms of the Law Ascertainment Act, 22 and 23 Vict. cap. 23, for the determination of these questions. We have now that opinion before us, which is conclusive on all questions of English law at issue between the parties.

That opinion is short, and I may read it. It is in these terms,—“This Court is of opinion that at the date of the marriage of the pursuer to the original defender, namely, the 24th March 1877, no valid or binding contract of sale of Overton in the said special case mentioned had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers; and that after the said marriage the said estate of Overton belonged to the pursuer in fee-simple, subject to a freehold estate of the original defender therein during the continuance of the coverture, and that those rights and interests were saleable by them, as to the original defender's estate without the concurrence of the pursuer, and as to the pursuer's estate only with the concurrence of the original defender in an acknowledged deed, and under the conditions imposed by the Statute 3 and 4 William IV. chapter 74, and the rules thereunder: And that on the conveyance of the estate, . . . the original defender, by the law of England, became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*; and that under the trusts of the indenture, set forth in paragraph 15 of the said special case, the pursuer is not entitled, by the law of England, to the sum of £5500 therein also mentioned, either as having survived the original defender, or as a chose in action not reduced into possession by the original defender during his coverture.”

The first thing, accordingly, which this opinion establishes, is, that the estate of Overton had not been converted into personalty at the date of the marriage, but that it then belonged to Mrs Tennent in fee-simple, subject to a freehold estate of the husband therein during the continuance of the coverture—that is, as we should say, that the husband was entitled to the rents during the subsistence of the marriage. Had the estate been personalty at the date of the marriage, there would seem to be no room for doubt that, whether by the law of Scotland or of England, the price would have belonged to Mr Welch Tennent.

But that not being so, and the estate being heritable estate in the person of the wife at the date of the marriage, the question arises, whether the price of the estate on its sale after the marriage belonged to the husband or the wife, and that question appears to me to depend for its solution entirely upon this other question, whether the answer is to be sought in the law of England or in the law of Scotland. If the question is to be ruled by the law of England, there can be no doubt as to the answer, because, in the opinion of the High Court of

Justice, by the conveyance of the estate Mr Welch Tennent became by the law of England absolutely entitled to the price. No. 158.

On the other hand, if the law of Scotland is to determine the matter, I think that it is conclusively settled by the authorities referred to by the Lord Ordinary that, where a wife sells her heritable estate, the price received is regarded as the *surrogatum* of the heritable estate, and does not fall within the *jus mariti* of the husband, but remains the property of the wife; and, indeed, I did not understand that this was seriously disputed by the defender.

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The question therefore is, whether the rights of the husband and wife in this fund are to be regulated by the law of Scotland or by the law of England. That the fund is personal estate by the laws of both countries I do not think is disputed, because, as I understand the opinion, it is because it is personal estate that the High Court of Justice holds that by the law of England it belongs to the defender. But if it is personal estate, then it is the law of the domicile of the spouses which rules the matter. I think that this is quite settled by the authorities to which the Lord Ordinary refers, and which I need not again quote.

The domicile of the spouses in this case being Scotch, the result is that as soon as this moveable fund came into existence the right to it fell to be regulated by the law of Scotland, and that as it was the *surrogatum* of the wife's heritable estate it did not go to the husband, but remained her own property.

Nor do I see anything in the circumstances attending the sale to take the case out of the ordinary rule. The sale was simply a sale by a married woman of her heritable estate, with concurrence of her husband, under the authority of the Act 3 and 4 Will. IV. c. 74. No doubt there are provisions in that Act by means of which Mrs Tennent might, had she chosen, have protected herself to a greater or less extent from the operation of the law of England, by which the price of the estate as a moveable fund would become the property of her husband. She did not avail herself of these provisions, and had there been any question in this case as to whether she intended that the price should go to her husband, that circumstance no doubt might have been material. But as all gifts between husband and wife are revocable by the law of Scotland, it is of no materiality whether she intended to give the price to her husband or not, seeing that she has completely revoked all such gifts.

The defender further pleaded that the £18,000, which it is admitted that Mr Welch Tennent had received, had not been applied to Mr Welch Tennent's own uses and purposes, but had been applied, with the pursuer's consent, to the joint uses and purposes of himself and his wife; but the defender intimated that he was not prepared to undertake the proof thus allowed. That being so, it must be held that the money was applied to Mr Welch Tennent's own uses and purposes.

But the defender further pleaded that it appeared from the opinion of the High Court that the sale of the estate was a sale of the joint rights of husband and wife in the estate, and that Mr Welch Tennent would have been entitled to have the price received for it apportioned according to the value of their respective rights; and I understand that he proposes that an inquiry should now be made as to what would or might have been the actuarial value put upon Mr Welch Tennent's rights as at the date of the sale, and to retain this sum out of the price as his share thereof.

Had this claim been made at the time, I think it probably would have been difficult to resist it. But I think that such an inquiry now is quite out of the

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question. Mr Welch Tennent's right was a right to the rents of the estate during the subsistence of the marriage. He received the whole available price of the estate, and appropriated the whole interest or income of it to his own uses during the subsistence of the marriage.

The defender is not asked to repay any part of that interest or income. I agree with the Lord Ordinary in thinking that the price of the estate must be considered as coming in place of the estate itself, and that the interest or income of the price which Mr Welch Tennent received must be held as equivalent to the rents to which he was previously entitled.

I am of opinion therefore that the interlocutor of the Lord Ordinary should be in substance adhered to. There is, however, a small matter, apparently not brought under his Lordship's notice, in respect of which I think it should be slightly altered. He has decerned against the defender for the full sum of £18,000, but I think that there should be deducted from this sum the expenses of the sale, and any other charges of a similar kind which formed proper deductions from the price received by him.

LORD MURE concurred.

LORD SHAND.—I entirely concur, and I have only to say that, as I think the case has been very clearly and exhaustively dealt with by Lord Fraser in the opinions appended to his interlocutors of 20th October and 10th November last, I can add nothing.

LORD PRESIDENT.—I concur in Lord Adam's opinion.

THE COURT adhered to the Lord Ordinary's interlocutor, with these variations,—(1) that the expenses incurred by Mr Tennent in connection with the sale of Overton were allowed to be deducted from the amount found due by the Lord Ordinary's interlocutor; and (2) that decree against the defender was given against him in his capacity of executor and general disponee of his brother only.

PETER DOUGLAS, S.S.C.—HAGART & BURN MURDOCH, W.S.—Agents.

No. 159.

June 29, 1889.  
Stewart v.  
Kennedy.

SIR ARCHIBALD DOUGLAS STEWART, Pursuer.—*Dundas.*

JOHN STEWART KENNEDY, Defender.—*Murray—C. S. Dickson.*

*Process—Jury trial—Interlocutor approving issue—Appeal to House of Lords with view to obtaining second issue—Court of Session Act, 1850 (13 and 14 Vict. c. 36), sec. 13.*—In an action of reduction of missives of sale of a landed estate the pursuer proposed issues of facility and circumvention, and of essential error. The Lord Ordinary appointed the issue of facility and circumvention to be "the issue for the trial of the cause." On a reclaiming note the Court adhered, Lord Shand dissenting, on the ground that the pursuer was entitled to both issues. The pursuer having appealed to the House of Lords, the defender moved the Court to allow the cause to go to a jury on the issue as adjusted, on the ground that the question whether the second issue should be granted was not "necessarily dependent" on the interlocutor appealed against within the meaning of sec. 13 of the Court of Session Act, 1850.\* The Court *refused* the motion, the Lord President and Lord Adam doubting whether a trial pending appeal would be competent.

\* Sec. 13 of the Court of Session Act, 1850, enacts "that no reclaiming note to the Inner-House, and no petition of appeal to the House of Lords, in any process before the Court of Session shall be held to remove such process from before the Lord Ordinary or the Court, as the case may be, as regards any point or points not necessarily dependent on the interlocutor so submitted to review, but such process shall for all purposes and to all effects not necessarily depen-

(*VIDE Stewart v. Kennedy, ante, p. 857.*)

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In this action for reduction of missives of sale of an estate (the circumstances of which are fully set forth, *ante, p. 857*), the pursuer proposed issues of facility and circumvention and of essential error. The Lord Ordinary (Kinneer), on 28th May 1889 pronounced this interlocutor:—"Holds the issue, No. 12 of process [being the issue of facility and circumvention], as now amended as adjusted and settled; approves of the same as now authenticated accordingly, and appoints the same to be the issue for the trial of the cause."

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1ST DIVISION.  
Lord Kinneer.  
C.

On 25th June, on a reclaiming note at the instance of the pursuer, the First Division, *diss.* Lord Shand, adhered to the Lord Ordinary's interlocutor, and remitted to him to proceed.

The defender, Mr Kennedy, thereafter moved the Lord Ordinary to fix a day for the trial of the cause.

The pursuer opposed the motion on the ground that he was about to appeal to the House of Lords against the interlocutor of 25th June with a view to obtaining an issue of essential error.

On 29th June the Lord Ordinary reported the cause to the First Division.

Counsel for the pursuer stated that the appeal was ready, and would be served on Monday, July 1st.

Argued for the defender;—The Lord Ordinary had appointed an issue of facility and circumvention to be the issue in the cause, and the Court had affirmed his interlocutor. It was therefore competent for the cause to be sent to trial on that issue alone, unless the point whether an issue of essential error should be allowed was "necessarily dependent" on the interlocutor submitted to the review of the House of Lords within the meaning of section 13 of the Court of Session Act, 1850. But that point was not "necessarily dependent" on the Lord Ordinary's interlocutor. Issues of facility and essential error were quite distinct, and it was only as matter of convenience that they were tried together in the ordinary case; the questions raised and the lines of proof were quite distinct. It was then a question of expediency whether the cause should go to trial on the issue already adjusted, or whether it should be delayed to await the result of the appeal. It would clear the case (should the House of Lords allow an issue of essential error) if the question of fraud were decided and out of the way. Time was of great importance here considering the pursuer was eighty-one years of age, and the pursuer had no cause to complain of the proposed course of procedure, because, if he were successful on the issue of facility that would put an end to the case, while, if the House of Lords refused the appeal he would be none the worse from the trial having already taken place. The cause should be set down for the sittings, or a remit should be made to the Lord Ordinary to fix an early day for the trial.

Argued for the pursuer;—The question for the House of Lords to determine was, "What was the proper issue on which to try the cause?" That question was raised by the Lord Ordinary's interlocutor, which only allowed one issue, whereas the House of Lords might hold that two issues were essential. The point was thus necessarily dependent on the interlocutor submitted to review, and it was impossible from the wording of the interlocutor to split it up into two points, one of which was appealed and the other not.<sup>1</sup> Assuming, however, that the proposed course was

lent on such interlocutor remain before the Lord Ordinary or the Court as the case may be, and shall be proceeded in by the Lord Ordinary or the Court, notwithstanding such reclaiming note or appeal, if it appear to the Lord Ordinary or the Court to be expedient and proper."

<sup>1</sup> *Johnston v. Johnston*, Aug. 10, 1869, 3 Macq. 619, Lord Chancellor, p. 624.

No. 159. competent, it would be very unusual, in fact unprecedented, and a hardship on the pursuer, as, should the appeal be sustained, it laid upon him the anxiety and expense of two jury trials instead of one, and, further, would save little time, as the House of Lords would, in cases where despatch was urgently required, make arrangements for an early hearing.

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LORD PRESIDENT.—The motion now made by the defender is founded on section 13 of the Court of Session Act of 1850, which provides "that no reclaiming note to the Inner-House, and no petition of appeal to the House of Lords, in any process before the Court of Session shall be held to remove such process from before the Lord Ordinary or the Court, as the case may be, as regards any point or points not necessarily dependent on the interlocutor so submitted to review, but such process shall, for all purposes and to all effects not necessarily dependent on such interlocutor, remain before the Lord Ordinary or the Court, as the case may be, and shall be proceeded in by the Lord Ordinary or the Court, notwithstanding such reclaiming note or appeal, if it appear to the Lord Ordinary or the Court to be expedient and proper."

The first question to be considered is whether that section applies to the interlocutor which has been taken to appeal. That interlocutor is the interlocutor pronounced by Lord Kinnear on 28th May and affirmed by us on 25th June. Our affirmance was a simple one, and everything therefore depends on the terms of the Lord Ordinary's interlocutor. He "holds the issue as now amended as adjusted and settled; approves of the same as now authenticated accordingly, and appoints the same to be the issue for the trial of the cause." Now, if the House of Lords should reverse our judgment on the matter of the relevancy of the averments of essential error, the issues for the trial of the cause would necessarily be two in number, and not one only. Now, when the Lord Ordinary approved of "the same"—that is to say, a single issue—to be the issue, he necessarily determined that there could be no other issue for the trial of the cause. The question, then, which will come before the House of Lords seems to be, whether the issue of facility and circumvention approved by Lord Kinnear's interlocutor is to be the sole issue sent to trial, or, in other words, whether his judgment was sound or not.

If our judgment is reversed, and it is held that another issue is required, then the issue of facility and circumvention will not be "the issue" for the trial of the cause but only one of the issues. I think it would be inconsistent with the Lord Ordinary's interlocutor and with our affirmance to hold that there can be two trials, for the Lord Ordinary and this Division only contemplated one issue and one trial. In these circumstances I doubt the competency of proceeding with the trial on the issue already adjusted, and if there is any doubt about the question of competency there can be no doubt on the question of expediency.

LORD MURE.—There is here a nice question raised by the form of the interlocutor as to the points which will arise before the House of Lords. It may be that the House of Lords may hold that the proper issue has not been settled here or that another issue is required. In those circumstances I do not think it would be expedient for us to grant the defender's motion.

LORD ADAM.—Your Lordship in the chair has exactly expressed my opinion on this question, and I have nothing to add.

LORD SHAND was absent.

THE COURT refused the motion.

DUNDAS & WILSON, C.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

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June 29, 1889.  
Stewart v.  
Kennedy.

RAYMOND BLASQUEZ, Pursuer (Reclaimer).—*Murray—John Wilson.*

LOTHIANS RACING CLUB, Defenders (Respondents).—*J. C. Thomson—  
H. Johnston.*

COSMO REID, Defender (Respondent).—*M. Kechnie—Sym.*

No. 160.

June 29, 1889.  
Blasquez v.  
Lothians  
Racing Club  
and Reid.

*Process—Jury Trial—Issue—Counter issue—Reparation—Slander.*—In an action of damages for slander, the pursuer obtained the following issue:—“(1) Whether, on or about 5th October 1888, within the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, the defender, in the presence and hearing of” A B “and others, falsely and calumniously said of and concerning the pursuer, ‘this is the man who owes me money,’ or used words of similar import, meaning that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?” The defender proposed the following counter issue:—“Whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay?” The pursuer contended that the words “and was a person who ought not to be allowed to remain in the said ring or paddock” should be added to the counter issue. The Court held that those words should be added to the counter issue.

RAYMOND BLASQUEZ, Princes Street, Edinburgh, raised an action for 1st DIVISION. damages against (1) the Lothians Racing Club and the office-bearers and Ld. Wellwood. C. individual members thereof, and (2) against Cosmo Reid, bootmaker in Edinburgh. The grounds of action were that the defender Reid had by false representations slandered the pursuer within the ring or paddock at a race meeting at Musselburgh in October 1887, and had wrongfully expelled him or caused him to be expelled from the ring or paddock, and that the Lothians Racing Club had wrongfully expelled the pursuer or caused him to be expelled from the ring or paddock.

The pursuer proposed the following as the first issue against Reid:—“(1) Whether, on or about 5th October 1888, within the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, the defender Cosmo Reid, in the presence and hearing of Augustus Francis Meredith Powell, medical student, Edinburgh, and Walter Sprott of the Edinburgh Police Force, and others, falsely and calumniously said of and concerning the pursuer, ‘this is the man who owes me money,’ or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and that the pursuer ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?”

The defender Reid objected to the words “and that the pursuer ought not to be allowed to remain in the said ring or paddock,” on the ground that they were merely an inference from the innuendo which pursuer placed upon the defender’s words, and maintained that they should be struck out.

He also proposed a counter issue in these terms,—“Whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay,” and maintained that such a counter issue would meet the substantial part of the alleged libel, and that he was not bound to do more.<sup>1</sup>

<sup>1</sup> Torrance v. Weddell, Dec. 12, 1868, 7 Macph. 243, 41 Scot. Jur. 149; Ogilvie v. Paul, June 28, 1873, 11 Macph. 776, 45 Scot. Jur. 511; M’Iver v. M’Neill,



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Argued for the pursuer;—The words objected to in the pursuer's issue were a material part of the libel. If it was said that he owed money and dishonourably refused to pay, it was also said that he ought to be turned out of the society of honest men. The defender's counter issue must meet the libel, and therefore the words "and was a person who ought not to be allowed to remain in the said ring or paddock" should be added to it.

LORD PRESIDENT.—I think these words should be added to the counter issue for the defender Reid.

LORD MURE.—My impression was rather that these words were not needed, but I think the defender Reid must prove the allegation contained in these words as part of his defence, and I do not think there is any hardship in requiring him to do so. If a person is distinctly proved not to pay his racing debts, one may be entitled to infer from that that he is not a person to be allowed to remain in the ring. I accordingly do not see any harm in the addition of these words, and think they should be inserted.

LORD SHAND.—I agree with Lord Mure that there is no need to add these words. If the defender makes out the first part of his counter issue, he substantially meets the issue for the pursuer. But I am in the same condition of mind as Lord Mure, and see no harm in the addition of these words.

LORD ADAM.—The concluding words of the pursuer's issue form, I think, a substantial part of the libel, and if there is to be a counter issue, it must be made to meet that issue, and must include these words.

THE COURT adjusted these issues for the trial of the cause:—“(1. Whether, on or about 5th October 1888, within the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, the defender Cosmo Reid, in the presence and hearing of Augustus Francis Meredith Powell, medical student, Edinburgh, and Walter Sprott of Edinburgh Police Force, and others, falsely and calumniously said of and concerning the pursuer, ‘this is the man who owes me money,’ or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer? Damages laid at £2000. Or, Whether the pursuer was owing the defender money on betting transactions, which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock? 2. Whether, on or about 5th October 1888, the defender Cosmo Reid wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, to the loss, injury, and damage of the pursuer? Damages laid at £5000. 3. Whether, on or about 5th October 1888, the defenders the Lothians Racing Club wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, to the loss, injury, and damage of the pursuer? Damages laid at £5000.”

A. W. GORDON, Solicitor—GILLESPIE & PATERSON, W.S.—D. HILL MURRAY, S.S.C.—Agents

MARSHALL & AITKEN, Appellants (Reclaimers).—*Begg—Napier.*  
ROBERT COCKBURN MILLAR (Campbell's Trustee) AND ANOTHER,  
Respondents.—*Goudy.*

No. 161.

July 2, 1889.  
Marshall &  
Aitken v.  
Campbell's  
Trustee.

*Bankruptcy—Sequestration—Trustee—Compromise approved by general body of creditors—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 169.*—A trustee in a sequestration entered into a compromise with a debtor to the estate, whereby he waived certain claims against the debtor on payment of a certain sum, and the debtor waived claims of retention, which, if sustained, would have extinguished the trustee's claim. At a meeting of creditors a resolution was passed approving the compromise. A creditor appealed against that resolution, and prayed the Court to ordain the trustee to grant his consent, as concurring pursuer, to an action which he proposed to raise against the debtor for the full amount of his debt, the appellant guaranteeing the expense of the proposed action. The Court *refused* the appeal, on the ground that the reopening of the question settled by the compromise might result in loss to the estate.

ON 28th August 1888 the estates of Captain John Alexander Living-<sup>1ST DIVISION.</sup>  
ston Campbell were sequestrated, and Mr Robert Cockburn Millar, C.A.,<sup>Ld. Kyllachy.</sup>  
was appointed trustee.<sup>M.</sup>

Thomas J. Millar was the sole commissioner in the sequestration.

The trustee claimed from Captain Edward P. Campbell, the bankrupt's brother, £1132, which he had received on the bankrupt's account.

Captain Edward Campbell stated that from the sum received by him he had made payments to his brother and to certain creditors of his brother at various dates from February to 13th June 1888, amounting in all to £891, 2s. 7d.; and that he was entitled to retain the balance to account of a personal claim he had against his brother for advances to the amount of £1042, 7s. 10d.

In November 1888 the trustee, with the consent of the commissioner, agreed to accept payment from Captain E. Campbell of £241, 5s. 7d. in full of all claims against him, and this sum was paid.

On 25th March 1889 a special general meeting of creditors was held at the expense of Messrs Marshall & Aitken, clothiers, Edinburgh (who had lodged a claim for £161, 14s. on 28th December). A motion was proposed and seconded, "that the meeting approve of the conduct of the trustee in settling with Captain E. P. Campbell." Mr Tait, on behalf of Messrs Marshall & Aitken, moved that, in respect they were prepared to guarantee the expenses in an action instituted against Captain Edward Campbell in connection with his illegal intrusions as agent for the bankrupt, the trustee be requested to give his consent, as such trustee, to the action. As this motion was not seconded, the former motion approving of the trustee's conduct was duly carried.

Messrs Marshall & Aitken thereupon brought this appeal against the above resolution under the 169th section of the Bankruptcy (Scotland) Act, 1856.

The case was heard before the Lord Ordinary on the Bills (Kyllachy) on 28th May, and, upon his Lordship's suggestion, the trustee lodged a minute, in which he stated,—“The trustee, with the consent of the only commissioner acting in the sequestration, entered into communication with Captain E. P. Campbell and his agent, Mr Somerville Greig, W.S., Edinburgh, and made a claim for payment of the whole of said sum of £1132, 8s. 2d.; that Mr Greig thereupon submitted to the trustee duly vouched accounts, two in number, and which shewed disbursements by Captain E. P. Campbell on his brother's behalf amounting to £1933, 10s. 5d., including the sum of £1042, 7s. 10d. due to himself personally for

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advances made by him to or for his brother between 1879 and 1884, and claimed to set off the whole of said sum of £1132, 8s. 2d. as against these disbursements; that the trustee and commissioner, after examining said accounts, admitted £891, 2s. 7d. as proper deductions from said sum of £1132, 8s. 2d., but declined to admit the said sum of £1042, 7s. 10d., and claimed payment of the balance of said sum of £1132, 8s. 2d., which amounted to £241, 5s. 7d.; that Mr Greig at first refused to admit liability for said last-mentioned sum, but ultimately, after certain negotiations, and having obtained the opinion of counsel, he agreed to pay over the said sum of £241, 5s. 7d. in full of all claims by the estate against his client, and this sum was accepted by the trustee and commissioner in terms of this arrangement."

On 4th June the Lord Ordinary (Kyllachy) refused the appeal.\*

Marshall & Aitken reclaimed, and argued;—(1) Assuming that the transaction was a compromise, it was invalid in respect it was not carried through with the consent of two commissioners, as prescribed by the 75th section of the Bankruptcy Act, 1856. There were two creditors who had lodged claims, and there should have been two commissioners. The trustee was not therefore in a position to make a compromise.<sup>1</sup> (2) Assuming that the transaction was of the nature of a compromise, the compromise was not only injudicious but illegal. Captain Edward Campbell, knowing his brother's insolvency, had paid away to other creditors a sum of money belonging to the bankrupt in defraud of the general body of creditors. An insolvent's agent was not in the same position as the insolvent himself, and Captain E. Campbell would not have been entitled to pay himself in full.

Argued for the trustee;—(1) The objection stated under the 75th section of the Bankruptcy Act of 1856 was not good. At the date of the election of the trustee and the sole commissioner in the sequestration,

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\* "OPINION.—This is an appeal against a resolution of creditors approving of the conduct of the trustee in a sequestration in settling certain claims against Captain E. P. Campbell, the bankrupt's brother. The appellants contend that the settlement approved of involves the renunciation of a claim competent to the estate which ought to be enforced, and they desire to be allowed to prosecute the same at their own expense, and to obtain the trustee's instance to enable them to do so.

"Had the transaction complained of been of the character alleged, I should have thought the appellants were right. Neither the trustee nor the other creditors would in that case have had any legitimate interest to prevent the claim being prosecuted at the appellants' expense. But I am satisfied upon the documents produced, and upon the minute which has been lodged for the trustee, that the transaction was truly of the nature of a compromise, whereby the trustee waived certain claims against Captain E. P. Campbell, and on the other hand Captain Campbell waived certain claims of retention which, if well founded, would have extinguished the trustee's claims altogether. I have not the means of judging how far the claims thus mutually waived were well founded. That is a matter on which it appears to me that the trustee and the creditors were entitled to judge. It is enough for the present purpose that by the settlement in question the bankrupt estate obtains payment of a sum of £241, 5s. 7d., to which, according to Captain Campbell's contention, they were not entitled, and which, if the question were re-opened, as the appellants propose, might be ultimately lost to the estate. It cannot, I think, be said that in these circumstances the body of creditors have no legitimate interest to prevent the matter being re-opened. I therefore refuse the appeal, and find the appellants liable in expenses."

<sup>1</sup> Dennistoun v. Dennistoun's Trustees, June 4, 1863, 1 Macph. 869, 35 Scot. Jur. 523; Gray v. Fraser, Feb. 6, 1850, 12 D. 684.

there were only two creditors with claims in the sequestration. One of these declined to act as commissioner, and in these circumstances the other creditor had to act as commissioner alone. Further, the resolution approving of the trustee's conduct was a resolution approving of what was on the face of the documents a compromise. (2) The trustee had in the exercise of a wise discretion agreed to accept from Captain Edward Campbell the sum of £241, 5s. 7d., giving up all further claims against him. Captain Campbell would have been entitled legitimately to set off the whole sum in dispute against a much larger debt due to him by the bankrupt. The trust-estate had thus been secured in a sum of money which might ultimately be lost to it if an action was raised against Captain Campbell by the appellants. He would be entitled to reopen the whole question settled by the compromise. In the case of *Spence v. Gibson*,<sup>1</sup> the compromise was inchoate, and the creditor wishing to raise an action guaranteed that no loss should be sustained by the trust-estate.

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**LORD PRESIDENT.**—In this case I agree with the Lord Ordinary.

It seems to be questioned whether the arrangement arrived at between the creditors and Captain E. P. Campbell was in the nature of a compromise, but I have no doubt that it was. The claim of Captain Campbell on the one hand to retain all the money was waived, and on the other hand the trustee restricted his claim to £241, 5s. 7d. There was the giving and taking on both sides necessary to constitute a compromise. The compromise is not made, as is the usual case, merely by the trustee and the commissioners, in consequence of there being only one commissioner on the estate at the time, and the trustee and that commissioner thought it desirable to bring the matter before the general body of creditors. A special meeting of creditors was accordingly called, and when it was held the creditors unanimously approved of what had been done with the exception of the appellants, Marshall & Aitken. They desired to open up the whole matter, and to sue Captain E. P. Campbell in the trustee's name for payment of a much larger amount than the trustee undertook to receive as a matter of compromise. Of course such a proceeding would bring into peril the £241, 5s. 7d. paid to the trustee, for if Captain Campbell is sued for a larger sum than he has paid over under the compromise he must be allowed to plead that he is not due anything to the trust-estate, and the trust-estate may consequently lose the £241 altogether.

In these circumstances I do not think it can be said that the creditors have done wrong in refusing to allow the appellants to use the trustee's name, for the question which the appellants propose to raise might be to the great detriment of the trust-estate.

**LORD MURE.**—I am of the same opinion. I agree with your Lordship that there was a compromise arrived at here, and it appears to have been of this sort—the matter was brought before the general body of creditors, and the arrangement come to by the trustee was approved of. Now, if an arrangement by the trustee has been deliberately approved of, it will not help the matter to a proper conclusion if we sanction a demand by an individual creditor to be allowed to act contrary to the resolution of the general body of creditors by suing a particular claim. I think therefore the decision of the Lord Ordinary is sound.

**LORD SHAND.**—I am of the same opinion. The case is one in which a com-

<sup>1</sup> *Spence v. Gibson*, Dec. 13, 1832, 11 S. 212, 5 Scot. Jur. 160.

No. 161. promise was made, not by the trustee and commissioner in the séquestration, but by the creditors themselves, who sanctioned and adopted it.

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In such cases the Court will refuse to confirm such a resolution, when appealed against by a complaining creditor, where it appears that the creditors are sacrificing the estate in any way, *e.g.*, by taking a small sum in discharge of a large claim with nothing clearly to justify this being done. But then, I take it that the person who proposes to get the use of the trustee's name in order to enable him to challenge the resolution or transaction must undertake to keep the bankrupt estate secure against loss—must insure that the estate shall not lose any advantage it may have gained by a compromise.

There was a question between Captain Edward Campbell and the trustee. The former claimed to be entitled to retain the whole sum paid to him by Messrs Cox & Company, and the trustee agreed that if he was paid the sum of £241, 5s. 7d. he would undertake not to go back upon the payments made by Captain Campbell to other creditors. The matter was thus compromised. The proposal of the appellants now is to reopen the whole question, and if they succeed there might arise a loss to the trust-estate, because it is quite clear that if the compromise is held to be ineffectual the trustee must repay this sum of £241, 5s. 7d. I agree with the Lord Ordinary where he says,—“It is enough for the present purpose that by the settlement in question the bankrupt estate obtains payment of a sum of £241, 5s. 7d., to which, according to Captain Campbell's contention, they were not entitled, and which if the question were reopened, as the appellants propose, might ultimately be lost to the estate.” The appellants cannot dispute that this may be the ultimate result of the proceedings which they propose to take. I think that this resolution is not one of the class with which the Court will, in the circumstances, interfere, and I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—I concur, and I think that the Lord Ordinary has put the case exactly upon the right grounds. The case was one of compromise, and that being so, the resolution appealed against ought not to be disturbed.

If the appellants had, at the meeting of creditors, offered to keep the trust-estate *indemnus* from loss and the costs of the action they proposed to raise in the trustee's name, and if this offer had been refused, that would have raised a different question. But we have none such here, and I think, therefore, that we ought to adhere.

THE COURT adhered.

TAIT & JOHNSTON, S.S.C.—SMITH & MASON, S.S.C.—Agents.

No. 162. JAMES NELSON, Pursuer (Reclaimer).—*Sir Charles Pearson*—*Loc.*  
THE ASSETS COMPANY, LIMITED, Defenders (Respondents).—*Murray—Salvesen.*

July 3, 1889.  
Nelson v.  
Assets Co.,  
Limited.

*Sale—Offer and acceptance—Qualification of offer—Consensus in idem.*—N. wrote this letter to A.,—“I hereby offer to purchase the following parts of the tenement . . . . known as His Lordship's Larder . . . .” The parts were described in detail, and a price was named. A. replied,—“I hereby accept your offer, as copied on the other side, . . . . for our interest in the property known as His Lordship's Larder.”

On examination of the titles it appeared that A. had no clear and indisputable title to certain portions of the subjects specially described.

In an action by N. to enforce implement, the Court *assolized* A., on the ground that the missives did not constitute a completed contract for the purchase and sale of the subjects.

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July 3, 1889.

Nelson v.  
Assets Co.,  
Limited.2D DIVISION.  
Lord Kinnear.  
M.

ON 6th December 1886 William Logan, house-factor, Glasgow, wrote the following letter to W. D. Husband, submanager of the Assets Company, Limited, Edinburgh:—"Dear Sir,—I hereby offer to purchase the following parts of the tenement at the south-west corner of the entrance from Argyle Street to St Enoch Square, known as His Lordship's Larder, namely, the top storey, with all the garret storey, except (a) garret room, ten feet square, in middle or nepos of storey; and (b) middle garret room with skylight; also four cellars north of Hunter's, except the eastmost back sunk cellar, with free ish and entry by the common close on the north to Argyle Street, and with a common right along with the other proprietors to the court behind, with entry from Adam's Court Lane. The price to be £3000 sterling, and to be paid at Whitsunday next, 1887, when I am to have entry, free of leases, . . . . . You are to allow £2000 of the price to lie on bond at 4½ per cent for five years from date of entry. Your acceptance will oblige." On 9th December Mr Husband sent in reply the following letter:—"Dear Sir,—As authorised by the directors, and on behalf of this company, I hereby accept your offer, as copied on the other side, dated 6th instant, of £3000 (three thousand pounds) for our interest in the property known as 'His Lordship's Larder,' St Enoch Square."

This action was raised by James Nelson, tobacco manufacturer, Greenock, to whom Mr Logan had sold and assigned his whole right, title, and interest in the subjects of the above offer and acceptance. The pursuer sought to have the company ordained to implement their part of the alleged contract, and to deliver up a valid disposition to the subjects contained in the offer and acceptance. The pursuer further sought to have the defenders ordained to pay £2000 damages in the event of failure to implement the contract.

The pursuer averred, and the defenders admitted, that from the progress of titles submitted to Logan's agent, in order that his agents might prepare a disposition in his favour, it appeared that the defenders had no title to one of the cellars sold, nor to the court behind the subjects, and no title to ish and entry by the common close on the north to Argyle Street, or by the entry from Adam's Court Lane. The pursuer further averred that the defenders had failed when called upon to clear the title or to grant a disposition with warrandice, and that he had suffered damage to the extent of £250 through their delay, which prevented his carrying out arrangements made with a purchaser to give possession of the subjects at Whitsunday 1887.

The pursuer pleaded;—(1) The defenders having contracted to sell to the pursuer's cedent the subjects enumerated in the contract of sale, they are bound to grant in the pursuer's favour a valid disposition thereof. (2) The defenders having failed to produce a valid progress of titles to the whole subjects sold, and having refused to grant a disposition of the said subjects with warrandice, they are liable in damages.

The defenders pleaded;—(2) In terms of said acceptance, the defenders were only bound to convey the property as it stood in their persons, and having offered a conveyance in said terms, they should be assolized. (3) *Separatim*. There having been no *consensus in idem placitum et conventio*, the defenders are entitled to absolvitor.

On 14th December 1888 the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Finds that the letters specified in the condescendence do not constitute a completed contract for the purchase and sale of the subjects

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described in the conclusions of the summons: Therefore assolizies the defenders from the conclusions of the summons, and decerns," &c.\*

\* "OPINION.—This action is brought to enforce performance of a contract for the purchase and sale of a portion of a house or tenement of houses in Glasgow, and the question is whether letters passing between the parties constitute a concluded contract to that effect.

"The pursuer is not a party to the correspondence, but the assignee of William Logan, house-factor in Glasgow, who writes to the defenders' manager a letter, dated 6th December 1886, containing the offer which is said to have been accepted. The pursuer alleges that at that date the writer of the letter had not examined the title-deeds of the property in question, but, without reference to the titles, his letter contains a sufficiently clear and specific description of the subjects which he proposes to buy. 'I hereby offer to purchase the following parts of the tenement at the south-west corner of the entrance from Argyle Street to St Enoch Square, known as His Lordship's Larder, namely, the top storey, with all the garret storey except (a) garret room, ten feet square, in middle or nepos of storey; and (b) middle garret room with skylight; also four cellars north of Hunter's, except the eastmost back sunk cellar, with free ish and entry by the common close on the north to Argyle Street, and with a common right along with the other proprietors to the court behind, with entry from Adam's Court Lane. The price to be £3000 sterling, and to be paid at Whitsunday next 1887, when I am to have entry, free of leases, with the exception of Costigane Brothers, as to which I am to have possession six months after the date of your acceptance hereof. You are to allow £2000 of the price to lie on bond at 4½ per cent for five years from date of entry. Your acceptance will oblige.' On the 9th of December Mr Husband, the defenders' manager, answers in these terms:—'As authorised by the directors, and on behalf of this company, I hereby accept your offer, as copied on the other side, dated 6th instant, of £3000 for our interest in the property known as "His Lordship's Larder," St Enoch Square, and in accordance with your stipulation as to the close 179 Argyle Street, leased to Messrs Costigane Brothers, I have given notice to the lessees that possession is required in terms of articles 1st and 3d of the relative minute of agreement and lease.'

"Now, if the defenders' right of property in the tenement known as 'His Lordship's Larder' had corresponded exactly with the description in Mr Logan's offer, there would probably have been no question as to the meaning and effect of these missives. But it turns out, according to the pursuer's averment, that they have no title, and by their own admission that they have no clear and undisputed title to certain portions of the subjects, viz., one of the cellars, the court behind the subjects, and the rights to ish and entry specially described. The defenders cannot convey to the pursuer rights which they do not themselves possess. But, on the other hand, it is clear enough, first, that the pursuer cannot be required to accept a conveyance which will be ineffectual to carry any part of the subjects specifically described in the offer; and secondly, that if the defenders have in fact contracted to sell and convey the whole of these subjects, they will not be excused from the consequences of wilful non-performance by reason of any defect in their own right or title. But I am of opinion that they have made no such contract. The defenders' manager does not accept the offer in the exact terms in which it is made, but accepts it as an offer for 'our interest' in the property described, and that appears to me to introduce into the acceptance a qualification which was not in the offer. It is a qualification which it was very natural to make in the circumstances, because the state of possession was such as to render it not improbable that questions might arise as to the exact import and bearing of the title. It was very natural, therefore, that the defenders should introduce a term into their acceptance which would serve to exclude from the bargain, if the purchaser agreed to it, any part of the property which did not belong to them, or in which they had no interest. I think the words they have used are sufficient for that purpose, and it follows that their letter is not an absolute and unequivocal acceptance which would

The pursuer reclaimed, and argued;—The offer was perfectly clear and unambiguous in its terms, and the same was true of the acceptance. The latter referred to the former as “copied on the other side,” importing an absolute agreement to buy the subjects therein described. The Lord Ordinary had viewed the acceptance as a counter proposal which the pursuer was not bound to accept. If the defenders intended that their acceptance should be of this nature, they ought to have called Mr Logan’s attention more definitely to it.<sup>1</sup>

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Argued for the defenders;—The Lord Ordinary had taken a sound view of the transaction alleged to be carried out by the missives. The acceptance was simply one with a qualification. If the pursuer’s argument was sound then the words “our interest” were pleonastic. If the defenders had meant to accept the pursuer’s offer in terms, then they would have merely said “we accept your offer.” The qualification of “our interest” was a perfectly natural one to make, because the state of possession was such as to render it not improbable that questions might arise as to the exact import of the title. The English case relied upon by the pursuer was not in point, because in it there was no introduction of a totally new term of contract as there was here. There was here no *consensus in idem*, and therefore no completed contract of sale.

At advising,—

LORD JUSTICE-CLERK.—The pursuer seeks to have the defenders ordained to deliver to him a valid disposition of the subjects described in the summons. The demand is made in these circumstances. Mr Logan, a house-factor, in whose right the pursuer is, wrote a letter, on 6th December 1886, to the Assets Company in which he offered to purchase certain parts of the tenement at the south-west corner of the entrance from Argyle Street to St Enoch Square, these

make the contract complete, but a counter proposal which the maker of the offer was not bound to accept, and which he has not in fact accepted. There is therefore no contract, because it is very clear in law that no contract can be constituted by missive letters, unless the letters contain an absolute and unqualified acceptance on the one part of the exact terms proposed on the other part.

“It is said that, inasmuch as it refers to the offer as ‘copied on the other side,’ the defenders’ letter must be held to import an absolute agreement to sell the subject specifically described, irrespective of any question as to their own right or title. I cannot assent to that construction, because it makes the words ‘for our interest’ unmeaning. The reference to the offer makes it clear enough that the parties were substantially at one as to the subject-matter of the proposed contract; but it does not, in my judgment, import a guarantee that every part of the description is exactly accurate, and the qualifying words which immediately follow are sufficient to shew that no such guarantee was intended. But assuming that the construction of the defenders’ letter is not so clear as they suppose, it is at least ambiguous, and the pursuer’s understanding of its terms is different from that of the defenders. But if that be so, there is no contract, because there is no *consensus in idem*.”

“The cases of *Robertson v. Rutherford* (July 18, 1840, 2 D. 1494, 12 Scot. Jur. 672), and *Whyte v. Lee* (Feb. 22, 1879, 6 R. 699), on which the pursuer relies, do not appear to me to support his argument. But they are not directly in point, because the only question in this case is whether the language employed by the defenders in their letter imports an unqualified acceptance of the terms proposed to them; and that is a mere question of construction, upon which there is no light to be derived from decisions as to the interpretation of other documents in different terms.”

<sup>1</sup> *Addison on Contracts*, p. 17; *Proprietors, &c., of English and Foreign Credit Co. v. Arduin*, March 13, 1871, L. R., 5 Engl. and Irish App. 64, and cases cited in the Lord Ordinary’s note.



**No. 162.** parts being described in detail. He named a price, and there were certain other stipulations in the offer, which are of no importance in the consideration of the case. The answer to this offer was in these terms, and was written by the sub-manager of the company:—"As authorised by the directors, and on behalf of this company, I hereby accept your offer, as copied on the other side, dated 6th instant, of £3000 for our interest in the property known as 'His Lordship's Larder,' St Enoch Square."

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Now, the pursuer asks that this acceptance should be read as if it had run thus:—"We accept your offer for our interest as described by you," for unless the acceptance is exactly for the subjects the pursuer offered for, there can be no valid acceptance.

I am unable to adopt this reading. I read the letter of the company as it has been read by the Lord Ordinary. I think the acceptance was one simply for the defenders' "interest" in the property, whatever that might be. I cannot read it as an acceptance by the Assets Company by which they accepted the pursuer's offer to purchase all the subjects described in the letter of the 6th December. There was no completed sale, the acceptance not corresponding with the offer. Further writing would have been necessary to complete a bargain. I am therefore of opinion that the interlocutor of the Lord Ordinary is right.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK.—I have found this case attended with difficulty, but upon the whole I concur in the judgment proposed.

LORD LEE concurred.

THE COURT adhered.

DOVE & LOCKHART, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

**No. 163.** J. B. K. M'INTYRE AND OTHERS (Mitchell's Trustees), First Parties—*Deas*  
ANNE JANE BARBOUR OR FERGUS, Second Party—*J. C. Lorimer.*

July 3, 1889.  
Mitchell's  
Trustees v.  
Fergus.

*Succession—Legacy—Ademption—Paisley Corporation Gas Act, 1870 (33 and 34 Vict. c. xxxv.), sec. 23.*—A testator bequeathed a legacy of "the shares standing in my name in the Paisley Gas Company." Before the date of the will a local Act had transferred the right of supplying gas to Paisley to the corporation, substituting annuities payable to the shareholders of the Paisley Gas Company for the shares in the company, and had provided that the annuities should be conveyed or affected by any deed or will which disposed of the shares. Subsequently to the will, and before the death of the testator, these annuities had been redeemed by the corporation, and the price of the testator's annuity had been lent to the corporation on a mortgage over the gas undertaking. *Held (diss. Lord Rutherford Clark)* that the legacy was not adeemed, and that the legatee was entitled to the mortgage as representing the shares.

2D DIVISION.  
M.

MRS MARY MITCHELL died at Largs, Ayrshire, on 19th February 1888, leaving a trust-disposition and settlement, dated 2d August 1884, and codicil, dated 14th October 1885. By the settlement she conveyed her whole estate to trustees, for certain purposes. By the fourth purpose she directed the trustees "to assign and transfer to my niece, Anne Jane Barbour, the shares standing in my name in the Paisley Gas Company."

Before the date of Mrs Mitchell's will the Paisley Gas Company had ceased to exist, and the interests of the shareholders had been converted into annuities payable by the corporation of Paisley, and before her death the corporation had redeemed her annuities, and at the date of her death she held a mortgage for the price, £320, from the Magistrates of Paisley, executed under the Paisley Corporation Gas Act, 1870. A

question arose between the trustees and Anne Jane Barbour (who had married a Mr Fergus) as to whether the latter was entitled, as the subject of the legacy, to the mortgage of £320. This special case, to which the trustees were first parties, and Mrs Fergus was second party, was stated to have the question determined.

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The following were the material facts:—By the Paisley Corporation Gas Act, 1870 (33 and 34 Vict. cap. xxxv.) the power of supplying gas for the town of Paisley was placed in the hands of the corporation of Paisley, and the corporation were required to pay to the shareholders of the Paisley Gas Company annuities at a certain rate on the amount paid upon their shares, and it was enacted that “all the shares of the company shall from and after the commencement of this Act be held to be extinguished.”

It was also enacted (sec. 23) that “the annuities shall in all respects be substituted for and represent shares in the capital of the company . . . and the annuities shall be conveyed or affected by any deed, will, or other instrument disposing of or affecting such shares.”

The Act further provided that the annuitants should be “creditors of the corporation for payment of the annuities respectively hereinbefore provided to be paid to them,” holding in security a mortgage over the lands and works vested in the corporation for the purposes of the Act.

It was also provided that the corporation might from time to time redeem the annuities on giving certain notices of their intention so to do.

At the passing of the Act of 1870 Mrs Mitchell's husband was owner of shares in the gas company to the nominal value of £150, and she was owner of shares to the nominal value of £50. After that Act they held the annuities into which these shares had been thereby converted. Mr Mitchell died in 1879, and Mrs Mitchell succeeded to his annuities, which were transferred to her name. She continued to hold both them and her original annuities at the date of her settlement in 1884.

In 1885 the corporation resolved to redeem the gas annuities, and gave the statutory notices of their intention. They also sent out a circular to the holders thereof, stating the sums of redemption money to which they were entitled (in Mrs Mitchell's case, £320), and offering to receive proposals for loans at 3½ per cent to replace a portion of the annuities. No correspondence took place between Mrs Mitchell or her agent and the corporation, but her agent arranged verbally with the treasurer of the corporation that she would lend the £320, and she received from the corporation a mortgage, dated 9th February 1886, repayable in 1891, in the terms quoted below.\*

The question of law was,—“Is the party of the second part entitled to demand, and are the parties of the first part bound to assign and transfer to the second party the said mortgage for £320, or has the said legacy in

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\* “By virtue of ‘The Paisley Corporation Gas Act, 1870,’ we, the Magistrates and Town-Council of the burgh of Paisley (hereinafter called a corporation) in consideration of the principal sum of £320 sterling paid by Mrs Mary Barbour or Mitchell, residing at No. 11 Union Street, Largs, to the treasurer, for the purposes of the said Act, do hereby grant and assign to the said Mary Barbour or Mitchell, and her executors, administrators, and assignees, such proportion of the several rents, charges, and revenues (except the gas guarantee rate) accruing to the corporation from the lands, property, and works vested in them under the authority of the said Act, and which have been or may be constructed and acquired by them for the purposes of that Act, and from the sale of gas and of residual products, as the said sum of £320 sterling doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rents, charges, and revenues.”

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favour of the said second party been adeemed, and does the amount thereof fall into residue?"

Argued for the first parties;—The legacy was a specific legacy of shares. It was adeemed by reason of the fact that the shares of which it consisted were transformed into annuities, and that these annuities had been bought up by the corporation. The deceased had been offered, and must be taken to have received, cash for her shares, or rather for the annuities into which they had been converted. She had lent that money to the corporation. It formed a substantially different thing from the subject of the original bequest. The loan was a purely voluntary loan on her part. It could not therefore be said that the only thing which had occurred to affect the legacy was due to a supervening cause quite apart from the testator's will.<sup>1</sup>

Argued for the second party;—The question was whether the subject of the legacy was not throughout substantially the same.<sup>2</sup> The state of fact was that the will itself did not use accurate language. In 1884, when it was made, the testatrix had no gas shares. She had already become a creditor for an annuity instead of a holder of shares. Her intention was quite clear. After the date of her will the annuities were redeemed, but the price just represented them, and was allowed to remain with the same debtor on the security of the same undertaking.

At advising,—

LORD JUSTICE-CLERK.—This case raises a question of some difficulty. The late Mrs Mitchell had at one time some shares in the Paisley Gas Company. Her husband also had some shares of the same company. These shares were, under an Act by which the Paisley Gas Commissioners took over the gas works from the old company, converted into annuities. She on her husband's death succeeded to his interest in these annuities. Having thus certain gas annuities, Mrs Mitchell, by the fourth purpose of her settlement, dated in 1884, directed her trustees "to assign and transfer to my niece, Anne Jane Barbour, the shares standing in my name in the Paisley Gas Company." Now, in 1884, she had no shares in any Paisley Gas Company, there being no Paisley Gas Company then in existence, and the shares having been converted into annuities.

A further complication took place between the date of the settlement in 1884 and the death of Mrs Mitchell in 1888. In the beginning of 1885 the corporation of Paisley, under powers contained in the Gas Act known as the Paisley Corporation Gas Act, resolved to redeem the gas annuities, and Mrs Mitchell's annuities thus ceased to exist. The corporation were willing that the sum for which they were to be liable as the redemption price of the annuities should be taken in loan by them at 3½ per cent, and accordingly the price of Mrs Mitchell's interest in the annuities, instead of being repaid to her, became, under an arrangement made for her by her agent, a loan to the corporation by her. That loan was in existence when she died.

Now, it appears to be the fact that Mrs Mitchell herself knew little about how the matter stood. There was no correspondence about it, and her agent made a verbal arrangement with the treasurer of the corporation as to the loan. She seems, at the date of her will in 1884, to have had no idea that the shares

<sup>1</sup> *Authorities*.—Chalmers v. Chalmers, Nov. 19, 1851, 14 D. 57; Anderson v. Thomson, July 17, 1877, 4 R. 1101; Luard v. Lane, 1880, L. R. 14 Ch. Div. 856; Harrison v. Jackson (1877), L. R. 7 Ch. Div. 339; Roper on Legacies, i. 331, 333.

<sup>2</sup> Oakes v. Oakes, 1852, 9 Hare, 666; Jack v. Lauder, 1742, M. 11,357; McLaren on Wills and Succession, i. 260.

had been changed into annuities, and there is no reason to suppose that after 1884 she knew that the annuities had been changed into a loan. She probably received her return, whether of dividend, annuity, or interest, without troubling herself as to the form of her security.

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Now, the settlement she left requires construction. She had no asset such as "shares in the Paisley Gas Company." But when we look at her estate we find that she had a sum invested in a gas undertaking belonging to Paisley at the time she made the settlement, and at the time of her death, when the settlement came into operation, the annuities had become a loan. There is no doubt that the sum in the loan is the sum which had been represented by annuities, and before that by shares. This therefore is certainly not the usual case of ademption of a legacy. In such a case there is a specific thing which is the subject of the legacy, and the bequest of it falls in consequence of the testator dealing with it so as to nullify the gift. For example, if a picture is the subject, the testator may have sold it or given it away during his life, or if shares form the subject, he may have turned them into money during his own life. But here the case is very different. There has been no action on the part of the testatrix indicating her intention to convert the subject into something else, or to deal with it in any way so as to bring the bequest to an end. She left her money where it was. No doubt the form of the investment was changed, but the case lacks the essential feature of ademption—the conversion of the subject so as to indicate an intention to depart from the previously evinced desire that a particular thing should go to a particular individual. It is to be observed, indeed, that none of the changes which were made were voluntarily made by herself. Each was enforced by the exercise of a right on the part of another, in one case a right to redeem, in the other a right to convert into an annuity. But for these various exercises of that power, which Mrs Mitchell had nothing to do with, it is plain that no change in the subject would have taken place. Mrs Mitchell knew that her money was invested in a gas undertaking. The form of the investment, however, did not influence her. She wished the money which was invested in that way to go to her niece. There is no difficulty in identifying the sum. It is the only sum to which she can refer. I am of opinion that the conversion of it into a loan to the corporation did not extinguish the legacy. We are, I think, entitled to consider all the circumstances, and I think no change of the intention that the money was to go to her niece can be inferred. I am therefore of opinion that we ought to find that the trustees must transfer to the niece the mortgage for £320.

LORD YOUNG.—I concur. The legacy is one of "shares standing in my name in the Paisley Gas Company." Now, that was an inaccurate description at the date of the will itself. But it is not doubtful what was intended, and I am of opinion that the will, notwithstanding that inaccuracy, was effectual to carry out that intention. The language was still more inaccurate at the date Mrs Mitchell died, for the change from annuities into a loan had taken place. But I think that the intention is sufficiently indicated to warrant, indeed to compel, the trustees to give effect to it. On the facts of the case, without departing from the principle of ademption at all, I am of opinion that the legacy was not adeemed, and that the legatee is entitled to it.

LORD RUTHERFURD CLARK.—I regret that I cannot concur in the judgment which your Lordship proposes. It is very likely that the testator intended that

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the party of the second part should take the money which is in question. But I do not think that we are entitled to proceed on any such conjecture, however probable.

The trustees are directed to transfer to Anne Jane Barbour the shares standing in the testator's name in the Paisley Gas Company. At her death the testator had no shares in that company, which, under an Act passed in 1870, had been acquired by the corporation of Paisley. But she was creditor in a mortgage for £320 over the undertaking belonging to the corporation. The money so invested was the proceeds of an annuity which she had previously held from the corporation, being the statutory equivalent which she received and was bound to receive for her shares in the gas company.

The 23d section of the Act by which the shares were converted into annuities declares that "the annuities shall in all respects be substituted for and represent shares in the capital of the company, . . . and the annuities shall be conveyed or affected by any deed, will, or other instrument disposing of or affecting such shares."

The testator's will was made after her shares had been converted into an annuity. I am willing to assume that the direction to transfer the shares would have been sufficient to dispose of the annuity. But to my mind this does not furnish a solution of the question before us. The annuity represents the shares, but there is no similar statutory declaration applicable to the mortgage.

The corporation of Paisley had a statutory power to redeem the annuities which they had granted under the Act of 1870, and they exercised that power. It was in the option of the testator to require payment of the redemption money or to take a mortgage over the undertaking. She chose the latter alternative.

If she had taken payment I conceive it to be clear that the legacy would have been adeemed, because the subject of it would have ceased to exist. I see no reason to doubt that the same result would have followed if she had invested the money in another security. The fact that the money so invested could be shewn to be the produce of the gas shares or of the annuity would not avail to preserve the legacy, for the simple reason that a bequest of the testator's gas shares could pass nothing but the shares themselves or their statutory equivalent. In my opinion, a legacy of the shares will not pass the produce of the shares, or any security on which that produce may be invested, unless there be some statutory enactment applicable to such produce or security similar to that which I have quoted regarding the annuity. For the same reason I think that the bequest which we are now considering cannot transfer the mortgage held by the testator over the undertaking belonging to the Paisley corporation. That mortgage is neither gas shares, nor has it been declared to be a statutory representative or equivalent for gas shares. It is nothing more than a security which the testator chose to take. When she parted with her shares, or rather with the annuity which was the equivalent of these shares, the subject of the legacy perished, and therefore in my opinion the legacy is adeemed.

LORD LEE.—The question in this case arises upon a direction in the trust settlement of the late Mrs Mary Barbour or Mitchell "to assign and transfer to my niece, Anne Jane Barbour, the shares standing in my name in the Paisley Gas Company."

It appears that at the date of her settlement (2d August 1884) there were no "shares" in the gas company standing in the testator's name. The Act of

1870, narrated in the case, had extinguished the shares, and substituted certain annuities. These were declared to be conveyed or affected by any deed or will disposing of or affecting such shares. But strictly speaking, there was nothing standing in the name of shares in Mrs Mitchell's name. She was merely a creditor in a gas annuity due by the corporation. No. 163.  
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The question is whether the subsequent redemption of this annuity in January 1886 under another clause of the same statute, and in terms of a circular issued by the corporation proposing to allow the redemption money to be invested as a loan secured upon "the several rents, charges, and revenues (except the gas guarantee rate) accruing to the corporation from the lands, property, and works vested in them under the authority of the said Act,"—viz., the Act under which the corporation acquired the gasworks and gas undertaking—together with the testator's acceptance of that proposal—so completely extinguished the subject of the bequest, that the legacy must be held to have been adeemed?

I have no doubt of the general rule of law that if the subject of the bequest ceases to exist, the legacy is at an end by ademption. This may occur in many cases even without evidence of intention.

I think that in this case the question of ademption depends upon the intention of the testator. For unless it can be made clear that the subject of the bequest, as viewed by her, was brought to an end, there is no ademption.

The testator's position at the time of her bequest was that of a creditor of the corporation for an annuity secured upon the gas undertaking, and the only change which was effected was that she became in respect of her right to the redemption money a creditor in a loan for the capital value of the annuity secured in the same way.

It was not a change from the position of shareholder into that of creditor. Nor was it from the position of creditor to that of shareholder. And on the whole, I think that the continuity of the subject of the bequest was sufficiently preserved to entitle the legatee, in the absence of any indication of intention to the contrary, to claim the testator's interest in the Gas Corporation loan, as representing the annuity, which was declared to be affectable by any deed or will disposing of the original shares.

I am of opinion, therefore, that the legacy was not adeemed, and that the Court should answer the first part of the question stated in this case in the affirmative.

THE COURT pronounced this interlocutor:—"The Lords are of opinion that the party of the second part is entitled to demand, and that the parties of the first part are bound to assign and transfer to the second party the mortgage for £320."

FODD, SIMPSON, & MARWICK, W.S.—WINCHESTER & NICHOLSON, S.S.C.—Agents.

WYLIE & LOCHHEAD, LIMITED, Pursuers (Appellants).—*M<sup>r</sup> Kechnie—C. N. Johnston.*

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JAMES HORNSBY, Defender (Respondent).—*Jameson—M<sup>r</sup> Lennan.*

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head, Limited,  
v. Hornsby.

*Guarantee—Mandate.*—A father, at the request of his son, signed and delivered him to be filled up a blank paper stamped with a sixpenny stamp. The son filled in above the signature the words:—"Messrs A and B,—I hereby guarantee payment of £500 by my son J. H., and the payment of the premiums of insurance on his policies . . . assigned to your firm." The son, a few days

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afterwards, assigned the policies by assignation *ex facie* absolute to the creditor to whom the guarantee was to be delivered. The £500 was paid, but the father, on being informed of the obligation to pay the premiums, repudiated liability. In an action raised against the father by the creditor to enforce the obligation for payment of the premiums, *held* that as the document founded on was not tested or holograph the *onus* lay upon the pursuer to prove that the defender had authorised the obligation to pay the premiums to be inserted above his signature, and that the pursuer had failed to prove such authority.

2D DIVISION.  
Sheriff of  
Kirkcud-  
bright.

I.

WYLIE & LOCHHEAD, Limited, furniture-dealers, Glasgow, raised an action in the Sheriff Court at Kirkcudbright, in July 1887 against James Hornsby senior, builder, Gatehouse, for payment of £47, 7s. 11d., being the amount of premiums of insurance paid by them in keeping up two policies of assurance on the life of James Hornsby junior, the defender's son, payment of which premiums they alleged to have been guaranteed by the defender. They also concluded that the defender should be ordained to relieve them of payment of future premiums.

The pursuers stated that James Hornsby junior had, on 3d February 1874, assigned to John Wylie, as sole and surviving partner of the late firm of Wylie & Lochhead, two policies of insurance for £300 and £500, and that by letter of guarantee produced by them, dated 31st January 1874, the defender had guaranteed payment of the premiums.

The letter of guarantee produced by the pursuers was not holograph or tested. It bore the signature of the defender across a sixpenny stamp, and was in these terms:—"Messrs Wylie & Lochhead. Gatehouse, 31st January 1874. Gentlemen,—I hereby guarantee payment of £500 s.g., by my son James Hornsby, of the Gairloch Hotel, and the payment of premiums of insurance on his policies with the Scottish Widows' Fund and Scottish Amicable Societies, assigned to your firm. But my liability under this guarantee will be reduced according to the amount of security furnished by Mr Robert Bell, brick-builder, or any other party you may accept in his stead."

The pursuers further averred that Wylie & Lochhead, Limited, incorporated on 20th August 1883, had acquired from Mr Wylie, sole partner of the firm of Wylie & Lochhead, by an agreement dated 13th August 1883 between Wylie and Wylie & Lochhead, Limited, the whole assets of the old firm and, *inter alia*, the right to the policies and to the letter of guarantee.

The defender denied that he had ever undertaken any obligation to the pursuers. He stated that he had undertaken along with another person to be security to the former firm of Wylie & Lochhead for his son to the extent of £500, and that he had signed a blank letter bearing a sixpenny stamp, which he had authorised his son to fill up as a guarantee for £500, and that the obligation to pay premiums of insurance had been inserted without his knowledge; that the £500 for which the defender became bound had been long since paid, and that the defender's responsibility for his son under said letter had entirely ceased.

The defender pleaded, *inter alia*;—(1) The letter of guarantee in question was not granted to the pursuers, nor transferred to them with defender's consent, and they cannot found thereon. (2) The alleged obligation for premiums is subsidiary to payment of the sum of £500, and that sum being paid, the obligation falls therewith. (3) The letter, so far as consisting of an obligation to pay insurance premiums, is not the act of defender, and does not bind him.

On 2d December 1887 the Sheriff-substitute (Dickson) dismissed the action as irrelevant on the ground that the pursuers alleged that since the granting of the alleged guarantee to "Wylie & Lochhead" the assets of

that firm had been transferred to Wylie & Lochhead, Limited, and that they did not aver that the defender consented to the letter of guarantee continuing in force, and that under section 7 of the Mercantile Law Amendment Act the letter of guarantee was of no force in favour of the pursuers.\*

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On appeal the Sheriff (Macpherson) adhered.

The pursuers appealed to the Court of Session. The Court, on 3d July 1888, recalled *in hoc statu* the interlocutors of the Sheriffs, and remitted to the Sheriff to allow a proof.

Proof was led. It was proved by the evidence of the defender himself and of his daughter, which was not contradicted, that, at the request of James Hornsby junior, he had, on 31st January 1874, signed a blank sheet of paper bearing a sixpenny stamp, and that he sent it blank to the office of Wylie & Lochhead addressed to James Hornsby junior, that he authorised him to fill it up with a cautionary obligation for £500, but gave no further authority. The defender was not even aware of the existence of insurance policies belonging to his son.

It was proved that on 3d February 1874 James Hornsby junior had assigned to Mr John Wylie, sole partner of Wylie & Lochhead, the two policies on his life. The assignation was *ex facie* absolute. It contained no obligation on the granter to keep the policies in force by paying the premiums.

In 1879 the defender being communicated with by Wylie & Lochhead regarding the guarantee, repudiated his liability to make payment of insurance premiums, and stated that he had never heard of the insurances before. He then, having paid up more than £500 on behalf of his son, asked redelivery of any guarantees signed by him on behalf of his son, and an earlier guarantee than that in question was returned to him by Wylie & Lochhead. They refused to give him up that in question on the ground that it guaranteed the insurance premiums, and was still binding.

In 1883 Wylie, as sole partner of Wylie & Lochhead, transferred to Wylie & Lochhead, Limited, the whole property, plant, and assets of the firm.

In July 1887 John Wylie, designing himself as "formerly sole partner of Wylie & Lochhead," on the narrative that the policies were held by him in trust in connection with the contracts of the firm now carrying on business as Wylie & Lochhead, Limited, assigned to the pursuers the two policies.

James Hornsby junior became bankrupt in or about 1885. The premiums on the policies due in 1886 and 1887 were paid by the pursuers themselves, and amounted to the sum sued for, £47, 7s. 11d.

The Sheriff-Substitute (Dickson), on 20th March 1889, found "that the said James Hornsby junior came under no obligation to pay the premiums that should fall due after the date of the assignation to John Wylie:

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\* The Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), enacts by sec. 7,—“No guarantee, security, cautionary obligation, or assurance granted or made after the passing of this Act to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made, unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change, shall appear by express stipulation or by necessary implication, from the nature of the firm, or otherwise.”



**No. 164.** Finds that there being no obligation upon James Hornsby junior to pay these premiums, there is no principal obligation to which the letter of guarantee (No. 3), so far as regards the payment of premiums, can apply, and that therefore no cautionary obligation was entered into by James Hornsby senior for payment of the premiums.

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On appeal the acting Sheriff (R. V. Campbell) adhered.

The pursuers appealed, and argued;—The obligation of the defender was really a primary obligation, not as the Sheriffs supposed an accessory one. The word “guarantee” was not equivalent to “caution,” and the obligation was to pay the premiums if called upon.

Argued for the defender;—The alleged obligation of the defender as to premiums was prior in date to the assignation of the policies, and was in no way connected with it. In order to its being a good guarantee there must be a valid principal obligation. But James Hornsby junior was not bound to pay the premiums.<sup>1</sup> There was further to be a co-cautioner, Mr Bell. But he did not sign, and therefore the defender was free.<sup>2</sup> It was proved that the defender had given his son no authority to fill up the paper sent to him with guarantee relating to premiums. Even if there was a guarantee, it was not assignable, and the pursuers had no title to sue.

At advising,—

**LORD YOUNG.**—This action at the instance of Messrs Wylie & Lochhead is an action on a document by which the defender is said “to guarantee payment of £500 by my son James Hornsby of the Gairloch Hotel, and the payment of premiums of insurance on his policies with the Scottish Widows’ Fund and Scottish Amicable Societies assigned to your firm.” The action concludes for payment of £47, 7s. 11d. as premiums for the years 1886 and 1887 with interest, and that the pursuers be free and relieved in future of payment of premiums to become due. As to the premiums for prior years, between 1874 and 1886, we do not know how these were paid.

The pursuers aver that, in February 1874, the firm of Wylie & Lochhead as it then existed, Wylie being the sole partner, obtained from the defender’s son, James Hornsby junior, an assignation of two policies on his life. That assignation is printed in the print before us. It is an absolute unqualified assignation of two policies on the life of James Hornsby junior, and contains no statement that it is truly an assignation in security. But it is familiar in law that if a creditor obtains such an assignation truly as a security, though without any words to that effect, he may use it, according to the honest meaning of the transaction, as a security for his debt as it may exist at any time, whether at the date of the assignation or subsequently incurred. The pursuers’ case is that Wylie received this assignation as a security for the debt existing at its date or which might be incurred.

Now, when the case was first in Court, the Sheriff-substitute and Sheriff decided that the pursuers could not sue on this guarantee. They did so on the ground that Wylie & Lochhead are now a limited company registered under the Companies Acts, that the guarantee was not in their favour but in that of the sole partner of the old firm, and that it was therefore not available to the pursuers as a guarantee or cautionary obligation. It seems that John Wylie, the sole partner of the old firm, transferred to the new company, the pursuers, in 1884, the whole assets of the old firm of Wylie & Lochhead, and the pursuers rely

<sup>1</sup> Jackson v. M’Iver, July 6, 1875, 2 R. 882; Bell’s Prin. sec. 251.

<sup>2</sup> Paterson v. Bonar, March 9, 1844, 6 D. 987.

upon that assignation, and the assignation of the policies by James Hornsby junior to Wylie in 1874. They say that any debt due to Wylie was transferred to the limited company, and that they are therefore now the creditors. They point also to a special assignation of the policies by John Wylie, formerly sole partner of Wylie & Lochhead, to the limited company, which is dated 28th July 1887, and their case is, that as creditors in the debt originally due to John Wylie and not yet paid, and as assignees of the policies, they are entitled to make them available for their security. Now, I think that is a sound view in law, and one which excludes that originally taken by the Sheriff, before we recalled his interlocutor, and allowed a proof.

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We have now the proof before us, and assuming the statutory difficulty to be out of the pursuers' way, I would point out that the alleged letter of guarantee is at the foundation of their case. That document is not holograph, nor is it probative. It requires to be proved. Now, there is conflicting evidence, or rather there are conflicting views of the evidence that has been led. The defender, the obligant *ex facie* of the letter, says distinctly that when he signed the paper on which the letter is he signed a blank paper having only a 6d. stamp on it. He says the paper with the stamp on it had been sent by his son to him for signature, and that he signed it. His daughter corroborates him.

[His Lordship read and examined the evidence of the defender and his daughter, to the effect that when the former signed across the stamp the paper was blank, and expressed the opinion that that evidence was true, and that it had been proved that the defender signed a blank paper on which the guarantee had been subsequently written.]

Now, I proceed to consider whether that writing of the letter of guarantee above the defender's signature was authorised. There are cases—the case of a signature on a bill-stamp is one of them, and there may be more—in which an authority is implied to place writing of an obligatory kind above a signature on a blank sheet of paper. If it is a bill-stamp, there is an authority implied to fill up a bill to any amount which the stamp will cover. But if a man puts his name to a blank paper with a 6d. stamp on it I know of no implied authority to write above it, and a party taking a document neither holograph nor probative must at all events prove not only the genuineness of the signature, but also that it was adhibited to the document as it stands, or that there was authority given to write over it what appears to have been written there. Here the part of the document sued on being the obligation to pay premiums on policies of insurance assigned to Wylie & Lochhead, the question is whether it is proved that the defender gave any authority to write over his signature such an obligation. Now, on this question the evidence is all one way. The defender says he gave none, had no idea that such would be written, and did not even know that his son's life was insured. Indeed, while the date put on the writing by Hornsby junior is 31st January 1874, there had then been no assignation of the policies, for the assignation of the policies is dated 3d February 1874, and the defender cannot therefore have known of such an assignation when he signed the blank paper. Now, is this a good obligation to Wylie & Lochhead, Limited, coming in right of Wylie, that the premiums will be paid? Were they entitled to rely on it as an obligation to pay the premiums on policies assigned on 3d February 1874, and to be held as a security for debt due and to become due? I am of opinion that it is not proved that the defender gave any authority to write such an obligation over his signature.

No. 164. James Hornsby junior, who might have given evidence on the point, is not a witness, and there is indeed nothing to shew that the defender gave such authority. It is a document that no careful man of business would have taken for such a purpose, and I must say I do not regret that the pursuers fail to shew it to be a good guarantee to them for the premiums in question.

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It is important to observe that the defender has for many years repudiated the obligation sought to be fixed upon him, and further, that though there was in 1883 a general conveyance by Wylie, as sole partner of the old firm, of its assets to the new company, there was no assignation of this document which had been repudiated. There was, indeed, the assignation of the policies in 1887 to the new company. One would have expected, however, an assignation of this alleged guarantee if Wylie had intended that it should belong to the new company.

I think the defender should be assolizied. I wish to add that had I been of opinion that there was authority to fill up the stamp as a guarantee, I could not have agreed in the finding of the Sheriffs "that there being no obligation upon James Hornsby junior to pay these premiums there is no principal obligation to which the letter of guarantee, so far as regards the payment of premiums can apply, and that therefore no cautionary obligation was entered into by James Hornsby senior." I think that is entirely erroneous.

LORD RUTHERFURD CLARK.—I concur.

LORD LEE.—I agree in the opinion of Lord Young entirely. But I should have been disposed to go a step further, and to proceed upon a construction of the document different from that relied on by the defender. It appears to me to refer to an existing debt, and not to any general indebtedness in respect of advances made or to be made. It contains, so far as I see, nothing to warn the defender that his liability was to continue though the existing debt should be paid if Messrs Wylie & Lochhead should go on to make further advances to the defender's son.

In this view of the guarantee for £500, my opinion is that the guarantee for payment for premiums of insurance on the policies is limited to securing the then subsisting debt, and came to an end when it was paid.

It is true that the policies are mentioned as "assigned to your firm," and that the assignation, as between the principal debtor and his creditors, was *ex facie* absolute, and therefore enabled them, as against him, to hold the policies and pay the premiums, in security not only of the subsisting debt, but of further advances. The defender, however, is not affected, in my opinion, by the form of the assignation. For he was no party to it, and was not bound to know that it was other than an assignation in security of the subsisting debt. Indeed, it appears that the assignation was not granted till four days later than the date of the guarantee.

I am unable, therefore, to read the guarantee as continuing to bind the defender to pay premiums of insurance so long as any balance of £500 should remain due by the defender's son to Messrs Wylie & Lochhead, although, as appears from the accounts, the subsisting debt was extinguished by payments in cash.

The LORD JUSTICE-CLERK concurred.

THIS interlocutor was pronounced :—"Find in fact that the document No. 3 of process founded on by the pursuers is neither

holograph nor tested, and was blank when signed by the defender, No. 164. and that the defender did not authorise the insertion therein of an obligation to pay the premiums of insurance upon the policies assigned by James Hornsby junior to John Wylie by assignation No. 13 of process: Find in law that the defender is not liable in payment to the pursuer of the premium of insurance specified in the account libelled."

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T. & W. A. M'LAREN, W.S.—J. & A. F. ADAM, W.S.—Agents.

HENRY MONCREIFF HORSBRUGH AND OTHERS (Christie's Trustees), No. 165.  
First Parties.—*C. K. Mackenzie.*

WILLIAM CHRISTIE AND OTHERS (Mr and Mrs Murray's Marriage-Contract Trustees), Second Parties.—*Don Wauchope.*

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ANTHONY HUGH MURRAY, Third Party.—*Sir Charles Pearson—Dundas.*

MRS MARY AGNES CHRISTIE OR MURRAY, Fourth Party.—*Don Wauchope.*

MRS HUGHINA MARGARET CHRISTIE OR ROWLAND, Fifth Party.—

*A. G. Pearson.*

WILLIAM ALEXANDER WOOD (Christie's *Curator Bonis*), Sixth Party.—  
*Wood.*

*Succession—Trust—Direction to trustees to retain.*—A testator appointed trustees, and left his property to be divided equally among his three children—two daughters and a son, providing that "any share that my daughter M. may receive to go direct to her and her children. Failing the above mentioned, her share to return to her nearest of kin, except her husband shall have the liferent. My daughter H.'s share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin. Also my trustees shall retain charge of her share. It is not to go into her hands. The same with reference to my son C., his share to remain in the hands of my trustees for his behoof. In the event of his demise, his share to return to his nearest of kin."

*Held* that the fee of each of the shares vested at the testator's death in his three children respectively; that the trustees were bound to pay over M.'s share to her at once; but that they were bound to retain the shares of H. and C. for their behoof.

MAJOR-GENERAL HUGH LINDSAY CHRISTIE died on 20th September 1888 2D DIVISION.  
leaving a holograph will or general settlement, dated 14th March 1887, whereby he appointed trustees and made provision for his wife. He further provided,—*M.*—"To my three children I leave all the rest of my property, consisting of stocks and shares, or whatever belongs to me at my death. To be divided equally. My money being principally in stocks and shares, I do not wish these to be uplifted unless it should be advisable so to do. My trustees are to invest my money or leave it invested in any fairly good security without limitation. Any share that my daughter Mary Agnes may receive, to go direct to her and her children. Failing the above mentioned, her share to return to her nearest of kin, except her husband shall have the liferent. My daughter Hughina Margaret's share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin. Also my trustees shall retain charge of her share. It is not to go into her hands. The same with reference to my son Charles, his share to remain in the hands of my trustees for his behoof. In the event of his demise, his share to return to his nearest of kin."

The testator was survived by his wife, his two daughters, and his son. His daughter Mrs Mary Agnes Christie or Murray had one child. By her antenuptial contract of marriage she was bound to pay over to her marriage-contract trustees all *acquirenda*, excepting sums not exceeding

No. 165. £100 each. His daughter Mrs Hughina Margaret Christie or Rowland had no marriage-contract, and there were no children of her marriage. His son Charles Robert Christie was under curatory.

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Questions having arisen in regard to the rights of parties under the settlement, a special case was submitted to the Court by (1) the testator's testamentary trustees, (2) Mrs Murray's marriage-contract trustees, (3) Anthony Hugh Murray, Mrs Murray's only child, and his father, as his administrator-in-law, (4) Mrs Murray, (5) Mrs Rowland, and (6) Charles Robert Christie's *curator bonis*.

The questions of law were as follows:—"1. (a) Did the fee of the share of testator's estate bequeathed to his daughter Mrs Mary Agnes Christie or Murray vest in her *a morte testatoris*, and is the capital of it now payable by the first parties, General Christie's trustees, to the second parties as her marriage-contract trustees? 2. (a) Did the fee of the share bequeathed to the testator's daughter Mrs Hughina Margaret Christie or Rowland vest in her *a morte testatoris*, and are the first parties bound to pay the capital now to her? or (b) Are the first parties bound to hold the fee of this share? 3. (a) Did the fee of the share bequeathed to the testator's son Charles Robert Christie vest in him *a morte testatoris*? (b) Are the first parties bound to pay the capital thereof now to the party of the sixth part as his *curator bonis*? or (c) Are the first parties bound to retain the capital?"

Argued for the first parties;—The intention of the truster was that there should be a continuing trust. There was no direction to realise and pay. On the contrary, the money invested was not to be uplifted, but was to be left invested. The case might be regarded as falling either under the principle of *Duthie's Trustees v. Kinloch*,<sup>1</sup> in which case the children of the testator would have only a liferent, the fee being in their issue, or under that of *Massy v. Scott's Trustees*,<sup>2</sup> in which case, although the fee would be held to vest *a morte* in the testator's children, their issue would have a protected right of succession. It was not necessary to create a trust here. There was a trust in existence. Even if Mrs Murray were entitled to receive her share, the position of Mrs Rowland and Charles Robert Christie was different. The testator had declared that the trustees should "retain" their shares. That was conclusive of his intention, and such an intention might legally be given effect to.

Argued for the second and fourth parties;—Whatever might be said as to Mrs Rowland's share, there was no doubt that Mrs Murray's came to herself in fee, and therefore fell to be paid over to her marriage-contract trustees. There was no protected succession.<sup>3</sup> It was "to go direct to her and to her children." The destination to herself and her children was just a destination to herself. The clause beginning "failing the above mentioned" meant failing her without children in the testator's lifetime. Mrs Murray was in a more favourable position than Lady Massy, because there the money was "to be settled by my said trustees on herself and her issue," and yet even there the Court said the trust was not to be kept up.

Argued for the third party;—His mother Mrs Murray had only a life-

<sup>1</sup> June 5, 1878, 5 R. 858.

<sup>2</sup> Dec. 5, 1872, 11 Macph. 173.

<sup>3</sup> *Massy v. Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173; *Gibson's Trustees v. Ross*, July 12, 1877, 4 R. 1038; *Ferguson's Trustees v. Hamilton and Others*, July 13, 1860, 22 D. 1442; *Allan's Trustees v. Allan and Others*, Dec. 12, 1872, 11 Macph. 216; *Houston or Mitchell v. Mitchell*, Nov. 17, 1877, 5 R. 154; *Beveridges v. Beveridge's Trustees*, July 20, 1878, 5 R. 1116.

rent. The fee had vested in him as representative of a class. The trustees were bound to invest the money and pay the income to his mother in liferent, and to divide it among the children at her death.<sup>1</sup>

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Argued for the fifth party;—There were no words used depriving Mrs Rowland of the absolute fee. Her share was settled in like manner to that of Mary Agnes, who undoubtedly got a fee. Alternatively, she got the fee, but the trustees were to see she did not dispose of the money except for onerous causes.

The sixth party adopted the argument of the fifth party.

At advising,—

LORD JUSTICE-CLERK.—This special case arises under the will of the late General Christie. The important part of the will is that in which the testator gives this direction to his trustees:—"To my three children I leave all the rest of my property, consisting of stocks and shares, or whatever belongs to me at my death. To be divided equally." Now, there are three children—two daughters and a son—and in reference to each of these, after this general bequest, he makes a separate settlement. He proceeds,—“Any share that my daughter Mary Agnes may receive to go direct to her and her children. Failing the above mentioned, her share to return to her nearest of kin, except her husband shall have the liferent.” That is all that he says about this share, and the question is, whether that bequest amounts to giving his daughter Mary Agnes, Mrs Murray, the fee of that share? I am of opinion that it does. “Failing the above mentioned,” I take to mean failing herself and her children while he is alive; but whether that be so or not, the direction is a distinct direction that any share that his daughter Mary Agnes receives is to go direct to her and her children. The subsequent words do not to my mind in any way qualify the right in her to the fee of that share.

But in the case of the other daughter and also of the son the direction is different. He says,—“My daughter Hughina Margaret's share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin.” That is for the purpose of excluding the husband's rights. Then he says,—“My trustees shall retain charge of her share. It is not to go into her hands.”

The first question is, whether that direction prevents the fee of that share from vesting in her? I am of opinion that it does not. I think that Hughina Margaret's share vests in her just as does that of Mary Agnes in Mary Agnes. But then the trustees are directed to retain this share. Is that a direction which, on the footing that the fee is the daughter's, can receive effect? I have had great difficulty upon that matter, which I understand some of your Lordships have shared. Some of the cases which have been quoted to us seem to negative the efficacy of such a direction. But I think in almost all of these cases it appeared that in order to prevent the actual money going into the hands of the person to whom the fee was given, it was practically necessary that the Court should set up a trust, and this was held to be beyond the power of the Court. That is not the case here. A trust is already created, and the testator directs his trustees to retain the charge of the shares. In my opinion that is a direction which they can obey.

<sup>1</sup> Keating and Others, June 17, 1870, 7 S. L. R. 548; Duthie's Trustees v. Kinloch, June 5, 1878, 5 R. 858.

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I have arrived at the same conclusion with regard to the bequest to Charles. In regard both to his share and that of his sister Hughina Margaret, I think that the gift of the fee to them is not inconsistent with the direction that the trustees should take charge of the shares, and not hand over the *corpora* of the shares to Hughina or Charles.

LORD YOUNG.—I am of the same opinion. The only point of interest is that concerning the direction to the trustees to retain in their hands what is given to another in property. It is quite certain that you cannot give money or anything else upon the condition that it is not to be spent, or that only so much be spent and the remainder saved. That is a repugnancy. If you make a person proprietor he must act as proprietor. But I think we have a different case here. I think the donor of money or anything else is entitled to appoint a trust for the protection of the donee. We are not called upon here to determine the exact effect or the scope of the powers of the trustees as to retaining charge of these shares and not allowing them to go into the beneficiaries' hands. We are merely determining that it is their duty to retain these shares in their own hands, and not to allow them to go into the hands of the beneficiaries. And I think that, in that way, very substantial protection may be given to the beneficiaries, just such as the testator thought was required. I do not speak of creditors, or what may be done, possibly, in order to frustrate the testator's view, but I think it desirable that the protection contemplated by the testator should at least be started, and, for my part, I should think that the law would be efficacious, if appealed to, to prevent the testator's wish being frustrated. The shares are the property of the donees, but they are in the hands of the trustees, to be managed by them, and withheld from the donees for their protection. The trustees are not limited to giving the donees the interest merely. They may deal with the shares in the course of their administration and management as trustees—capital and interest—as they may think best for the interest of the donees as the proprietors. Their interest as proprietors is, I think, committed to the charge of the trustees by these words, although we are determining no more at this moment except that it is according to the true meaning of the deed, and the duty of the trustees under it, to retain these shares, and not allow either to pass into the hands of the proprietors.

LORD RUTHERFURD CLARK and LORD LEE concurred.

THE COURT pronounced the following interlocutor:—"Answer the questions therein stated as follows, viz.—1 (a) That the fee of the share of the testator's estate bequeathed to his daughter Mrs Mary Agnes Christie or Murray vested in her *a morte testatoris*, and that the capital thereof is now payable by the first parties, General Christie's trustees, to the second parties, her marriage-contract trustees; 2 (a) that the fee of the share bequeathed to the testator's daughter Mrs Hughina Margaret Christie or Rowland vested in her *a morte testatoris*, but that the first parties are not bound to pay the capital to her now; and (b) are bound to hold it; 3 (a) that the fee of the share bequeathed to Charles Robert Christie vested in him *a morte testatoris*; (b) that the first parties are not bound to pay the capital thereof now to the party of the sixth part as his *curator bonis*; but (c) are bound to retain it," &c.

MELVILLE & LINDSAY, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—MURRAY & FALCONER, W.S.—J. S. & J. W. FRASER TYTLER, W.S.—SCOTT-MONCRIEFF & TRAIL, W.S.—GILL & PRINGLE, W.S.—Agents.

CHARLES STEWART PARNELL, Pursuer.—*Balfour—Asher—Strachan.*  
JOHN WALTER AND ANOTHER, Defenders.—*Lord-Adv. Robertson—*  
*D.-F. Mackintosh—Murray.*

No. 166.

July 3, 1889.\*  
Parnell v.  
Walter.

*Jurisdiction—Arrestment—Partnership.*—A person to found jurisdiction against A, a domiciled Englishman, arrested in the hands of B all sums due by him to A. It was proved that B had in his hands a fund belonging to an English copartnery, of which A was a partner (and no other property in which A had an interest), and that while by the law of England a partnership has no *persona*, and the title to the partnership assets is in the individual partners, a partner has no beneficial right other than a right to a share of the surplus assets of the partnership on realisation.

*Held* by Lord Kinnear, Ordinary, that the arrestment was not effectual to found jurisdiction against A.

*Jurisdiction—Slander—Publication.*—*Held* by Lord Kinnear, Ordinary, that neither the direct dispatch by post of an English newspaper from the publishing office in England to persons in Scotland, nor the sale of the newspaper in Scotland, is sufficient to give the Scots Courts jurisdiction to entertain an action of damages for slander alleged to have been published in the newspaper.

On 11th August 1888 Charles Stewart Parnell, Member of Parliament for the city of Cork, raised an action against “John Walter, proprietor of *The Times* newspaper, and residing at No. 40 Upper Grosvenor Street, London, W., and George Edward Wright, printer and publisher of the said *Times* newspaper, Printing House Square, Blackfriars, London, E.C., —Defenders; against whom arrestments have been used *ad fundandam jurisdictionem*, in virtue of letters of arrestment signeted the 11th day of August 1888.”

The summons concluded for damages for slander alleged to have been published in *The Times* newspaper of the 18th April 1887 and of the 3d, 4th, 5th, and 6th July 1888.

The defenders pleaded;—1. No jurisdiction against either defender.

The pursuer pleaded;—1. The defenders are subject to the jurisdiction of this Court (1) in respect of the publication of the said newspaper in Scotland; and (2) in respect of the foresaid arrestments.

The following were the averments and answers bearing on the question of jurisdiction:—(Cond. 1) “The pursuer is proprietor of Avondale, in the county of Wicklow, Ireland, and he is also Member of Parliament for the city of Cork, and is the recognised leader of the Irish representatives in the House of Commons. The defender John Walter is the registered proprietor of *The Times* newspaper, under the Act 44 and 45 Vict. cap. 60, and the other defender, George Edward Wright, is the printer and publisher thereof. As the registered proprietor of the said newspaper Mr Walter is entitled to sue and liable to be sued in all actions relative thereto, and in that capacity he defended the action at the instance of Hugh Frank O'Donnell, hereinafter referred to, and other actions against the said newspaper. Mr Walter has also right as proprietor to recover and discharge debts due in respect of the said newspaper.” (Ans. 1) “Admitted that the pursuer is an Irish proprietor and Member of Parliament for the city of Cork. He is the leader of that section of the Irish representatives in the House of Commons known as the Parnellites or Nationalists. Admitted that the defender Wright is the printer and publisher of *The Times* newspaper, published in London. Explained that he is not a proprietor of *The Times*, but is only a salaried servant of the proprietors thereof. Admitted that the defender is the person who, in terms of the Act 44 and 45 Vict. cap. 60, is registered as a proprietor on behalf of himself and others of *The Times* newspaper, as defined by and



No. 166. for the purposes of the said Act. *Quoad ultra* denied, and explained that *The Times* is not the exclusive property of the defender Walter, and that he is not the proprietor thereof, but that it belongs to a partnership of which he is a member, along with Sir Henry Fraser Walter, Sir Edward Walter, and other persons, and that he is not entitled to sue nor liable to be sued in actions relative to the said newspaper." (Cond. 8) "The defenders not being resident in this country, the pursuer used arrestments *ad fundandam jurisdictionem*, conform to executions herewith produced. By the said arrestments funds have been attached in the hands of the arrestees, to which the defender Mr Walter has right, as proprietor of the said newspaper. It is denied that the said newspaper is only published in London. For many years prior to and in the months of April, May, and June 1887, and July 1888, copies thereof, and particularly of the issues of the several dates libelled, containing the foresaid facsimile letter, report, and articles, were sent by post by the defenders from their publishing office in London to many persons resident in Scotland, and to clubs and reading-rooms there, and were sent in parcels by rail to numerous news-agents throughout Scotland for sale and distribution to and among the general public there, and were by them so sold and distributed. The said newspaper thus was and is published by the defenders in Scotland." (Ans. 8) "Admitted that the defenders are not resident in Scotland. Explained further, that neither of the defenders is subject to the jurisdiction of the Scottish Courts. Denied that any jurisdiction has been founded against the defenders. The executions of the letters of arrestment are referred to. No sum whatever was due by the arrestees to either of the defenders, and nothing was consequently attached by said arrestments. *The Times* newspaper is only published in London. *Quoad ultra* denied." The defenders objected to the relevancy of these averments. They maintained (a) that publication was not *per se* a sufficient ground of jurisdiction; and (b) that the term "registered proprietor" in cond. 1 was ambiguous, in respect that it might mean either sole proprietor, or proprietor in virtue of the Act 44 and 45 Vict. cap. 60,\* or proprietor in the sense of having a beneficial interest along with other partners; and that

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\* The Newspaper Libel and Registration Act, 1881 (44 and 45 Vict. cap. 60), sec. 1, enacts, *inter alia*,—"The word 'proprietor' shall mean and include as well the sole proprietor of any newspaper, as also, in the case of a divided proprietorship, the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves, and the persons in like manner representing or responsible for the other shares or interests therein, and no other person."

Sec. 7 enacts,—“Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances) it shall be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible 'representative proprietors.'”

Sec. 8 enacts,—“A register of the proprietor of newspapers as defined by this Act shall be established under the superintendence of the register.”

Sec. 9.—“It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the registry office, on or before the 31st July 1881, and thereafter annually, in the month of July in every year, a return of the following particulars, according to the schedule A. hereunto annexed, that is to say :—(a) The title of a newspaper; (b) The names of all the proprietors of such newspaper, together with their respective occupations, places of business (if any) and places of residence.”

Sec. 19 enacts,—“This Act shall not apply to Scotland.”

if it did not mean sole proprietor the arrestments alleged were inept to No. 166.  
found jurisdiction against the defenders.

On 6th November 1888 the Lord Ordinary (Kinnear) allowed a proof <sup>July 2, 1889.</sup>  
on the question of jurisdiction.\* <sup>Parnell v.</sup>  
<sup>Walter.</sup>

The defenders reclaimed.

**LORD PRESIDENT.**—The question, or at least the most important question, which the Lord Ordinary had before him was whether arrestments had been used which had the effect of founding jurisdiction against the defender Mr Walter, and his Lordship came to be of opinion that he could not decide on that question without proof. I entirely agree with his Lordship. I think it would be a very rash thing indeed to say on the face of this record as it stands that it shews that there is no good arrestment to found jurisdiction, or that the averments of such an arrestment having been made are irrelevant. They do not appear to me to be irrelevant, and I think if the averments as made are established in point of fact the arrestment will probably be found to be good for its purpose. But it is not necessary to anticipate what the result of the proof may be. It is enough, I think, for the present purpose of disposing of the Lord Ordinary's interlocutor to say that without evidence it is quite impossible to dispose of this question satisfactorily, and therefore I think the interlocutor of the Lord Ordinary so far is open to no objection.

His Lordship has declined in the meantime to dispose of another objection to the jurisdiction of the Court, pleaded on behalf of the printer and publisher of this newspaper, Mr Wright, and it may be that that ground of jurisdiction is quite separable from the other, and might be disposed of separately. But when we come to that, it is really a matter dealing entirely with the course of procedure in the case, and your Lordships have always been exceedingly unwilling to interfere with the discretion of a Lord Ordinary in a matter of that kind. This question of jurisdiction will come to be determined along with the other, and I do not see such overwhelming expediency or necessity for disposing of this question separately as to lead me to interfere with this decision. I am for adhering to the Lord Ordinary's interlocutor.

**LORD MURE.**—I am entirely of the same opinion, and have nothing to add.

**LORD SHAND.**—It is a salutary rule of this Court, which has been long in observance, and has prevented very often a great deal of litigation at the initiatory stages of cases, that in a matter of procedure we should not interfere

\* "OPINION.—There are two separate grounds of jurisdiction upon which it is maintained that jurisdiction is founded. In the first place, the execution of arrestments for that purpose; and in the second place, the publication of the slander complained of in Scotland. I think it impossible to determine the questions raised upon the first of these two pleas until the facts have been ascertained. I think it quite indispensable to know what debt has been arrested, and what relation of debtor and creditor exists between the arrestees and the defender, if any such relation exists. As to the other ground of jurisdiction—publication in Scotland—I am not aware of any authority or precedent for sustaining an action of this kind against an Englishman domiciled and resident in England without either arrestment or personal service upon the defender; and if I were disposing of that point now, I should think it is probable that it might be disposed of upon the averments upon record alone; but I think it is not expedient to pronounce any formal judgment upon that point until the whole question of jurisdiction can be determined by one interlocutor. Therefore I shall allow parties a proof of their averments bearing upon the question of jurisdiction."

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with what has been settled by the Lord Ordinary, unless it is established that injustice is to be done, or that some miscarriage of justice may follow from the course the Lord Ordinary has chosen. In this case it appears to me that the whole of the argument we have heard to-day will be quite open to the defender after this proof has been taken, and it is on that footing that I understand the Lord Ordinary has pronounced his judgment. The question whether the arrestments have or have not attached funds which belong to the defender Walter so as to make him liable to the jurisdiction of this Court is, as it appears to me, a question attended with some difficulty, and I must reserve any opinion about it till we have the proof, and I think it desirable that we should have the proof in order to reach a sound judgment on that point.

The only matter upon which I have any doubt—as to whether this interlocutor should be simply adhered to or not—arises from the argument presented by Mr Murray on the averment in article 8,—“By the said arrestments funds have been attached in the hands of the arrestees to which the defender Mr Walter has right as the registered proprietor of said newspaper.” It is said that under that averment the pursuer may probably propose to lead evidence as to English law. Well, I am not prepared to say that that is not competent; I think it would be quite competent. If the defender in such a case were taken by surprise by something of that kind, no doubt the Lord Ordinary could remedy it by saying, “This is a matter of which no notice was given. I shall not close the proof without giving the defender an opportunity of meeting it.” That would be very inconvenient, and it might be met by the pursuer giving notice of what he proposes to do—if he proposes to lead evidence of English law in fortification of the statement I have just read. That is the single consideration that weighs on my mind on the question whether this interlocutor be adhered to without some further averment, but I think an averment on that subject is not necessary.

As to the position of the other defender, Wright, the Lord Ordinary indicates that he thinks there is no ground of jurisdiction against him, but still he thinks it desirable to keep the case entirely together, and to dispose of it ultimately on the whole facts. I entirely agree in the course the Lord Ordinary has taken. I think it is desirable to get the facts before we decide upon any narrow question of relevancy, or upon any point such as has been argued on the part of the defenders.

LORD ADAM.—I also concur.

THE COURT adhered.

The evidence led at the proof was to the following effect:—*The Times* was established in 1785 by John Walter, the grandfather of the defender Walter. In his lifetime John Walter, the elder, gave off certain shares of the property in the paper by deeds *inter vivos*, and by testamentary disposition he bequeathed the remaining shares. These shares by subdivision (by deeds *inter vivos* or testamentary) came to belong to a number of persons. The defender Walter was one of these. There was no written contract of partnership between the proprietors. The printing premises and plant belonged to the defender Walter, who had been appointed manager by the other proprietors, under a deed of indenture dated 5th November 1846, and was joint manager along with his son, Arthur Fraser Walter, under a similar deed of indenture dated 22d June 1885. In the returns made under the Newspaper Registration Act, 1881, “John Walter” was entered as the

proprietor until 1888, when (by authority of the Board of Trade) the entry was "John Walter, on behalf of himself and all others, the proprietors of such paper." At the date of the action, some of the other proprietors were minors.

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The pursuer adduced Messrs W. O. Danckwerts and Brodie Innes, and the defenders Messrs Lumley Smith, Q.C., and William Graham, all members of the English bar, as witnesses regarding the English law of partnership.

It was the opinion of all these witnesses that writing was not, by English law, essential to constitute a partnership—that such a contract might be inferred from the actings of the parties; it was further common ground that the circumstance that some of those who had a beneficial interest in the estate were minors (and so by English law incapable of contracting) was not fatal to the existence of a partnership between those who were *sui juris*, although the pursuer's witnesses considered that the fact that some of the parties were minors was a strong argument against the inference of partnership.

In the circumstances of the particular case, Messrs Danckwerts and Brodie Innes were of opinion that the relation between the parties beneficially interested in *The Times* was that of co-owners, not partners, at least as regarded the goodwill and the permanent element of *The Times*, but they appeared to admit that the actual business of publication was the property of a partnership. Messrs Lumley Smith and Graham, on the other hand, were of opinion that the sole relation was that of partners—the goodwill being a partnership asset; but that in any view, the subjects arrested belonged to the partnership. These subjects were sums (amounting in all to about £15) due by Edinburgh advertisement agents for advertisements inserted in *The Times*.

The property belonging to a partnership, according to English law, it was conceded on both sides, is in the individual partners—the partnership having no separate *persona*; but it is only the legal estate of which the individual partners have the property, their beneficial interest does not give them individually any right to the specific property of the partnership, but only to a share of the surplus assets on realisation. Hence an execution creditor of an individual partner could not take part of the partnership property in satisfaction of his debt; he could only force a dissolution, and recover payment out of the share found due to his debtor.

It was admitted that no property belonging to the defender Wright had been arrested.

The defenders did not dispute that *The Times* was sold and circulated in Scotland, but they maintained that it was not published there. The evidence shewed that they delivered copies of the paper at a post-office in London, or at a London railway station, to persons who had prepaid the price of the copies they desired to buy. It did not appear that the paper was ever delivered (as regards persons resident in Scotland) on any other footing.

Argued for the pursuer;—The pursuer had established jurisdiction on the grounds (a) of arrestment, and (b) of publication.

As regarded the first and more important of these grounds, there was no doubt that funds belonging to *The Times* (whatever that might mean) sufficient in amount to found jurisdiction had been well arrested; the amount was not illusory, and that, according to all the authorities, was sufficient. The next question was as to the body called *The Times*. What was the legal quality of the right possessed by a large number of persons who had, in the course of the last hundred years, come to be beneficially interested in *The Times*? The result of the evidence was that that right was a right of ownership, not a right of partnership;

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but even if it were a right of partnership, the effect, in this question of jurisdiction, did not materially differ, for the result of the evidence was that the law of England did not recognise a partnership as a separate *persona* from the individual partners—the property of the partnership was just the property of the individual partners. The relation was identical with that of the co-owners of a ship. The pursuer having arrested property in Scotland undoubtedly belonging to *The Times*, had thus arrested property in Scotland belonging to Mr Walter individually, and so had well established jurisdiction in the Scots Courts against him. It was true that according to the defender's witnesses an execution creditor of a partner could not, in equity, carry off the partnership assets which he had attached, in satisfaction of the partner's debt to him; all he could do was to bring an accounting, and so bring about a dissolution of the partnership, but the pursuer did not propose to carry off the property he had arrested, and he had well arrested what was at law the property of the defender Walter, although equity might not permit the pursuer to appropriate that property specifically and without reference to the equities of the other partners. It did not affect the validity of the arrestment that the subject arrested might be owned by other persons than the person against whom it was desired to found jurisdiction, nor even that, on an accounting, nothing would be found to be due to the person whose interest bore to be arrested.<sup>1</sup>

But, even if the property arrested as being the property of a partnership was insufficient to found jurisdiction against an individual partner, jurisdiction was well established against the defender Walter, in the first place because he had been registered as the representative proprietor in virtue of the Newspaper Libel Act, 1881; in the second place, because he had until 1st August 1888, and therefore during the whole time in which the paper was publishing the slanders complained of, registered himself as "sole proprietor," and consequently having held himself out to the world as solely responsible for the paper, it was not open to him to deny responsibility now, and thirdly, because of the mandate in his favour conferred by the other proprietors in the deeds of 1846 and 1885; he was in short *The Times*. If it was desired to call *The Times* into Court, that was well effected by calling him.

In any case, *The Times* had been published in Scotland, and that *per se* was a good ground of jurisdiction in actions for slander alleged to have been uttered in the newspaper so published.

Argued for the defender;—The evidence shewed that the business of publishing *The Times* belonged to a partnership, and did not belong to a number of co-owners. It might be that the permanent element—the goodwill—of *The Times* did not belong to the partnership, but that was immaterial, for the debt arrested was due to the partnership, which carried on the business of publication. Now, it might be quite true that technically, according to English law, a partnership was not a separate *persona*, as it was in Scotland, but there was in substance no difference between the two laws. The individual partners, while they were the proprietors of the partnership assets, according to the English law had as such merely the legal estate—they were proprietors merely in a fiduciary sense; the beneficial interest was in the partners as a whole, and not as individuals. While the Scots law adopted the phraseology of a separate legal *persona*, that of England gave the legal title to the individual partners as trustees. In both systems the same result followed, that a debt due to the partnership could not be taken in satisfaction of a debt due by an individual

<sup>1</sup> Gibson v. Smith, March 10, 1849, 11 D. 1024, 21 Scot. Jur. 331.

partner. The beneficial interest of each partner was merely such an interest as resulted from a division of the surplus assets after realisation. No. 166.

But it was said that the defender, Mr Walter, had been reared up into such a position of responsibility as entitled the pursuer to arrest debts due to the partnership as being his individual debts, so as to found jurisdiction against him. That argument was based partly on the Newspaper Registration Act, and partly on the mandate in the deeds of 1846 and 1885, constituting him manager. Now, the Newspaper Registration Act, which did not extend to Scotland, while it might make Mr Walter the proper person to sue in the English Courts as representing the other partners, in no way altered the contract between the partners. It did not convert the debts due to the partnership into debts due to Mr Walter individually, and if it did not do that, it had no effect in the present question. The primary purpose of the Act was to prevent newspapers from concealing the identity of their proprietors, particularly in the case of actions for alleged slander, but while this was an action of that sort, the present question was one of jurisdiction, and depended entirely upon whether the estate arrested was the property of the defender, and the Act had no bearing on such a question. The answer to the argument on the alleged mandate in the deeds of 1846 and 1885 was the same. That mandate might confer very large powers of management on Mr Walter, but that did not make debts due to the concern debts due to him.

On 5th February the Lord Ordinary (Kinnear) pronounced this interlocutor:—"The Lord Ordinary sustains the first plea in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses." \*

\* "NOTE.—The only question which I can determine at present in this action is the question of jurisdiction. It is a remarkable action, in this respect, that neither of the parties is personally subject to the jurisdiction of the Scottish Court. The pursuer, who is not resident in Scotland, complains that he has been injured in his character and reputation by the publication of certain slanderous statements in *The Times* newspaper, and upon that ground he brings this action against the two defenders, as proprietor and printer of *The Times*, neither of these persons being resident in Scotland, but both of them being domiciled and resident in England. The defenders do not, as I understand, dispute that they are answerable for the statements which are published in *The Times* newspaper, but they maintain that they cannot be required to answer except in the Courts of their domicile, and that they are not subject to the jurisdiction of the Court of Scotland. The pursuer, on the other hand, maintains that this Court has jurisdiction upon two grounds—in the first place, because the newspaper which contained the slanderous statements of which he complains has been published in Scotland; and secondly, because he has arrested funds in Scotland belonging to the defenders. As to the first of these grounds, I have seen no reason to alter the opinion which I indicated upon a former occasion. I do not think it at all doubtful that *The Times* is published in Scotland; but there is no authority for holding that publication alone will give jurisdiction against a foreigner who has not been personally cited. I am not prepared to assent to the argument which Mr Balfour maintained, that publication ought to give jurisdiction, for reasons which he represented as being reasons of expediency and necessity. I think his argument inconsistent with the general doctrine both of our own law and of the civil law, both of which recognise the maxim, *Actor sequitur forum rei*; and accordingly, in the only case in which publication alone appears to have been suggested as a ground of jurisdiction it was rejected by the Court—I mean the case of *Longworth v. Hope*, July 1, 1865, 3 Macph. 149, 37 Scot. Jur. 552. Lord Colonsay says nothing directly as to this ground of jurisdiction, but it is evident that he

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The pursuer reclaimed, but, when the cause was put out for hearing, intimated that he did not insist in his reclaiming note.

thought it insufficient, because he speaks of the arrestment as the only ground upon which the jurisdiction of the Court could be sustained. Lord Curriehill expressed the opinion which I think is implied in the judgment of Lord Colonsay. Lord Curriehill says :—‘ I think we have no jurisdiction otherwise than in virtue of the arrestments. The circumstance of the alleged libel having been published by the defenders does not appear to me to be in itself sufficient ; for if the defenders, who reside in England, have merely published the newspaper complained of, I do not see how that would subject them to the jurisdiction of the Scottish Court.’

“ The other ground of jurisdiction is certainly anomalous, and probably it is as much opposed as the first to the general doctrine of law which I have mentioned. But it is a rule of the law of Scotland, too well established to be called in question, that the jurisdiction of this Court over foreigners may be created by the arrestment of their personal funds in this country ; and it was decided in *Longworth v. Hope* that this mode of jurisdiction is applicable to actions of damages for slander. The jurisdiction, therefore, comes to depend upon its being established that funds belonging to the defenders, or either of them, have been effectually attached by the pursuer’s arrestment. It is not now maintained that any fund belonging to the defender Mr Wright has been so attached, and therefore, so far as he is concerned, the case is necessarily at an end. But the question remains as to whether funds belonging to Mr Walter have been attached. Now, the arrestments upon which the pursuer founds are in ordinary form ; and the execution bears to attach in the hands of certain arrestees, certain sums, more or less, due and addebted by them to the said John Walter, or to any other person or persons for his use and behoof. It appears from the evidence of the arrestees that they have incurred debts for the price of certain advertisements which they have inserted in *The Times* newspaper. The defender says that he is not the proper creditor in these debts, but that the true creditor is a copartnership or firm of which he is a member ; and if that be so it would follow that he has no direct right of action to recover debts contracted to this firm of which he is a member ; and, consequently, that those debts could not be attached by arrestments in the terms I have mentioned. Now, that raises two questions. In the first place, whether the debts in question are owing to Mr Walter as an individual or to the firm of which he says he is a member ; and in the second place, if they are owing to the firm, whether the right of Mr Walter as an individual partner is such that the debts due to the firm can be effectually taken in execution of his separate debt. Both of these questions must be determined by the law of England, which I must take as matter of fact to be ascertained by the evidence of experts. I had the advantage of hearing from the learned counsel who were examined as witnesses a very able and interesting exposition of the law of England upon these two points ; and I have the more satisfaction in considering their opinions, because I find that upon all points which are material to the present question they are substantially at one. I do not think it necessary to examine the evidence in detail. The result of it is to make it perfectly clear that the debts in question are not owing to Mr Walter as an individual, but that they are owing to a firm of copartners of which he and others are members. The fact of partnership being established, the next question is, whether, according to the law of England, the right of a partner of a trading firm in the assets of the copartnership is of such a character that the debts due to the firm may be taken in execution by the separate creditors of a partner for the satisfaction of his separate debts. I think it is established by the evidence that in that respect the law of England is precisely the same as the law of Scotland. The evidence shews that the assets of a copartnership belong to the partners jointly, each of them having an undivided interest in the whole ; and what is meant by the share of a partner is thus explained by a very eminent writer, to whose work counsel referred,—‘ What is meant by the share of a partner is his proportion of the partnership assets

THE COURT accordingly, in respect that the pursuer did not insist in the reclaiming note, dismissed the same. No. 166.

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after they have all been realised and converted into money, and all debts and liabilities have been paid and discharged.<sup>1</sup> That is the law of England, as it is proved in evidence; and I think it is a perfectly accurate statement of the law of Scotland also. It follows as a necessary consequence that debts due to the firm cannot be taken in execution by a separate creditor of a partner for debts due by him as an individual. It is said that the rule of our law, by which the separate creditors of an individual partner cannot arrest debts due to the copartnery, arises from a principle which is not recognised in England, inasmuch as the law of that country does not treat the firm as a separate person distinct from its members. But it is not, in my opinion, because of the mere impersonation of the firm that its assets cannot be arrested by the creditors of a partner, but because the partner has no separate share in the assets which is capable of being attached by that diligence. The principle is that a partner has no right to claim any particular portion of the assets as belonging exclusively to him, and neither his assignees nor his separate creditors can have any higher right against the joint property than the debtor or cedent from whom they derive their interest. The true ground, therefore, is that which is stated in Lord Pitfour's note, quoted by Mr Bell, when he says that the creditors of the partner can only affect his share of the balance after payment of the copartnery debts.

"The proposition maintained for the pursuer is a very startling one, because it comes to this, that the separate creditor of any partner of an English trading firm may arrest funds belonging to the firm which he may find situated in Scotland, and carry them off for the satisfaction of his separate debt. There is no authority in the law of Scotland for that proposition. I think the principle upon which we should hold that the arrestments now in question were quite ineffectual to attach debts due to a Scottish copartnery is equally applicable to the case of debts due to a copartnery in England. Mr Balfour in his argument referred to the cases in which it has been held that ships may be arrested for the debts of a part owner. There is no analogy between these cases and the present, because the right of a part owner in a ship is altogether different in its legal character from the interest of a partner in the assets of a trading firm, and also because the arrestment of a ship is a diligence of a totally different kind from the arrestment of a debt. The arrestment of a ship is a diligence *in rem*. The ship itself is seized and detained in port. But the objection which the defender takes to the arrestments founded upon is, that they attach nothing. The arrestment of a debt either for founding jurisdiction or for execution operates in a totally different way from the seizure of a corporeal moveable. It operates *in personam*. It interpellates the arrestee from paying his debt to his proper creditor, and ultimately compels him to make it forthcoming to the arresting creditor, and thereby discharges him of his debt to his own creditor. And since that is the mode in which the diligence operates, it follows of necessity that it cannot affect debts payable to anyone, except the person designed in the arrestment. An arrestment of debts due to the defender personally will not prevent the arrestee from paying his debt to the firm, of which the defender is only a single member. It will give him no answer to the demands of the firm, which is his true creditor. It would not compete with an arrestment by the firm's creditors of debts due to the firm; it attaches nothing.

"It is said that, by reason of the defender's mandate as manager, all the proprietors of *The Times* are responsible for a wrong done by him in the conduct of the newspaper, and therefore that the pursuer has his remedy against the property of them all. And Mr Balfour in the course of that argument said—and I think quite soundly—that it was a very good test of the validity of an arrestment for founding jurisdiction to consider whether a fund which is attached by that arrestment could be taken in execution by the decree sought for in the action. Now, I cannot assume that persons who are not called as defenders are

<sup>1</sup> Lindley on Partnership, 4th edit. vol. i. p. 661.



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JOHN WALTER AND ANOTHER, Petitioners.—*Murray*.July 3, 1889.\*  
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*Process—Nobile Officium—Certified copy of proceedings in Scottish Courts—Clerk's certificate.*—On the petition of one of the parties to a cause the Court authorised and required the Principal Clerk of the Division to certify a copy of the proceedings for production in the Irish Courts in a similar action there between the same parties.

1st DIVISION.  
C.(VIDE *Parnell v. Walter and Another*, Feb. 5, 1889, *ante*, p. 917.)

The action of damages for libel at the instance of Charles Stewart Parnell, M.P., against John Walter and another was dismissed by the Lord Ordinary (Kinnear) on the ground of want of jurisdiction on 5th February 1889, and a reclaiming note was thereupon presented by the pursuer to the First Division.

Subsequently Mr Parnell raised an action of damages for the same libel against the same defenders in the High Court of Justice in Ireland, and an order for service was granted by the Court. Mr Walter thereupon applied to have the order for service set aside on the ground of the dependency of the above proceedings in the Scottish Courts.

This was a note by Mr Walter in which he prayed the Court to direct the principal Clerk of the First Division "to sign an authenticated copy of the proceedings" in the Court of Session, which he stated was required in order to support his contention in the Irish Courts.

It appeared that the Clerk had found himself unable to give the certificate required, as he knew of no authority which bound or entitled him to do so.

Counsel for the petitioners founded upon the 14th section of the Act 50 Geo. III. cap. 112,† which he maintained could not be held to be repealed by the Statute Law Revision No. 2 Act (35 and 36 Vict. cap. 97), sec. 1, schedule, although in terms that was so. The section in question did not fall within the preamble of the Statute Law Revision Act, and the enacting clause of that Act bore that the Act should not "affect any form or course of pleading, practice, or procedure." Even without any statutory authority, the Court must have power to direct some method of certifying such proceedings.<sup>1</sup> If the view of the Clerk was correct, nothing but a certified copy of the interlocutor could be given.

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responsible for the wrong of which the pursuer complains. But supposing that they could be made responsible, I think it very clear that no decree in this action could be pronounced against anyone except the individual defenders, and that no writ of execution founded upon the decree, could be carried into effect against the property of anybody else. The proposed test therefore appears to me to be quite conclusive of the question. The debts arrested are debts which are due, not to the individual defender, but to him and a number of other persons jointly, and no decree in this action could be carried into execution by ordering payment of these debts to the separate creditor of the defender. There is no other ground of jurisdiction, I think, requiring consideration, and the judgment, therefore, must be to sustain the first plea in law for the defender, and to dismiss the action."

\* Decided Feb. 23, 1889.

† Sec. 14.—"Provided always, and be it enacted that it shall and may be lawful for any party to require, and the said assistants respectively are hereby required, to furnish to such party authenticated copies of all or any part of the proceedings in any cause, signed by one of the principal Clerks of Session, and which copy the principal Clerks of Session are hereby respectively required to sign, but no fee whatever shall be paid or payable for such copy (save and except the ordinary charge for copying paid at the time in the Court of Session)."

<sup>1</sup> Dickson on Evidence (2d ed.), 1255.

LORD PRESIDENT.—I do not think that we require any statutory authority to enable us to do what Mr Murray asks. It seems to me to be matter of ordinary procedure, such as the Court in its discretion will adopt where necessary. No. 167.  
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LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT accordingly pronounced an interlocutor authorising and requiring the Principal Clerk of Session to grant the certificate craved.

J. & F. ANDERSON, W.S., Agents.

ROBERT STEWART, Pursuer (Reclaimer).—*Murray—J. Wilson.*  
JOHN THOMAS NORTH, Defender (Respondent).—*Gloag—Kennedy.*

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JOHN WELSH, Pursuer and Real Raiser.

ELDRED & BIGNOLD AND ANOTHER, Claimants.—*Gloag—Kennedy.*

ROBERT STEWART, Claimant.—*Murray—J. Wilson.*

*Jurisdiction—Foreign—Arrestment jurisdictionis fundandæ causa—Defeasible right.*—On 26th May 1887 A, to found jurisdiction against B, a domiciled Englishman, arrested in the hands of C a sum due by him to B under a decree for costs in an English action, and on the following day A served a summons upon B.

On 13th June 1887 B's English solicitors obtained from the English Court a charging order, which by the law of England had the effect not only of transferring B's claim for costs to them, but of invalidating any prior attachment by a creditor of B.

B pleaded no jurisdiction, and the Lord Ordinary (Kinnear) sustained the plea, on the ground that B's claim for costs against C being defeasible the arrestment was *ab initio* ineffectual to attach the debt.

On a reclaiming note the Court reversed the Lord Ordinary's judgment, holding that as there was a debt due by C to B at the date of the arrestment jurisdiction had been duly constituted when the summons was served, and that the subsequent transfer of B's right did not affect the jurisdiction already constituted.

*Arrestment—Foreign—English decree for costs—Charging order.*—A on the dependence of an action against B arrested in the hands of C a sum due by him to B under a decree for costs in an English action. B's English solicitors subsequently obtained a "charging order" from the English Court, which by the law of England had the effect not only of transferring B's right to them, but of invalidating any prior attachments of the fund by his creditors. Held (*aff. judgment of Lord Kinnear*) that the claim of the English solicitors was preferable to that of A.

On 26th May 1887 Robert Stewart, farmer, Elibank, near Peebles, used arrestments in the hands of John Welsh, residing in Edinburgh, of all sums due by him to Colonel John Thomas North, residing near London, to found jurisdiction against North. 1st DIVISION.  
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C.

At the date of these proceedings North held a judgment of the High Court of Justice, dated 25th April 1887, against Welsh for payment of £419, 11s. 4d. of costs in an action which Welsh had raised against him in England.

Stewart subsequently raised an action of count, reckoning, and payment in the Court of Session against North, and, on the dependence of that action, on 27th May 1887, used arrestments in Welsh's hands of the sum due by him to North to satisfy any judgment that might be pronounced in favour of the pursuer of the action.

On 1st June 1887 a certificate of the judgment for costs in name of North was registered in the Books of Council and Session under the Judgments Extension Act, 1868.

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On 13th June 1887 Messrs Eldred & Bignold, Colonel North's solicitors, obtained from Mr Justice Smith in chambers an order that they should have a charge upon the costs recovered for their costs in the English action.

At the request of Mr Welsh's agents a copy of the charging-order was sent to them on 14th July 1887.

In his defences to Stewart's action, lodged on 21st July 1887, North stated, *inter alia*, that the sum in the decree against Welsh was not arrestable or attachable in respect of claims against North, as Messrs Eldred & Bignold, solicitors in London, who had acted for North and were owed in respect of costs, &c. a sum exceeding the £419, 11s. 4d., were in right of the whole fund which was due and payable only to them. "According to the law of England, so long as the costs of the solicitors of the party found entitled to costs by decree of Court are not otherwise paid or satisfied, the debtor in the said decree is not entitled to pay or satisfy the decree except with their assent or through their hands, and they have a lien on the decree and all costs payable to their client in the cause for the full amount of their costs as between solicitor and client, which lien attaches *ipso jure* on judgment being signed, and is preferable to the claim of any assignee or creditor of their client. The said solicitors are held as creditors in the said debt, *quoad* their unpaid or unsatisfied costs, substantially to the same effect as law-agents who have obtained decree for expenses in the Courts of Scotland, in their own names, as agents disbursers."

North pleaded;—(1) The said debt not being arrestable by a creditor of the defender, no jurisdiction has been founded against him. (2) The alleged arrestments not having affected any property of the defender, and being inept to found jurisdiction, the jurisdiction ought not to be sustained, and the present action should be dismissed, with expenses.

The defender was allowed a proof of his averments in support of the plea of no jurisdiction, and thereafter the following queries were adjusted for the opinion of English counsel:—"1. Was North, before his solicitors obtained the charging order, entitled, while his solicitors' account for the costs of the action remained unpaid, to demand payment to himself of the amount of costs found due in the action, or were the solicitors the true creditors to the exclusion of their client? 2. What was the effect, if any, either at common law or under the provisions of the 28th section of 23 and 24 Vict. c. 127, upon the respective rights of the solicitors and North of the charging order, and, in particular, had it any retrospective effect upon their respective rights?"

Mr R. B. Finlay, Q.C., returned the following opinion:—"Query 1. Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it (*Mercer v. Graves*, L. R., 7 Q. B. 499), but Messrs Eldred & Bignold, in virtue of their particular lien for costs in that action, might, at any time while the money remained unpaid, have given notice to Mr Welsh not to pay Colonel North, and if, after such notice, Mr Welsh had paid Colonel North he might have been compelled to pay again to Messrs Eldred & Bignold (*Omerod v. Tate*, 1 East, 464). To this extent, but no further, were Messrs Eldred & Bignold the true creditors to the exclusion of Colonel North. In virtue of this lien, as it has been called, the claim of Messrs Eldred & Bignold, in respect of their costs, would have priority over an attachment obtained by a judgment creditor of Colonel North against Mr Welsh as garnishee, if notice of their lien had previously been given to the garnishee (*Eisdale v. Conyngham*, 28 L. J., Ex. 213; *Simpson v. Prothero*, 26 L. J., Chy. 671), and I think even where notice had not

been so given, though on this last point there does not appear to be any direct authority. In the case of *Hough v. Edwards* (1 H. and N. 171) the solicitor had no lien for costs in the proceedings in which the judgment had been recovered. No. 168.  
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"Query 2. I am of opinion that the charging order of the 13th June 1887 conferred a valid title upon Messrs Eldred & Bignold under the statute, and that such charging order had a retrospective effect. This order was properly made, as costs are 'property recovered' within the meaning of the section (per Brett, M.R., in *Dallow v. Garrold*, 14 Q. B. D., p. 545, 546). A charging order under the statute 23 and 24 Vict. c. 127, sec. 28, gives the solicitor priority over a judgment creditor who has previously served a garnishee summons (*Dallow v. Garrold*, 14 Q. B. D. 543). As Mr Stewart was of course aware that the sum which he arrested was payable under a judgment, he had constructive notice of the lien of Colonel North's solicitors (*Faithful v. Ewen*, 7 Ch. D. 495). I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of their claim against Colonel North. . . ."

The Lord Ordinary (Kinnear), on 3d November 1888, found that the arrestments were inept and ineffectual to found jurisdiction, and dismissed the action.\*

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\* "OPINION.—The question whether the arrestments used by the pursuer are effectual to found jurisdiction depends upon the relative rights of Colonel North and his solicitors, Messrs Eldred & Bignold, in the debt which is said to have been attached.

"Before the date when the arrestments were used Colonel North had obtained judgment against the arrestee for the sum of £419, 11s. 4d., as the taxed costs of a suit in the High Court of Justice in England. At the date when the defences in the present action were lodged, Messrs Eldred & Bignold had obtained a charging order, the legal effect of which is explained in Mr Finlay's opinion. It was held, in *Walls' Trustees v. Drynan*, 15 R. 359, that the question raised by a plea to jurisdiction is 'not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de presenti*, at the time when the objection is stated,' and if it were to be held in accordance with that judgment, that the question is to be determined with exclusive reference to the state of rights at the time when defences are lodged, it would appear to me to follow from Mr Finlay's opinion that the jurisdiction is not well founded, because at that time the arrestments were, according to the opinion, ineffectual. Mr Finlay says, not merely that the charging order 'conferred a valid title upon Messrs Eldred & Bignold,' but also that it had a retrospective effect, so as to give them a priority over an attachment previously obtained by a creditor of Colonel North.

"It is enacted by the statute to which the learned counsel refers, section 28, that 'all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bona fide* purchaser without notice, be absolutely void and of no effect as against such charge or right.' It seems to be clear enough, both from the opinion and from the case of *Dallow v. Garrold*, cited by Mr Finlay, that the pursuer, as arresting creditor, does not fall within the exception in favour of purchasers without notice, and accordingly it was hardly disputed that in the multiplepoinding Messrs Eldred & Bignold must be preferred, because in a question with them the arrestments used by the pursuer are absolutely void.

"But it is said that the true point of time to be considered is the date when the arrestment was used to found jurisdiction, because, if that arrestment were effectual at the time, no subsequent event could displace the jurisdiction thereby established. It may be that that is a sound proposition, and I do not think

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Stewart reclaimed, and argued ;—The question of jurisdiction fell to be determined with relation to the validity of the arrestment *jurisdictionis fundandæ causa* as at the time when it was laid on. It could not matter that the subject arrested had been removed at a later date, if the jurisdiction had once been established.<sup>1</sup> The judgment giving the defendant the costs in the English suit was in favour of Colonel North himself. The charging order did not become operative in any way, or affect the arrested fund until it had been applied for and pronounced. Until then Colonel North was himself the creditor, and could not be said to be in

there is anything to the contrary in the judgments delivered in the case of *Walls*, but I think the arrestment was inept from the beginning, because I must hold, in accordance with Mr Finlay's opinion, that it was ineffectual to attach the debt. It is true that before the solicitors obtained the charging order Colonel North could have demanded payment, but Messrs Eldred & Bignold might at any time while the money remained unpaid have given notice to Mr Welsh not to pay to Colonel North. Colonel North therefore had at no time an exclusive right to recover, and his right such as it was could not be made available to attach the debt so as to exclude Messrs Eldred & Bignold, because they could defeat the attachment so long as the money remained unpaid. They have in fact defeated the arrestment, and they must obtain decree in the multiplepounding\* for payment of the money alleged to have been well arrested by Mr Stewart. It appears to me impossible to give effect to their claim in that action, and at the same time to hold in the present action that the money was effectually arrested by the competing claimant in the multiplepounding.

"It is said that the arrestment to found jurisdiction is in a totally different position from an arrestment in execution, because it does not impose a *nexus*. It may not be a lasting *nexus*, and there may be a question how long it continues. But still, like any other arrestment, it must be effectual to attach the subject arrested, for the purpose for which it is used, or else it must be inept.

"The *nexus* must be capable of subsisting until the time when the objection to jurisdiction can be pleaded, or else it is of no effect. This appears to me to be very clearly brought out in the Lord President's judgment in the case of *Lindsay* (22 D. 571), where he explains the meaning of an arrestment to found jurisdiction. 'It means this, that it fixes a subject in the country, and the subject being in the country, the party is answerable to the jurisdiction of this Court.' On this principle, it was held in the case of *Trowsdale's Trustees v. The Forcett Railway Company*, 9 M. 88, that in order to found jurisdiction by arrestment the subject arrested must be capable of attachment by diligence in execution; and Lord Neaves states the reason very much in the same way as the Lord President does in *Lindsay's* case. 'The principle rests on the fact that there is something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. . . . We must not extend the fiction beyond the limits already recognised. I am not aware of its having been extended beyond circumstances where the arrestment shews that the decree will not be a *brutum fulmen*, from there being a subject within the jurisdiction of the Court which can be attached.' It is true that the effect of the decree is not to be measured by the value of the subject arrested. But the subject, whatever be its value, must be effectually seized by the arresting creditor, although the seizure may be only temporary, and although it may cease to operate without the procedure which is necessary to determine the effect of an arrestment in execution.

"In the present case, the arrestment has fixed nothing within the country. There is no subject attached which could be taken in execution of a decree against the defender. The arrestment is therefore, in my opinion, inept.

"No other ground of jurisdiction is alleged."

\* The proceedings in the multiplepounding are reported, *infra*, p. 935.

<sup>1</sup> *Cameron v. Chapman*, March 9, 1838, 16 S. 907 (Lord Corehouse, p. 918).

any way a trustee for his solicitors. The law of Scotland recognised as No. 168. good an arrestment *ad fundandam* upon a fund to which the creditor's right was defeasible.<sup>1</sup> No doubt, it was not the same question whether an arrestment *ad fundandam jurisdictionem* was good, and whether the arrestment would be upheld in a forthcoming. But the criterion of arrestability in both cases was the same. It had been held that debts might be arrested *currente termino*.<sup>2</sup> An arrestment *ad fundandam jurisdictionem* imposed no *nexus*,<sup>3</sup> and its purpose was served when the jurisdiction was founded. Assuming that the charging order had the effect which Mr Finlay in his opinion attributed to it, it could at anyrate—founded as it was on an English statute—have no more than a local effect, and did not, at least retrospectively, affect the nature of the right to the fund.

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Argued for Colonel North;—It had been laid down that jurisdiction was not to be extended beyond what was warranted by authority and precedent.<sup>4</sup> The date at which the validity of the arrestments *ad fundandam* fell to be determined was the 4th July 1887, when the defences were lodged.<sup>5</sup> In order to make an effectual arrestment *ad fundandam* it must be shewn that there was a *nexus* laid on the fund which was capable of being continued until the jurisdiction was prorogated or satisfaction was given. The arrestment was to be taken subject to all modifications *tantum et tale* as it stood in the arrestee.<sup>6</sup> When the arrestment was laid on here, there were practically no funds in the hands of the arrestee, for they were nothing more than a sum of expenses due to Messrs Bignold. They had the entire beneficial interest, although *ex facie* it might be in Colonel North. It could make no difference in the relation of parties that the English decree had been made a Scots decree under the Judgments Extension Act.

At advising, on 14th June 1889,—

LORD PRESIDENT.—In this case the Lord Ordinary has found “that the arrestments used by the pursuer in the hands of Mr John Welsh are inept and ineffectual to found jurisdiction,” and he has dismissed the action.

I am unable to agree with the Lord Ordinary, and I am of opinion that the arrestments which were used for the purpose of founding jurisdiction were effectual for that purpose. The debt which was due by the arrestee to the defender arose out of a judgment which was pronounced in the English Courts against him, in which he was found liable in costs to Colonel North. That judgment was subsequently registered in Scotland, and thereafter had the effect of a judgment of this Court, in so far as it was necessary to make it a foundation for diligence.

The execution of arrestments *ad fundandam jurisdictionem* in the present

<sup>1</sup> Baines & Tait v. Compagnie Générale des Mines d'Asphalte, March 15, 1879, 6 R. 846; Lothian v. M'Cree, Nov. 27, 1828, 7 S. 72; Douglas v. Jones, June 30, 1831, 9 S. 856; Lindsay v. London and North-Western Railway, Jan. 27, 1860, 22 D. 571.

<sup>2</sup> Corse v. Masterton, 1705, M. 767; Marshall v. Nimmo & Co., Dec. 18, 1847, 10 D. 328; Bell's Com. 5th ed. ii. 73, 7th ed. ii. 69.

<sup>3</sup> Malone & M'Gibbon v. Caledonian Railway Co., May 28, 1884, 11 R. 853; Carlberg v. Borjesson, Nov. 21, 1877, 5 R. 188.

<sup>4</sup> Cameron v. Chapman, March 9, 1838, 16 S. 907 (Lord Corehouse, p. 918).

<sup>5</sup> Walls v. Drynan, Feb. 1, 1888, 15 R. 359.

<sup>6</sup> Chamber's Trustees v. Smith, April 15, 1878, 5 R. (H. of L.) 151; Wyper v. Carr & Co., Feb. 2, 1877, 4 R. 444.

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action took place on 26th May 1887. The summons was signeted on the following day, and on the same date arrestments on the dependence of that action were used. In the present case we have nothing to do with the arrestments on the dependence, and the present question falls to be dealt with as if they had never been used. The validity and effect of the arrestments *ad fundandam jurisdictionem* are the matters we have to decide.

The reason why the arrestments are said to be ineffectual is that the London solicitors of the defender are said to be entitled to a preference on the arrested fund in competition with their client, and with all the world. That would, no doubt, have been so, if they had been in possession of a charging order from the English Courts. But they did not get a charging order until the 13th June, and the arrestments *ad fundandam jurisdictionem* were used, as I have said, on the 26th May. On that date the arrestee was undoubtedly a debtor to the defender. That he should afterwards cease to be a debtor to the defender, either by assignation of the debt or by any competent legal diligence, does not prevent the action from being good at the date when it was raised. And if it was good then I am of opinion that it does not affect its validity for the purpose of jurisdiction that the fund which was arrested in order to found the jurisdiction was afterwards carried off by someone else. An arrestment to found jurisdiction cannot be followed by a furthcoming, and in no other way can an arrestment *ad fundandam* be made available for the purposes of payment. Accordingly, an arrestment *ad fundandam jurisdictionem* can never be used for other purposes than merely to lay upon the funds in the hands of the arrestee such a *nexus*, or whatever else it may be called, as will found jurisdiction in this Court. The charging order in this case is not very different from any other diligence which is preferable not by reason of its priority in point of time but by reason of inherent right. The arrestment on the dependence may be defeated by a subsequent preference caused by the charging order, but it depended on whether the English solicitors chose to obtain the charging order or not. They might have refrained altogether from taking the order, trusting to their client to recover the costs himself, or their debt might have been satisfied. In fact, it was a mere contingency whether the debt would be affected by the charging order, and the circumstance of its having the possible effect of carrying off the fund at a subsequent time did not in any way affect the value of the arrestment *ad fundandam jurisdictionem* at the time it was used.

I see that the Lord Ordinary has referred to the case of *Wall's Trustees v. Drynan*, 15 R. 359, and it appears to me that his Lordship has misunderstood the point which the Court settled in that case. He says,—“It was held, in *Wall's Trustees v. Drynan*, 15 R. 359, that the question raised by a plea to jurisdiction is ‘not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de presenti*, at the time when the objection is stated.’” The point which the Court was called upon to settle in that case was whether an arrestment to found jurisdiction was used too late or not. It was used in that case after the signeting of the summons, and my opinion was to the effect that the question fell to be determined as at the date when the objection was stated, and that if there was jurisdiction then the time at which the arrestment was used was of no consequence. And so, in the present case, if I could affirm that there was no jurisdiction when the defence was taken, I should sustain the objection; but I am

of opinion that there was jurisdiction, because antecedent to the raising of the summons arrestments were used against a fund which then belonged to the defender.

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I am therefore for recalling the Lord Ordinary's interlocutor, and repelling the plea against the jurisdiction.

**LORD MURE**.—I concur with your Lordship. As to the facts of the case, I do not think it can be disputed that when the arrestment *ad fundandam jurisdictionem* was used there were funds in the hands of the arrestee to which the defender had a valid claim, so that the jurisdiction of the Court was, I conceive, well founded at the time when the arrestment was laid on. It now, however, appears that a firm of English solicitors had a contingent interest over the fund, and that in order to secure that interest they obtained a charging order from the Courts in England some days after the arrestments were used, and it is contended that the effect of that charging order, in accordance with the opinion of English counsel, was to transfer the fund in question to the solicitors. But even assuming that to be the case, the circumstance will not have the effect of invalidating the arrestment as a means of founding jurisdiction. Because it is in my opinion settled that if an arrestment is *ex facie* well laid on when used, the fact that another party has made a claim to the arrested fund as not belonging to the debtor will not interfere with the jurisdiction. The rule applicable to this question was, I think, fixed in the case of *Douglas v. Jones*, 9 S. 856, where the Court held, in a question as to the validity of an arrestment to found jurisdiction, that it was not relevant to allege that it would turn out upon inquiry that the defender had in reality no interest in the fund arrested. The decision in that case appears to me to apply here.

**LORD SHAND**.—At the time when the arrestments *ad fundandam jurisdictionem* were used, decree had been granted in favour of Colonel North for £419, and the opinion of English counsel is to the effect that Colonel North was at that time entitled "to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it." Accordingly when the arrestments were laid on, the funds arrested were funds of which Colonel North could have demanded payment, and which Mr Welsh would have been in safety to pay to him. It further appears that, as time went on, Colonel North's solicitors applied to the English Courts for a charging order, as they had right to do, and obtained it, and in accordance with the opinion to which I have referred, when that charging order was got and intimated Colonel North's right to the fund came to an end.

The question is whether at the date when the arrestments were laid on the fund in question was an arrestable subject. It was undoubtedly a fund to which the defender then had right, although the right was one of a defeasible nature, but until the right was defeated it certainly possessed a value for the defender. It was of such value that it could be made the subject of a transaction. In these circumstances, I have no doubt that it was an arrestable right which was capable of founding jurisdiction.

The arrestments were used before the summons was signeted. It was afterwards signeted, and the action raised. That is in accordance with the ordinary practice, and is, in my opinion, the correct and proper practice to be adopted, where an action is to proceed on jurisdiction founded on or created by arrestments. But the point urged by the respondent was that the charging order was obtained,



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and the defender's right to the fund in question was defeated before the defences were lodged. That circumstance cannot, in my opinion, affect the jurisdiction of the Court, which undoubtedly existed when the action was raised. It is said that upon the authority of the case of *Walls v. Drynan*, 15 R. 359, the date of the lodging of the defences is the time to which the Court must look, in order to see whether there is jurisdiction against a defender. I did not take part in that judgment, but it seems to me that the point which was decided was in the language of the Lord President (p. 363), thus expressed :—" It is enough to say that jurisdiction is founded in perfectly good time if it is founded when the summons is served, because until the summons is served there is no action." This view in no way conflicts with the pursuer's contention in this case. In the present case, there was jurisdiction founded even before the summons was signeted, in accordance with the usual and, as I think, the proper practice. I see nothing in the decision in *Walls'* case to lead me to the conclusion that arrestments which were good as at the date when they were used could lose their effect because of something which happened between that date and the lodging of the defences.

I therefore agree with your Lordship that we must recall the Lord Ordinary's interlocutor, and repel the plea of want of jurisdiction.

LORD ADAM.—Upon 26th May 1887 the pursuer executed an arrestment *jurisdictionis fundandæ causa* in Mr Welsh's hands, upon the allegation that the latter was debtor to Colonel North, the defender, in a sum of £419, 11s. 4d., the costs in an action between Mr Welsh and Colonel North in the English Courts in which the latter was successful. *Ex facie*, there is no doubt that this was a debt due by Mr Welsh to Colonel North, but as I understand the argument, it is said that it was truly a debt due by the former to the English solicitors of the latter. Upon that matter, the opinion of English counsel which is before us is to the effect that up to the 13th June Colonel North was entitled to demand payment of these costs, and Mr Welsh was bound to pay them. If that be so, I cannot understand a better description of what will constitute a debt, and accordingly I think the arrestment was good as at the 26th May.

On the 27th May, a summons was served upon the defender, and arrestments were used upon the dependence of the action. If there was a valid and pending action against the defender, he was bound to answer the citation which was thus given him, not because the service could create jurisdiction, but because the jurisdiction was created previously. The arrestment was the means by which the defender was validly cited to appear, and as soon as it had served its purpose in that way, it was of no further use, and there was an end of it. It is said that the effect of the charging order was to sweep away the fund which had been validly arrested, and a question has also arisen as to the effect to be given to the arrestment on the dependence of the action. But neither of these can touch the validity of the arrestment *jurisdictionis fundandæ causa*, which was, I think, perfectly good to found jurisdiction as of the date on which it was used.

I am of opinion that the interlocutor of the Lord Ordinary is wrong, and must be reversed.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the first and second pleas of the defender, and remitted to the Lord Ordinary to proceed.

The question as to the effect of the arrestments used by Mr Stewart on the dependence of his action was raised in a multiplepinding raised by Mr Welsh, the fund *in medio* being the sum due by him of costs in the English action, the amount of which he had consigned in Court. No. 168.  
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Messrs Eldred & Bignold and Colonel North lodged a joint claim. The former claimed the whole fund, and Colonel North claimed only in the event of their claim not being sustained.

The former pleaded;—(1) In respect of their holding the said decree for their costs as from the 25th day of April 1887, the claimants are entitled to be ranked and preferred in terms of their claim. (2) The said fund not being arrestable by any creditor of North's at the date of the said arrestments being used, and the alleged arrestments being inept, the claimants should be preferred to the arrestor or alleged arrestor. (3) The right of the claimants being preferable to arrestments laid on subsequent to 25th April 1887, they should be ranked and preferred in terms of their claim.

Mr Stewart claimed the whole fund, and pleaded;—(1) The claimant having attached under the diligence set forth the fund *in medio*, he is entitled to be ranked and preferred in terms of his claim.

The proof in the action *Stewart v. North* was held as proof in this action.

On 3d November 1888 the Lord Ordinary (Kinnear) sustained the claim for Messrs Eldred & Bignold to the whole fund *in medio*.

Mr Stewart reclaimed, and argued;—The effect of the charging order was confined to England; it was a remedy simply upon the English Statute of 23 and 24 Vict. cap. 127, and was of no avail here. Besides by the registration of the decree, the decree became a Scots decree, and the operation of English law was entirely excluded.

Argued for Messrs Eldred & Bignold;—Looking to the terms of Mr Finlay's opinion, the charging order transferred the whole right to the arrested fund to Messrs Eldred, who were therefore entitled to be preferred to the fund in preference to Colonel North. As against Stewart, the question fell to be decided altogether apart from that relating to the jurisdiction *ad fundandam*.<sup>1</sup>

At advising,—

LORD PRESIDENT.—I think that the Lord Ordinary was right in sustaining the claim for Eldred & Bignold. The fund *in medio* consists of a sum which is due by Welsh, the arrestee, to Colonel North under a judgment of the High Court of Justice in England. This sum is the amount of costs found due to Colonel North in an action by Welsh against him in which he was successful. So long as there was no interposition on the part of the English solicitors he could have accepted payment from Welsh, and Welsh would have been safe in making payment to him. But it was in the power of the English solicitors to interpose, obtaining what is known as a "charging order," which had, it appears, the effect of transferring the right from North to them. I think that according to the law of England as it is explained very clearly in the opinion of Mr Finlay, and it is by the law of England as so explained that we must decide, this right of Colonel North was a qualified right. The arresting creditor arrested in the hands of the debtor under the English judgment the sum for which Welsh was accountable to North. But if he was not accountable to North—if he was not liable to account to North,—then that which was arrested was not

<sup>1</sup> *Authorities cited*.—Goetz v. Aders, Nov. 27, 1874, 2 R. 150; Strother v. Read, M. Forum Competens, No. 4.

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prestable by the arrestee, for the charging order though subsequent to the arrestment has the effect of making Welsh, the arrestee, accountable to Eldred & Bignold instead of to North.

Therefore, I think, Eldred & Bignold were preferable, and that the judgment of the Lord Ordinary is right.

**LORD MURE.**—I agree in thinking that we must decide this question according to the law of England, and I have no difficulty in concurring with your Lordship. The import of the opinion of English counsel is that by the step taken by Eldred & Bignold the right of North was transferred to and became absolute in them. That being so, I think they are to be preferred.

**LORD SHAND.**—The sum arrested was the amount of a decree for costs obtained by North in a suit before the High Court of Justice in England. Subsequently to the arrestment in the hands of Welsh, Messrs Eldred & Bignold obtained a charging order, which is dated 13th June, and intimated to Welsh on 14th July. The question is whether that charging order had, when duly intimated, the effect of entitling Eldred & Bignold to obtain decree for the money arrested, preferably to Stewart, the arresting creditor. I am of opinion with your Lordships that the arrestment is not good in a question with Eldred & Bignold. The question must be determined by the law of England, and that for the reason that it is a question not of the particular remedy, but of the right itself. Now, the nature of North's right is explained in three passages of the opinion of Mr Finlay. He says,—“Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it, but Messrs Eldred & Bignold, in virtue of their particular lien for costs in that action, might, at any time while the money remained unpaid, have given notice to Mr Welsh not to pay to Colonel North, and if after such notice Mr Welsh had paid to Colonel North, he might have been compelled to pay again to Messrs Eldred & Bignold.” In a subsequent passage of the opinion he says,—“I am of opinion that the charging order of 13th June 1887 conferred a valid title upon Messrs Eldred & Bignold under the statute, and that such charging order had a retrospective effect,” and in the last place there is this important passage,—“I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of their claim against Colonel North.”

What then, according to the law of England, was the right of North at the date of the arrestment by Stewart. I think the answer to that question is, that it was a defeasible right. If the arrestee had paid to North before the date of the charging order, the discharge he would have obtained for the money from North would have been quite good, but until payment was actually made the right was defeasible, and being defeasible, it was defeated by the charging order, and the intimation of it. The arresting creditor could not by his arrestment obtain any higher right than the debtor to him, Colonel North, had. If North had assigned the claim to a third party, his assignee would in that case have had no higher right than the cedent or assignor himself had to give. The right of the assignee would have still been defeasible. As North's right was defeasible, and by the law of England was defeated by the charging order, I think that the Lord Ordinary's right, and that Eldred & Bignold have a preferable claim.

LORD ADAM concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

J. & A. HASTIE, S.S.C.—ALEXANDER CAMPBELL, S.S.C.—Agents.

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JAMES BULLOCH AND OTHERS (Clouston's Trustees), First Parties.—

*Sir Charles Pearson—Graham.*

MRS MARIA BULLOCH AND OTHERS, Second Parties.—*Gloag—*

*Sir Ludovic Grant.*

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*Succession—Testament—Falsa demonstratio—Direction to pay—Trust.*—A trustor, by his trust-disposition and settlement, directed his trustees to pay or make over to each of three of his daughters one-fifth share of the residue and remainder of his means and estate, "the said shares to be at the absolute disposal of my said three daughters respectively." By subsequent codicil he "revoked and altered" his settlement "to this extent, that, in place of the absolute power therein given to" his three daughters, "I restrict that absolute power in each case to one half of their respective shares of my heritable estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime, beyond the interest or revenue derived from it; but they shall have power, by any deed or writing duly executed by them, to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime."

The trustor's moveable estate amounted to £175,000, and his heritable estate to £8000. In a special case between the trustees and the three daughters held (1) that the words "shares of my heritable estate" applied to shares of the testator's whole estate whether heritable or moveable; and (2) that as there was a clear direction to the trustees in the trust settlement to pay over the daughters' shares, and as that direction was not recalled, and no machinery was provided for carrying out the provisions of the codicil, the trustees were not entitled to hold any part of the shares,—*diss.* Lord Adam, who was of opinion that the terms of the codicil amounted to a revocation of the direction to pay over as regards one half of each daughter's share, and an implied direction to hold that half for her in liferent, and on her death to pay the fee as she may have directed.

*Observations* on the cases of *Allan's Trustees v. Allan*, 11 Macph. 216; *M'Nish v. Donald's Trustees*, 7 R. 96; and *Douglas' Trustees v. Kay's Trustees*, 7 R. 295.

PETER CLOUSTON, insurance broker, Glasgow, died on 30th August 1888, survived by four daughters, viz., Mrs Hannah Bulloch, wife of James Bulloch; Mrs Maria Bulloch, wife of Matthew Bulloch; Miss Christian and Miss Elizabeth Keir Clouston. 1ST DIVISION.  
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He left a trust-disposition and settlement, dated 31st December 1883 (under which Mr James Bulloch and others were appointed trustees), and various codicils, of which one was dated 29th November 1886.

The value of his moveable estate was about £175,000, and of his heritable estate, including his house in Glasgow, about £8000.

By the third purpose of his trust-disposition he directed his trustees to allow his unmarried daughters, Christian and Elizabeth, the liferent of his house in Glasgow, under certain conditions.

The fourth purpose contained, *inter alia*, the following clauses:—"In the fourth place, my trustees shall from time to time, as the same comes to be realised, divide the whole residue and remainder of my means and estate (including sums or property retained to meet annuities or liferent interests, or otherwise, as the same fall in) into five equal parts or shares, and hold and dispose thereof in manner following:— . . . (Second) Subject to the said provisions and the deductions after mentioned, my

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trustees shall pay or make over one of the said fifth shares of the said residue and remainder of my means and estate to each of my three daughters, Mrs Maria Clouston or Bulloch, wife of the said Matthew Bulloch, and the said Miss Christian or Christina Clouston and Elizabeth Keir Clouston, respectively (being three fifth shares in all), the said shares, so far as available, to be paid or made over as soon as conveniently may be after my decease, and the remainder to be paid or made over as and when the same becomes available, the said shares to be at the absolute disposal of my said three daughters respectively."

He further provided that each of his unmarried daughters, so long as they should remain unmarried, should have an income of at least £1200 per annum, and that if the income of their shares of the residue fell short of that amount, the trustees should retain in their hands such a sum out of the shares falling to his married daughter and the children of a daughter who had predeceased them as would bring up their income to that amount.

The codicil of 29th November 1886 was in the following terms:—"After serious and mature consideration, and reflecting on the uncertainty of circumstances which may happen, I hereby revoke and alter the clause named (second) on twenty-third line of page sixth in my trust-disposition or settlement, to this extent, that, in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one half of their respective shares of my heritable estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it; but they shall have power, by any deed or writing duly executed by them, to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime."

Questions having arisen as to the effect of that codicil, a special case was presented to the Court, to which Mr Clouston's trustees were the first parties, and Mrs Maria Bulloch and the Misses Christina and Elizabeth Clouston the second parties.

The first parties contended that the truster had by his codicil of 29th November 1886 restricted the absolute right in their respective shares of residue conferred on his three daughters Maria (Mrs Bulloch), Christina, and Elizabeth, by the said trust-disposition and settlement, to a liferent as regards one-half thereof, and that the trustees were bound to retain the half of such shares for behoof of these ladies in liferent, and subject to their power of disposal by will, but not otherwise.

The second parties contended that the codicil of 29th November 1886 was void from repugnancy, and, alternatively, that it applied only to the heritable or real estate of the truster.

The following questions were submitted for the opinion and judgment of the Court:—"1. Are the first parties, as Mr Clouston's trustees, bound by the codicil dated 29th November 1886 to hold one half of the shares of the whole residue of the truster's estate, given by the clause named (second) of the fourth purpose of his trust-disposition and settlement to his daughters Maria (Mrs Bulloch), Christina, and Elizabeth, for behoof of these ladies in liferent, subject to a power of disposal by will only of their respective shares? or, 2. Are the said trustees bound by the trust-disposition and settlement, and the codicil of 29th November 1886, to hold only one half of the heritable or real estate of the truster for behoof of the said three daughters in liferent, subject to their power of disposal by will only, and to pay or make over their respective shares of the whole

moveable estate, as well as the other half of the heritable estate, to the said three daughters in the manner directed by the clause named (second) of the fourth head or direction of the trust-disposition and settlement? or, 3. Is the codicil of 29th November 1886 void on the ground of uncertainty? or, 4. Are the first parties, as Mr Clouston's trustees, bound and entitled by the trust-disposition and settlement and codicil of 29th November 1886 to hold any part of the shares of the moveable or heritable estate of the truster, or are they bound to pay and make over said shares, or any, or what part thereof, to Maria (Mrs Bulloch), Christina, and Elizabeth, the truster's three daughters, and, if so, on what terms?"

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Argued for the first parties;—The evident intention of the testator, as shewn by the trust-settlement and codicil, was that his unmarried daughters should have a good income on which to live in the house in Glasgow, and that they should not have the power of depriving themselves of it. That could not be insured unless the words "shares of my heritable estate" in the codicil were read as meaning "shares of the whole estate to be inherited" by the daughters, as the interest of one half of each daughter's share of heritage would be very small indeed. The suggested meaning of the word "heritable" was sanctioned by authority (*cf.* Johnson's and Webster's Dictionaries), but if that meaning was not to be adopted, then the word should be struck out altogether as being at variance with the general intention of the truster. When such was the case, the Court would go directly in the teeth of the words used in the deed.<sup>1</sup> The words of the codicil amounted to a revocation of the direction to pay over in the trust-deed. To carry out the intention of tying up one half of each daughter's share there was no necessity to create a trust; the existing trust was sufficient for the purpose.<sup>2</sup> The trust here did not exist for one purpose only, as was the case in *Allan's Trustees*,<sup>3</sup> but had to continue for other purposes, so that machinery to enable the trustees to carry out the truster's intention was ready to hand. There was no uncertainty in the legal sense in the words of the codicil—neither the subject nor the object of the clause was doubtful.

Argued for the second parties;—There was no case in which the Court had gone so far as to read "heritable" as meaning "moveable," or mixed heritable and moveable estate. Such a reading would amount to making a new will for the testator. Further, the trustees were not entitled to hold any part of the estate. There was a distinct direction to pay over in the settlement, and that was never recalled. The revocation of such a direction must be as clear as the direction itself. In such cases where there was a direction to pay over, and no revocation of the direction and no machinery provided by which the trustees could hold instead of pay over, it was clearly settled that the intention that a part or the whole of the provision should be tied up was of no effect.<sup>4</sup> The testator had attempted a legal impossibility, viz., to direct that money should be paid over, and yet that it should not be at the disposal of the beneficiary. To carry out any such intention a trust was required.

At advising,—

LORD PRESIDENT.—The parts of the testator's will which we have to construe

<sup>1</sup> *Archibald's Trustees v. Archibald*, June 15, 1882, 9 R. 942; *Dunlop v. McCrae*, July 18, 1884, 11 R. 1104.

<sup>2</sup> *Massy v. Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173, 46 Scot. Jur. 127; *Duthie's Trustees v. Kinloch*, June 5, 1878, 5 R. 858.

<sup>3</sup> *Allan's Trustees v. Allan*, Dec. 12, 1872, 11 Macph. 216.

<sup>4</sup> *Allan's Trustees v. Allan*, 11 Macph. 216; *M'Nish v. M'Donald's Trustees*, Oct. 25, 1879, 7 R. 96.

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are, first, the provisions in the principal deed in favour of his three daughters, Maria, Christian, and Elizabeth, and second, the alterations on those provisions introduced by the codicil of 29th November 1886. In the fourth purpose of his original settlement the testator expresses himself thus :—“(Second), Subject to the said provisions and the deductions after mentioned, my trustees shall pay or make over one of the said fifth shares of the said residue and remainder of my means and estate to each of my three daughters, Mrs Maria Clouston or Bulloch, wife of the said Matthew Bulloch, and the said Miss Christian or Christina Clouston, and Elizabeth Keir Clouston respectively (being three fifth shares in all), the said shares, so far as available, to be paid or made over as soon as conveniently may be after my decease, and the remainder to be paid or made over as and when the same becomes available, the said shares to be at the absolute disposal of my said three daughters respectively.” That is a conveyance which the trustees are to make to the beneficiaries in absolute property, the payment being to be made immediately after the truster's death, so far as funds are available, and so far as funds are not available then as soon as they become available. To emphasise his meaning the testator adds these unnecessary words at the end of the clause, “the said shares to be at the absolute disposal of my said three daughters respectively.”

Now, in the codicil the truster expresses himself thus :—“After serious and mature consideration and reflecting on the uncertainty of circumstances which may happen, I hereby revoke and alter the clause named (second) on twenty-third line of page sixth in my trust-disposition or settlement to this extent, that, in place of the absolute power therein given to my daughters, Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one half of their respective shares of my heritable estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime.” Now, the part of the truster's property dealt with by that codicil, taking its words literally, is his heritable estate. That consists of a house (his own residence) in Glasgow, which he arranges in his settlement is to be occupied by his unmarried daughters, and also of another property of which the value does not exceed £2000. Thus, if these ladies were to be restricted only as regards each one's share of the heritable property the effect of this codicil would be very slight, so slight that it is difficult to believe that that could be the meaning of the testator. Indeed, there are several circumstances which appear on the face of the codicil which point to a different result so strongly that it is impossible to resist the conclusion that the truster did not intend that this codicil should be restricted in its operation to his heritable estate only, but intended it to affect moveable property as well.

The first observation which occurs to me is, that the truster speaks of his daughters' respective shares of his heritable estate, but the subject with which he deals in the original settlement is not shares of heritable estate, but shares of the residue of his means and estate. He dealt with his estate as a mixed estate, and the shares were shares of a mixed moveable and heritable estate.

In the next place, the utterly futile character of the restriction, if the codicil is read according to the strict meaning of the words, gives rise to the gravest

doubts whether that strict meaning can be what the testator intended, particularly as the object of the whole codicil is to make sure that the daughters "shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." Now, if they were entitled to spend everything they had just as they liked, except one-half of their shares of the heritable estate, they might very easily, notwithstanding the provisions of the codicil, reduce themselves to absolute poverty. The notion which the truster had of what was a proper income for his unmarried daughters may be gathered from the fact that elsewhere in his settlement he says that they shall not have less than £1200 each per annum, and to insure that they shall have that income, he burdens the shares falling to his married daughters with the amount necessary to make up that sum, should the shares specially given to the unmarried daughters produce an income of less amount. The views therefore of the truster with regard to what was a proper income for his unmarried daughters were largely in excess of the revenue produced by one-half of his heritable estate.

But further, all the other expressions of the codicil tend to the same result. A power is given to these daughters to deal in their wills with the one-half share in question, but during their lifetimes they cannot deal with it "beyond the interest or revenue derived from it," that is, derived from the half he wished to tie up. Now, "interest or revenue" is not the proper way to speak of income derived from heritable estate, such income is almost always spoken of as rent, whereas "interest or revenue" is peculiarly applicable to moveable estate.

These considerations lead me to the conclusion that there has been a palpable mistake in the use of the word "heritable," a mistake so palpable as to entitle the Court to hold that the truster intended to write "their respective shares of my whole estate." The result of giving effect to this view would be that these daughters would have an absolute power of disposal of one half of their provisions under the settlement, but that as regards the other half, they would be tied up in such a way that they could not spend the capital but only the income, though they might dispose of the capital by will.

That, I think, was the intention of the testator, but the question remains, has he provided the machinery requisite for carrying out his intention? The original deed directs the trustees to pay over the shares without any qualification, and that direction has never been recalled. In these circumstances, it is difficult to see what the trustees can do but pay over the money absolutely. There is no direction to them to hold this part of the estate, and the distinction between holding and paying over the estate was constantly in the mind of the testator throughout the deed. To make this restriction, which was evidently the truster's intention, operative, it would require that some means should be given to the trustees to enable them to carry it out, and where, as here, there is a direction to pay over, and no direction to hold, I do not see how trustees can hold and refuse to pay over.

If the question was one dependent entirely upon principle, and was now presented for decision for the first time, I should think it a matter of the highest importance, and should be inclined to consult the other Judges; but it has been expressly decided that where a truster has provided no machinery for carrying out such an intention as this, the intention cannot receive effect. That was decided in the case of *Allan's Trustees* (11 Macph. 216), which was before the other Division of the Court in 1872. In that case a testator directed his trustees to pay and make over the fee of the residue of his estate to and among his whole

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children, "declaring that the provisions therein made in favour of females shall be purely alimentary to them, and not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration of husbands, and not affectable by their own or such husband's debts or deeds." It was there held that as there was a clear direction to the trustees to pay to the beneficiaries, who were alone interested, and as the Court could not consistently therewith create a trust, which was the only mode of rendering the daughters' provisions inalienable, the daughters were entitled to receive payment on their own receipts. The Court, however, in order to give effect so far as possible to the testator's intentions, directed that the receipts should bear an exclusion of the *jus mariti* and right of administration. Whether that would have any practical effect the Court did not say, but they at least paid that respect to the testator's intention.

The ground of judgment in that case is very clearly set forth in the opinions of the Lord Justice-Clerk and Lord Cowan. The former says,—“If this condition had related to a sum payable annually it would perhaps have been proper that the Court should exercise its equitable jurisdiction for the purpose of carrying into effect such an intention. But in the present case I do not think this is practicable. The testator has attempted to do two inconsistent things. He has ordered his trustees to pay over, while he has endeavoured to limit the full right of property in the payees, and that without a trust, and without creating a separate or resulting right in anyone else.” Lord Cowan says,—“Mr Bell in his Commentaries, and other writers, lay it down that effectual protection for a fund left by a father to his children can only be obtained by means of a trust; and the question here raised comes in effect to be whether we are to create a trust in order to carry out the conditions which Mr Allan annexed to his daughter's provisions. I am not aware of the Court having ever exercised such power. I think we are not entitled to authorise the trustees to do otherwise than the testator has directed, which is to pay the money directly to the beneficiaries.” In that decision Lord Benholme and Lord Neaves concurred. Now, that is a very weighty decision, and I should be little disposed to dispute its soundness standing by itself. It was, however, followed by the case of *M. V. v. Donald's Trustees* (7 R. 96). I need not notice that case at any length, because it follows precisely on *Allan's Trustees*, but I may merely say that the Judges composing the Court in this case were not the same as those who decided *Allan's Trustees*, which of course makes the judicial concurrence of opinion on the point all the stronger.

Another case which was not cited in the arguments involved a recognition by this Division of the doctrine laid down in *Allan's* case, viz., the case of *Douglas's Trustees v. Kay's Trustees* (7 R. 295), where by her antenuptial marriage-contract a lady, who was a minor, with consent of her father disposed to trustees the whole estate belonging or which should belong or accrue to her during the subsistence of the marriage. Her father thereafter by his settlement gave her a share of the residue of his estate as her absolute property, and directed that it should not fall under the conveyance in her marriage-contract, and should be exclusive of the husband's rights, and he authorised his trustees “to take such steps as they may think necessary or proper for giving effect to the provision and declaration.” The father there foresaw that if the money came into the wife's hands it would fall into the power of the marriage-contract trustees, and he thought that if he gave the directions I have mentioned to his trustees he might succeed in preventing that. But he had not, as the Court

held, taken the proper means to effect his purpose, because there being a clear direction to the trustees to pay over the money to the daughter, it was held that as the father's settlement conferred on his daughter an absolute right to the property and possession of the share of residue, the declaration that it should not fall under the conveyance in the antenuptial marriage-contract was ineffectual.

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The reasons which I assigned for the judgment I shall take the liberty to explain by a short quotation from my opinion. I say, speaking of the father,—“He says to his trustees, ‘Do all you can to prevent the fund from falling under the marriage-contract trust, but do so in a way consistent with giving Mrs Douglas an absolute fee and full power of disposal of the fund.’ Now, the question is whether that could effectually be done, whether he could give her a full power of disposal and yet exclude the operation of the marriage-contract trust. I do not doubt that it might have been done by creating a trust with a direction to pay the income to Mrs Douglas during her marriage for her alimentary use only, or by some provision of that kind. But then the fee would not be in Mrs Douglas, but in the trustees, and whether Mrs Douglas and her marriage-contract trustees would have been inclined to accept such a provision in place of her legal rights would have been for them to consider. But in the case here which we have actually to consider there is nothing more than a declaration of will and intention by the testator. He does not give any power, and does not give any authority by which his trustees can do what he wishes. They could not create a subordinate trust at their own hand; that is well settled by the case of *Allan's Trustees* (11 Macph. 216), nor could they continue to hold the money themselves, for they are directed to pay it over to Mrs Douglas as soon as the state of the trust permitted. The father desired that the money should not pass into the hands of the marriage-contract trustees. But what has that to do with the question? Could it be said for one moment that he could by a mere expression of intention exclude the diligence of his daughter's creditors? As I said before, this is a most onerous obligation by Mrs Douglas. She is personally bound just as if she had contracted a debt by borrowing so much money. Therefore I think that there is no answer to the demand of the marriage-contract trustees.

“I may put the question in this way: Was Mrs Douglas not entitled if she chose to give the money to the marriage-contract trustees? It would be very difficult to answer that question in the negative. She had full power of disposal; she could give the money to whom she pleased, including these trustees, and if she had the power was she not also under an obligation to give it?” The rest of the Court, with the exception of Lord Deas, agreed in that opinion. Now, that case appears to me to involve a full recognition by this Division of the authority of the case of *Allan's Trustees*, and the principle embodied therein. The application of the principle to the present case is too clear to require explanation.

I am therefore of opinion that though the intention of the testator in this codicil was to tie up one-half of his daughters' shares, he has not effectually done so, not having provided means whereby his intention may be carried into effect.

LORD MURE.—On the first question raised by this case which relates to the meaning of the codicil I have never felt much difficulty. Looking at its terms

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generally, I think it is clear that the testator's intention was to restrict his daughters' right in the provisions made for them by the settlement to the extent of giving them an absolute right over one-half only of their provision, while as regards the other half they were to have a life interest only of their shares, and an absolute power of disposal of the fee. The testator however in making the codicil has used the expression "shares of my heritable estate," and the use of the word "heritable" has given rise to a difficulty, viz., whether the testator intended to make a change with regard to the half of the whole of each provision, or only with regard to the half of that part of the provisions which consisted of heritage.

In the circumstances of the case, where the moveable estate of which the residue consists is large, and the heritable very small, it is plain that the object of the testator in making the change, as distinctly explained by him in the codicil, could never have been effected if the heritable estate only was to be dealt with, for the income of the half of each daughter's share of that part of the residue would have been so small as not to exceed the wages of a superior servant. It is quite clear to me therefore that the term "heritable estate" was used unintentionally, and that what the testator was really dealing with was each daughter's share of the whole residue, whether it consisted of heritable or of moveable estate. I am, therefore, of opinion that we are entitled to construe the codicil as applying to each daughter's share of the whole provision given to her.

But it is at this point that to my mind the whole difficulty of the case begins, for the testator has not, I think, provided machinery by which this intention can be carried into effect. On this question, I find myself in the same position with your Lordship, having regard to the decisions in *Allan's Trustees* and others which have been mentioned. If we had been free to deal with this as an entirely new question, I should have been disposed to endeavour to adopt some means by which the testator's intention could be effectually carried out, for he has not, I think, provided any himself. But your Lordship has drawn attention to various cases in which it has been held that where there is a direction to trustees to pay over a sum of money absolutely to a beneficiary no qualification of the kind here sought to be imposed can be made operative unless something of the nature of a trust has been interposed. The Court cannot of its own accord, as I understand those decisions, make a trust to carry out the intention of a testator. I am therefore of opinion that the trustees are now bound to pay over their whole provisions to the truster's daughters.

LORD SHAND.—I am of the same opinion on both points. I think that in the interpretation of the settlement and codicil nothing can be plainer than this, that the term "heritable estate" did not in the mind of the testator mean heritable property as opposed to personal. I have nothing to add as to the grounds on which I have reached that conclusion, as your Lordship has already exhausted them. Taking it then on that assumption, it appears to me that the term as used in this codicil must apply to estate generally whether heritable or moveable, and I think that Mr Graham in his argument has afforded a means of giving effect to the testator's intention without doing violence to the language of the codicil, for I think that though the word "heritable," in its most common sense, means heritage as opposed to moveable property, yet there is another and quite proper meaning of the term. In Johnson's Dictionary one meaning

which is expressly given to the word is "whatever may be inherited," and if that be one meaning of the word, and if by giving it that meaning we can give effect to the testator's plain intention, then I think we are entitled to give it that meaning.

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Again, in Webster's Dictionary, I find that the first meaning of the word is "capable of inheriting or taking by descent," but the second is "that may be inherited," and it is added that this last is the true sense of the term. Now, if here we substitute that phrase for "heritable estate" as it occurs in the codicil, then the words of the codicil correctly set forth the intention of the testator. On this ground I have no difficulty in construing the codicil as applying to moveable as well as to heritable estate, and I think that in doing so we do no violence to its language.

On the other point raised by the case I feel no difficulty. It is clear that in the original settlement there is an absolute direction to the trustees to pay over the daughters' shares to them, and I find nothing in the codicil which could have the effect of withdrawing that direction. I doubt whether such a direction could be withdrawn by inference—indeed I am of opinion that where such a direction is clearly stated you must find in some subsequent deed, or clause of the original deed, an equally clear direction to the trustees to hold the shares if an intention to that effect is to be operative. Here the direction in the original deed is "to pay or make over" the shares "as soon as conveniently may be after my decease," while in the codicil with respect to one-half of each daughter's share it is provided that none of the daughters shall have power to deal with their shares during their respective lifetimes beyond the interest or revenue derived from it, but shall have power to dispose of it in their wills. Now, can we read those words as equivalent to a direction to the trustees not to pay over the shares but to continue to hold them until the death of the daughters? I cannot so read them, and I do not think that the Court is entitled to put any such meaning on the words of the codicil. The testator may have thought that these conditions would attach even in the hands of the legatees, but if he did so think he was in error. I think that we are not entitled to add so material an element to the settlement and codicil, and that if we did so we should be going entirely contrary to the class of cases referred to by your Lordship, to which I may add the case of *Gibson's Trustees v. Ross* (4 R. 1038).

LORD ADAM.—On the first point I concur with your Lordship, and have nothing to add, but I have arrived at a different conclusion on the second point, namely, whether or not these one-half shares are to be paid over to the beneficiaries absolutely. Of course, I do not differ as to the law applicable to the case, for I am bound to recognise the law as laid down in the cases of *Allan*, *Lady Massey's Trustees*, and others, but I differ on the construction of this codicil. I think that the effect of that deed is to destroy and sweep away altogether the direction to pay over which occurs in the original settlement as regards one-half of the shares.

The question here must be settled, like all questions of this nature, by reference to the intention of the testator, and his intention must be given effect to, unless he has expressed his intention in such a way that it cannot, for defect of machinery or otherwise, be given effect to in law.

Now, here I think the testator's intention appears clearly from the terms of the codicil, and if so, the trustees are bound to give effect to it. In the

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second clause of the fourth purpose of the settlement the testator directs his trustees to pay and make over his daughters' shares as soon after his death as conveniently may be, and to be at their absolute disposal. In the codicil he revokes and alters "the clause named (second)" in his settlement to the extent that "in place of the absolute power therein given to my daughters . . . . I restrict that absolute power in each case to one-half of their respective shares of my heritable estate,"—that is to say, one half of each share is left to be paid over absolutely as directed in the settlement; and then the codicil goes on to give directions as to the disposal of the other half, thereby altering or revoking the directions of the settlement. It proceeds, "and in respect of the other half, none of them shall have power to deal with it during their respective lifetime, beyond the interest or revenue derived from it," but power is given to them to leave it, by will, to such person or persons as they may think proper. I think nothing can be clearer than that the intention was that the daughters were to have only the liferent of this half share, and that the fee was to be paid "after their death to such person or persons or such objects as they [the daughters] may think proper." If that is so, it appears to me that it goes directly to the root of the direction to pay over, for if the fee of this one-half share is only to be given to such persons as the daughters think proper, and name in their wills, that necessarily implies an alteration of the direction to pay it over absolutely to them. In short, I think the whole directions as to disposal of this half share are to be found in the codicil. That being so, I do not think the case falls under the decision in the cases of *Allan* or *Douglas*, for I think there is no absolute direction to pay over the fee to the daughters; the direction is to pay it over to such persons as the daughters may think proper. That is the distinction between this case and those I have named. In them there was a distinct direction to the trustees to pay over the fee to the beneficiaries.

Now, in those cases what was decided was this, that where there was such a direction to pay over you could not qualify or limit the right of property so conferred except by the interposition of something of the nature of a trust. Now, I quite agree in that statement of the law, but I hold that here the effect of this codicil is to give a direction to the trustees not to pay over the fee of these half shares to the daughters, but only the liferent. If that be so, is there any want of machinery to carry out the directions? I think not, for if I am right in saying that the testator has expressed his intention that the fee shall only be paid over after the daughters' deaths, then there is an implied direction to the trustees to hold the shares till that event occurred. There was, in short, an existing and continuing trust to hold for the daughters in liferent, and then to pay over the fee as they might direct. That is my construction of this codicil, and I do not think it conflicts with the case of *Allan* for the reason I have already stated.

I may say that so far as I know in all the previous cases the direction was to pay over the fee, but here the direction is to give only the liferent. That is a distinction to which the Lord Justice-Clerk called attention in *Allan's* case as a case which might possibly call for the intervention of the Court to give effect to the direction. But here, I think, we have existing machinery by which effect may quite easily be given to the intention of the testator. I am sorry to dissent from the decision of your Lordships, but this is the reading which I feel constrained to give to the codicil.

THE COURT pronounced this interlocutor:—"Find and declare that No. 169. the first parties, as Mr Clouston's trustees, are not bound or entitled by the codicil dated 29th November 1886, to hold any part of the shares of the residue of the truster's estate, given by the clause named (second) of the fourth purpose of his trust-disposition and settlement to his daughters Maria (Mrs Bulloch), Christian, and Elizabeth for behoof of these ladies in liferent, subject to a power of disposal by will only of their respective shares, but that the said trustees are bound to pay over the whole of the said shares to the said Maria, Christian, and Elizabeth, and decern."

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WEBSTER, WILL, & RITCHIE, S.S.C.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

WILLIAM BLAIR, Petitioner (Reclaimer).—Party.

No. 170.

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, Respondents.—  
*Low—Maconochie.*

July 10, 1889.  
Blair v. North  
British and  
Mercantile  
Insurance Co.

*Bankruptcy—Sequestration—Affidavit—Verity of debt—Constitution anew of notour bankruptcy on same debt after four months—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), secs. 9, 15, and 22.*—A debtor was charged in July 1888 by the assignees to a debt to make payment thereof. On failure to pay, his estates were sequestered, but in January 1889 the sequestration was recalled in respect of an informality in the oath of the petitioning creditor. On 17th January he was charged of new on the same debt, and on his failure to pay the creditor again petitioned for sequestration. The oath produced with the petition bore that the debtor "was justly indebted and resting owing" to the creditor the amount of the debt, and that "no part of said sum has been paid or compensated." Sequestration having been awarded, the debtor petitioned for recall on the grounds (1) that the oath was disconform to the requirements of section 22 of the Bankruptcy Act, 1856,\* in respect it did not set forth in terms that the debt had not been paid either to the cedent or to the assignee, and (2) that the petition for sequestration was incompetent under sections 9 and 15 of the Act, in respect it was presented more than four months from the commencement of notour bankruptcy in July 1888. The Court *refused* the prayer of the petition.

*Taylor v. Drummond*, 10 D. 335, and *Glen v. Borthwick*, 11 D. 387, *doubted*.

*Observed per* the Lord President that all that the statute requires is, that the petitioning creditor shall swear that the debt is resting owing.

In October 1886 Messrs Scott & Gray, solicitors, Dundee, obtained Bill-Chamber. decree in two actions in the Sheriff Court of Dundee, at their instance, 1st Division. against William Blair, bookseller there, for £65, 18s. 1d. and £47, 7s. 11½d. *Ld. Kyllachy.* M.

In February 1888 Messrs Scott & Gray assigned their rights under the decrees to the North British and Mercantile Insurance Company.

In June 1888 the insurance company charged Blair to pay the sums contained in the decrees.

Blair having failed to pay, the insurance company presented a petition to the Lord Ordinary on the Bills praying for sequestration of his estates, and sequestration was awarded on 18th August 1888.

\* Section 21 provides that the petitioning creditor shall produce with his petition an oath "to the effect hereinafter provided."

Section 22 provides, "Such oath . . . shall be taken by him before a Judge Ordinary, Magistrate, or Justice of the Peace to the verity of the debt claimed by him."

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On 8th January 1889 the sequestration was recalled in respect of an informality in the petitioning creditor's oath (see *Blair v. North British and Mercantile Insurance Company*, Jan. 8, 1889, *supra*, p. 325).

New charges on the decrees were thereafter given (without the former charges being withdrawn) on 17th January, and Blair having again failed to pay the debt, sequestration was awarded on 31st January, on the petition of the insurance company.

Blair thereafter presented a petition to the Lord Ordinary on the Bills (Kyllachy), praying for recall of the sequestration, on the grounds, *inter alia*, (1) that the oath of the petitioning creditor was disconform to the requirements of secs. 21 and 22 of the Bankruptcy Act, 1856, in respect that it did not set forth in terms that the debt had not been paid to Messrs Scott & Gray, the cedents in the assignation, in virtue of which the insurance company had petitioned for sequestration.\* (2) That the sequestration was incompetent under secs. 9 and 15 of the statute, in respect that the petition was presented more than four months from the commencement of notour bankruptcy in July 1888 when the first charges were given.†

The insurance company opposed the prayer of the petition.

On 4th June the Lord Ordinary refused the petition.‡

\* The oath bore that the debtor "is justly indebted and resting owing to the said North British and Mercantile Insurance Company" the sum in question, and further, "that no part of said sum has been paid or compensated."

† Sec. 9 provides that "notour bankruptcy shall be held to commence from the time when its several requisites concur, and when it has once been constituted shall continue in case of a sequestration till the debtor shall obtain his discharge, and in other cases till insolvency cease, without prejudice to notour bankruptcy being anew constituted within such period."

Sec. 15 provides that "petitions for sequestration presented without the concurrence of the debtor shall be competent only within four months of the date of the debtor's notour bankruptcy."

‡ "OPINION.—The recall of the sequestration is sought upon various grounds, some of which have been considered by my predecessor, but on none of which a final judgment has been pronounced. I have therefore considered the questions raised as still open, and have heard a full argument upon them. . . .

"(2) The second ground of recall is rested upon an objection to the terms of the petitioning creditors' oath, which is said to be disconform to the statute as interpreted by certain decisions, viz., *Taylor v. Drummond*, 10 D. 335; *Glen v. Borthwick*, 11 D. 387. The debt of the petitioning creditors is, as before mentioned, constituted by two decrees of the Sheriff Court of Dundee, to which the petitioning creditors have obtained an assignation. The objection is, that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent. In point of fact, the oath is in general terms, and simply sets out that the debt in question is due to the petitioning creditors, the decrees and assignation being produced to the Justices of the Peace; but the oath itself not going into particulars. My opinion is that this objection is not well founded. The statute does not require that the oath shall set forth more than that the particular debt is justly due (secs. 21 and 22), and the oath in the present case, in my opinion, sufficiently complies with the statute. No doubt it has been held that where the petitioning creditors' title to the debt depends upon an assignation, and the oath proceeds on the principle of narrating first the constitution of the debt and then its transmissions, and then proceeds to aver non-payment, it is necessary that the averment of non-payment shall apply both to the deponent and to the previous creditors. In other words, there must be no doubt upon the face of the oath that the petitioning creditor depones that the debt is due, and due to him. But each of the cases referred to proceeded on its own specialties, and they do not

The petitioner reclaimed, and argued ;—(1) The title of the petitioning No. 170. creditors depended on the assignation, and when that was the case it was necessary that the oath should bear in so many words that the debt was resting owing, and that payment had not been made either to the cedent or to the assignee.<sup>1</sup> Here it only bore that the debt was resting owing, and that payment had not been made to the assignee. [LORD PRESIDENT. —I think that all that the statute requires is. that the deponent shall swear that the debt is resting owing. The addition of anything else in regard to the verity of the debt is superfluous and dangerous.] (2) The petition was incompetent under section 15 of the Act in respect that more than four months had elapsed since the date of notour bankruptcy, i.e. July 1888, when the first charges were given. The 9th section of the Act provided that notour bankruptcy should commence from the time when its several requisites concurred, and should continue in case of a sequestration till the discharge of the debtor, and in other cases till insolvency ceased, neither of which had taken place here. The declaration at the end of that section that the continuance of notour bankruptcy should be “without prejudice to notour bankruptcy being anew constituted within such period,” referred to its constitution at the instance of another creditor, or in respect of a different debt.

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The argument of the respondents sufficiently appears from the opinion of the Lord Ordinary.

LORD PRESIDENT.—I agree with the Lord Ordinary on the different questions raised in this case.

With regard to the second objection referred to by his Lordship, I must say that I should not like to hold the two cases of *Taylor v. Drummond* and *Glen v. Borthwick* as binding authorities. They have both been questioned, and

appear to me to have laid down any rule which is applicable to the present case.

“(3) The third and only other objection to the sequestration was one founded upon the provisions of sections 9 and 15 of the Bankruptcy Act, which relate to the commencement of notour bankruptcy and the date of presenting the petition for sequestration. It appears that the petitioner was rendered notour bankrupt so far back as July 1888, in virtue of a charge following on the decrees above referred to, and that sequestration followed on 28th August 1888, but was subsequently, on 8th January 1889, recalled by the Court in respect of an informality in the oath. New charges were thereafter given on 17th January, and notour bankruptcy being thus constituted anew, the present sequestration was awarded on 31st January 1889. The objection is that this sequestration was incompetent in respect that it was dated more than four months from the commencement of notour bankruptcy in July 1888. It appears to me that it is a sufficient answer to this objection that while the 9th section of the statute provides that ‘notour bankruptcy shall be held to commence from the time when its several requisites concur, and when it has once been constituted shall continue in case of a sequestration till the debtor shall obtain his discharge, and in other cases until insolvency cease,’ it is at the same time expressly declared that all this shall be ‘without prejudice to notour bankruptcy being anew constituted within such period.’ It seems to me that this provision was expressly designed to meet cases like the present. Reference may be made to *Balfour v. Pedie*, 3 D. 612, where a similar question was raised under the previous Bankruptcy Statutes.

“On the whole, I am of opinion that no grounds exist for recalling the sequestration, and I therefore refuse the petition, with expenses.”

<sup>1</sup> *Taylor v. Drummond*, Jan. 11, 1848, 10 D. 335, 20 Scot. Jur. 114; *Glen v. Borthwick*, Jan. 19, 1849, 11 D. 387, 21 Scot. Jur. 106.



No. 170. doubts have been cast upon them for good reasons.<sup>1</sup> But apart from that, it seems to me that the oath here is a perfectly good one as an oath of verity, and contains all that is required by the 22d section of the Bankruptcy Statute. There are certain other things prescribed as necessary to be mentioned in the oath where they actually occur, but in this case none of these exist. The oath sets forth that the debtor is "justly indebted and resting owing" to the creditor the amount of the debt, and that "no part of said sum has been paid or compensated."

July 10, 1889.  
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There is no room for saying that that is not a perfectly good oath of verity—that is to say, it affirms that the debt is resting owing, which is all that the statute requires.

On the third question there is no necessity for me to add anything. It is perfectly clear that the objection is bad.

LORD MURE.—I am of the same opinion, and have nothing to add to the Lord Ordinary's views.

LORD SHAND.—I concur. I think the Lord Ordinary's judgment altogether sound.

I agree with your Lordship that the cases of *Taylor v. Drummond* and *Glen v. Borthwick* are doubtful authorities, and would not in my opinion be followed in modern times.

LORD ADAM concurred.

THE COURT adhered.

PARTY—J. & F. ANDERSON, W.S.—Agents.

No. 171. HIGHLAND RAILWAY COMPANY, Appellants.—*Low—Salvesen.*  
SPECIAL COMMISSIONERS OF INCOME-TAX, Respondents.—*Gloag—*  
*A. J. Young.*

July 10, 1889.  
Highland  
Railway Co. v.  
Special Com-  
missioners of  
Income-Tax.

*Revenue—Income-tax—Railway—Expenditure on permanent improvements.*  
—A railway company, in making their return for assessment of income-tax, claimed as deductions from the revenue of the year of assessment (1) a sum expended upon the improvement of the permanent way of a line of railway which they had acquired and amalgamated with their concern, in order to bring it up to the standard of the rest of the line; (2) a sum representing the cost of the extra weight in relaying part of the main line with steel in place of iron rails, and with chairs of additional weight. In the books of the company, these sums were charged against capital. The Commissioners of Income-tax disallowed the sums as deductions from revenue, holding that they were properly chargeable to capital. On appeal, the Court affirmed their determination.

Exchequer  
Cause.  
1st Division.  
C.

THE Highland Railway Company, in making their return for income-tax under schedule D for the year 1888-9, based on the profits of the preceding year, as shewn by their printed accounts for the two half years ended 31st August 1887 and 29th February 1888, claimed to deduct, in addition to the several items charged as the expenditure of the year in working the railway, the four sums of £9119, £755, £1555, and £878. These amounts were entered under the following heads in the accounts of the company for the half years ended 31st August 1887 and 29th February 1888:—

<sup>1</sup> Cf. *Aitken v. Woodside*, Feb. 28, 1858, 14 D. 572.

£9119, August 1887.	}	"Improvement of Sutherland and Caithness section, to bring it up to the standard of the rest of the main line."	No. 171.
£1555, February 1888.			
£755, August 1887.	}	"Cost of extra weight. Relaying with steel rails and heavier chairs, &c."	July 10, 1889. Highland Railway Co. v. Special Commissioners of Income-Tax.
£878, February 1888.			

These sums were charged against capital in the books of the railway company.

In an appendix annexed to the case the details of the expenditure of the sums were set out as undernoted.\*

At the hearing before the Special Commissioners the Highland Railway

\* "MAIN LINE.

Amount expended during the year ending 29th February 1888—

£755 3 8  
878 2 10

£1,633 6 6

	Tons. Cwts. Qrs.	Price.	£	s.	d.
The additional weight of the steel rails over the iron ones, was, average, £4, 17s. 2½d. per ton,	105 15 2	95s. to 100s.	514	0	3
The additional weight of chairs over the old ones was, average price, £3, 6s. 4½d. per ton,	337 6 3	65s. and 67s. 6d.	1,119	6	3

£1,633 6 6

"SUTHERLAND SECTION.

Amount expended during the year ending 29th February 1888—

£9119 4 9  
1555 15 4

£10,675 0 1

	Tons. Cwts. Qrs.	Price.	£	s.	d.
Steel rails,	833 8 2	110s.	4,594	9	9
Chairs,	327 10 0	65s.	1,064	13	11
Fish-plates and other accessories,	... ..	...	648	15	1
Sleepers,	No. 26,235	3s. 4d.	4,372	11	4
Engine power,	... ..	...	135	0	0
Timber beams for girder bridges,	... ..	...	260	2	3
Carriage of materials,	... ..	...	7	16	8
Wages of platelayers and labourers,	... ..	...	857	16	3
			11,941	5	3
Cr. Old iron flange rails and fish-plates taken up,	... ..	...	1,266	5	2

£10,675 0 1"

**No. 171.** Company contended that the sums represented the extra cost necessitated by the inferior condition of the permanent way of the original line, and also of the Caithness line, when amalgamated with the Highland Railway Company in 1884. The expenditure on the Caithness line was stated to represent the extra cost of relaying the lines over and above what would have been necessary to renew and relay the section as it was previous to the amalgamation.

July 10, 1889.  
Highland  
Railway Co. v.  
Special Com-  
missioners of  
Income-Tax.

The Special Commissioners disallowed the deductions, on the ground that they were properly charged to capital, as shewn in the company's own printed accounts, and they added the amounts to the sum returned by the company's secretary.

The ground of the Commissioners' decision was that the expenditure was an improvement of the property, and chargeable to capital; and as regarded the Sutherland and Caithness section, that the purchase of that railway in an inferior condition would obviously affect the cost at which it was obtained.

The Highland Railway Company took a case, which was stated under the Taxes Management Act, 1881 (43 and 44 Vict. c. 19, sec. 59), and from which the preceding narrative is taken.

Argued for the Railway Company;—In determining the question it was of no consequence that for the purposes of the company, as between it and the shareholders, the sums had been charged in the company's books against capital. That was a matter of convenience merely. The sums ought, for purposes of assessment of income-tax, to be charged against income.<sup>1</sup> A reference to the appendix shewed that the sums expended on the Sutherland line were sums dealing purely with the maintenance and upkeep of the line. As regarded the main line, the mere fact that steel rails and not iron ones were used in connection with the repairs did not alter the character of the repairs. There was no such permanent improvement of the property as made these outlays a proper charge against capital. The company derived no additional revenue from these outlays, and they were thus a proper deduction from the revenue of the year.

Argued for the Commissioners;—The fact that the company had entered the sums in their books against capital was conclusive against them. They had done rightly in this, because the outlays had materially improved the permanent way, and made the company's property more valuable. As regarded the Sutherland section, the repairs on it must really be regarded as part of the cost of the undertaking, for that section was obviously acquired by the railway company owing to its inferior condition at a proportionately cheaper rate. As regarded the main line, the repairs were incontestibly of a permanent nature.

**LORD PRESIDENT.**—The sums which the appellants now propose to charge against income are in their own books charged against capital, and the reason why they say the charge should be made against income is, that it is really part of the proper annual expenses at the time. I do not know any other ground on which that could be maintained. By charging these sums against capital they have been able to bring out a much larger profit upon the line for the year, and so have been enabled to pay to their shareholders a much larger dividend than if those sums had been charged against income. One result of that would be that if their present argument were sustained the

<sup>1</sup> Caledonian Railway Co. v. Special Commissioners of Income-Tax, Nov. 18, 1880, 8 R. 89.

aggregate amount of income-tax which they deducted from their shareholders in paying their dividends would be much larger than the company would now pay to the Inland Revenue, and so a considerable balance of the income-tax upon the actual revenue of the company would remain in the pocket of the company itself. That would be a very anomalous result, but it is one of the results of their having entered those sums as charges against capital in their books instead of charging them against income. That, however, does not decide the case by any means, but if the respondents are right in their present contention it shews the extreme inconvenience of their keeping their books in such a way as to lead to anomalous results of that kind, and I think it is a pretty good indication to the Commissioners upon their part that they could not properly make it a charge against income at all. At the same time, though this is the condition of the appellants' books, I do not by any means say that that is conclusive, if they can shew that what they have made a charge against capital ought really to have been made a charge against income, and properly constitutes a charge against income; and, therefore, the question remains for consideration, whether these charges as described in their books could with any propriety be dealt with otherwise than they have been dealt with by themselves.

I take in the first place the portion of the sums in question which relate to the improvement or renewal of the Sutherland and Caithness section, "to bring it up to the standard of the rest of the main line," using the language of the appellants' books. Now this, of course, presupposes that in acquiring the property of the Sutherland and Caithness line the company were aware that they could not with any propriety use that line in connection with their main line without expending a good deal of money upon it, in order to bring it up to the standard of the rest of the main line. It appears to me therefore that they must have acquired this Sutherland and Caithness line at a lower figure than it would otherwise have brought, in consequence of its being in that imperfect condition; and, if that be so, it seems to follow of necessity that the renewal or improvement of this Sutherland and Caithness line, to bring it up to the proper standard, is just part of the cost of acquiring that line to work along with the main line. If it had been brought up to that standard before they bought it, they would have had to pay so much more for it, and finding it in that condition, and knowing that they could not use it in connection with the main line without expending this large sum of money upon it, that just shews that although it cannot be said in the proper sense to be part of the price of the line, it is certainly part of the cost of that line to be wrought along with the main line. I think that is quite sufficient to dispose of the portion of the case relating to the Sutherland and Caithness line.

But there have been some observations made upon the details of those two sums of £9119 and £1555, as brought out in the case. It is said that when you look at these details, they look many of them a good deal like maintenance of the line. Well, so it is, but then in the ordinary case it is very possible that some of these things might come under the head of mere annual maintenance of the line. But these details must not be read except in connection with what is entered in the appellants' books as the description and purpose of that expenditure, which is to renew or improve the Sutherland and Caithness line so as to bring it up to the standard of the main line. All these details are necessary and indispensable to effecting the object of improving the Sutherland and Caithness line up to the main line standard.

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No. 171. Now, that appears to me to be as plain as anything can be a charge against capital, and properly stated in the books as such.

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Then when we come to the question about the condition of the main line itself, it must be kept in view that this is not a mere relaying of line after the old fashion. It is not taking away rails that are worn out or partially worn out and renewing them in whole or in part along the whole line. That would not alter the character of the line; it would not affect the nature of the heritable property possessed by the company. But what has been done is to substitute one kind of rail for another—steel rails for iron rails. Now, that is a material alteration, and a very great improvement in the *corpus* of the heritable estate belonging to the company, and so stated, surely is a charge against capital. All that is done, it will be observed from the details given with reference to this matter, is to charge the price of the rails and chairs,—that is to say, the weight in addition to what was the original weight of the rails and chairs. That is the whole charge, and that is a charge made entirely for the improvement of the property—the permanent improvement of the property. Now, that that can be anything but a charge against capital, I am unable to see. Certainly, if you build a new house upon your land, that is an addition to the property and an improvement to the property, and that never becomes a charge against income; and just as little, if you build up a railway upon the line which you possess, which is to be a much more valuable railway than that which you have removed, just as little can that be a charge against income. It is a material improvement in the subject, and consequently must form a charge against capital. For these reasons, without going further into detail, I must say that I have no doubt as to the soundness of the decision of the Commissioners.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT affirmed the determination of the Commissioners.

J. K. & W. P. LINDSAY, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents

No. 172. WILLIAM CAMPBELL MUIR AND OTHERS (Muir's Trustees), First Parties—  
*Jameson—C. J. Guthrie.*

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Muir's Trus-  
tees v. Muir.

WILLIAM CAMPBELL MUIR, Second Party.—*R. V. Campbell—Begg.*

MARY ESDAILE MUIR AND OTHERS, Third Parties.—*Jameson—  
C. J. Guthrie.*

*Succession — Vesting — Postponement — Intestacy — Residue.*—A testator directed his trustees to hold the whole residue of his moveable estate “for behoof of and equally among the children” of his only child, W. C. M., “and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or, in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use alienarily, and their respective children in fee.” There was further a clause of survivorship in the event of any son of W. C. M. dying without issue before the period of payment, but there was no such clause with reference to daughters' shares. At the date of the truster's death, W. C. M. had two sons and four daughters, and two

daughters were born after that date. The second daughter survived the truster, but died intestate and unmarried before attaining the age of twenty-five. In a special case W. C. M. maintained that his deceased daughter's share fell to be dealt with as intestate succession either of the truster or of herself. *Held* that the daughter's share had not vested in her, and fell to be divided among the other children of W. C. M. as part of the residue of the truster's estate.

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July 12, 1886.  
*Muir's Trustees v. Muir.*

*Paxton's Trustees v. Cowie*, July 16, 1886, 13 R. 1191, *distinguished*.

WILLIAM MUIR, of Inistrynich, died on 30th May 1880, survived by William Campbell Muir, his only child. He left a trust-disposition and settlement, dated 16th October 1877, by which he appointed his son and others to be his trustees.

1st DIVISION.  
C.

The fourth purpose of the trust-deed was as follows:—"(*Quarto*), I direct and appoint my said trustees and their foresaids to hold and administer the whole residue and remainder of my means and estate for behoof of and equally among the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or, in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use allenary, and their respective children in fee, subject to the following conditions, viz., . . . (3) On the death of any of the said daughters of the said William Campbell Muir, and of any husband enjoying a liferent interest in the trust moneys, my trustees shall pay over to their children and the heirs of such children, in equal shares, the fee of their mother's share, held in trust as aforesaid, payable to them respectively, in the case of sons, on their attaining twenty-five years of age, and in the case of daughters, on their attaining to that age or being married, whichever of these events shall first happen, until which time the income shall be applied for behoof of the said children respectively: And it is hereby specially provided and declared, that in the event of any of the sons of the said William Campbell Muir dying before the said period of payment leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life, the issue of my female grandchildren being provided for under the above destination; and in the event of any of the said sons of the said William Campbell Muir or their issue dying before the respective periods of payment of their shares without leaving lawful issue, the share of such deceiver shall fall to and be divided equally among the survivors and survivor of my said grandchildren jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life."

William Campbell Muir was married in 1867, and six daughters and two sons were born of the marriage. All of the children, with the exception of the two youngest daughters, were born before the death of their grandfather.

The second daughter, Annie Elizabeth Muir, who was born in 1870, died on 28th November 1887, intestate and without issue.

Questions having arisen as to her share of the residue of her grandfather's estate, a special case was presented for the opinion and judgment

No. 172. of the Court. The trustees of the late Mr Muir were the first parties, William Campbell Muir was the second party, and his surviving children (to whom Mr Maconochie, advocate, was appointed *curator ad litem*) were the third parties thereto.

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The parties of the first and third part maintained that on a sound construction of the said trust-disposition and settlement, no right to a share of the residue of the late William Muir's estate vested in the deceased Annie Elizabeth Muir, but that the share which the first parties would have been bound to set apart for her if she had attained twenty-five years of age or been married still formed part of the undivided residue of the said trust-estate to which those children only who should survive the term of payment, or in the case of daughters be married should that event first happen, should have right. The second party maintained that on a sound construction of the said trust-disposition and settlement (a), the equal share of the residue of William Muir's estate provided for the deceased Annie Elizabeth Muir along with the other children of William Campbell Muir alive at the date of the death of William Muir, became, by her death without leaving issue, intestate estate of the late William Muir, to which the second party was entitled to succeed as his father's heir *in mobilibus*; or (b), alternatively that William Campbell Muir was entitled to one-half of the capital of her share, to be ascertained as at the date of Miss Annie Elizabeth Muir's death, as heir of his daughter, the remaining half devolving on his surviving children as next of kin of their deceased sister.<sup>1</sup>

The following questions were submitted to the Court:—"1. Did the share of the residue of the late William Muir's estate, which under his trust-disposition and settlement would have been set apart for Miss Annie Elizabeth Muir in *liferent*, and for her children in fee, had she attained the age of twenty-five years or been married, become on her death without leaving issue—(a) Intestate estate of the said William Muir, to which the second party is now entitled to succeed as his heir *in mobilibus*; or (b) Intestate estate of the said Miss Annie Elizabeth Muir, to one half of the capital of which the second party is now entitled to succeed in terms of section 3 of the Intestate Moveable Succession Act, 1855, and the other half of which falls to be paid to her surviving brothers and sisters as her next of kin? or (2) Did no right to the fee of a share of the residue of the late William Muir's estate vest in the said Miss Annie Elizabeth Muir, and does the whole of said residue fall to be divided, in terms of the said trust-disposition and settlement, among the other children of the said William Campbell Muir or their issue, to the exclusion of the said Annie Elizabeth Muir, or anyone claiming through her?"

At advising,—

LORD PRESIDENT.—The question for our decision here depends on the construction of the trust-deed of the late Mr Muir of Inistrynich, which is dated in October 1877.

The testator died possessed of considerable landed property, and to that his only child, Mr William Campbell Muir, succeeded. The settlement with which we have to deal conveys moveable property only, and the purposes of the deed are all directed to the division of that property among the children of William

<sup>1</sup> Paxton's Trustees v. Cowie, July 16, 1886, 13 R. 1191; Fulton's Trustees v. Fulton, Feb. 6, 1880, 7 R. 566; Lindsay's Trustees v. Lindsay, Dec. 14, 1880, 8 R. 281; Ross v. Dunlop, May 31, 1878, 5 R. 833; Buchanan's Trustees v. Buchanan, May 26, 1877, 4 R. 754.

Campbell Muir, with the exception of certain of the purposes under which No. 172.  
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 character, beyond which he takes no benefit by the deed. Muir's Trustees v. Muir.

At the time of the testator's death his son had six children, two sons and four daughters, but since his death two other children, both daughters, have been born of the marriage. Accordingly, in dealing with his grandchildren the testator was necessarily dealing with an unascertained class, for not only might one or more of the children have died, but others might be born, as indeed happened.

The provision of the deed which we have to construe runs thus,—“(Quarto), I direct and appoint my said trustees and their foressaids to hold and administer the whole residue and remainder of my means and estate for behoof of, and equally among, the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or, in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use alienarly, and their respective children in fee,” subject to certain conditions. It then provided,—“(3) On the death of any of the said daughters of the said William Campbell Muir, and of any husband enjoying a liferent interest in the trust moneys, my trustees shall pay over to their children and the heirs of such children, in equal shares, the fee of their mother's share, held in trust as aforesaid, payable to them respectively, in the case of sons on their attaining twenty-five years of age, and in the case of daughters on their attaining to that age or being married, whichever of these events shall first happen, until which time the income shall be applied for behoof of the said children respectively: And it is hereby specially provided and declared that, in the event of any of the sons of the said William Campbell Muir dying before the said period of payment, leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life, the issue of my female grandchildren being provided for under the above destination; and in the event of any of the said sons of the said William Campbell Muir or their issue dying before the respective periods of payment of their shares without leaving lawful issue, the share of such decesser shall fall to and be divided equally among the survivors and survivor of my said grandchildren jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life.” It is to be observed, in the first place, as regards daughters, that they can never take more than an alimentary liferent in the shares provided for them,—there is no provision for them getting a fee; but as regards sons, there is a clause of survivorship in the event of their dying without lawful issue.

Now, what happened was this: Annie Elizabeth Muir, the second daughter of Mr William Campbell Muir, died unmarried and intestate in 1887, the testator himself having died in 1880. The question therefore comes to be, what became of the share provided for her and her children, if she had any. The



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contention of her father is that her share is either intestate succession of William Muir or intestate succession of Miss Annie Elizabeth Muir.

The second of these contentions is clearly inadmissible, because the fee of her share did not and never could belong to her. As to the first contention, it appears to me to be equally inadmissible, in respect of the nature of the provisions in the deed. Mr Campbell Muir's counsel cited the case of *Paxton's Trustees* (13 R. 1191), and said that the decision there afforded authority for holding that Miss Annie's share lapsed by her death, and fell to be dealt with as intestate succession of her grandfather.

Now, the case of *Paxton's Trustees* established the important general rule, which is thus expressed as the result of the judgment, "that when a legacy is given to a plurality of persons, named or sufficiently described for identification, 'equally among them,' or 'in equal shares,' or 'share and share alike,' or in any other language of the same import, there is (in the absence of expressions by the testator importing a contrary intention) no room for accretion in the event of the predecease of one or more of the legatees, and this whether the gift is in liferent or in fee to the whole equally, or whether the subject of the gift be residue or a sum of fixed amount, or corporeal moveables." Now, the first condition for the application of that rule is, that the persons to whom the legacy is left must either be named or sufficiently described for identification. It cannot, therefore, apply to a class of persons of unascertained number, and therefore I think that *Paxton's* case has no application to the present. The principle of the rule of that case is that each share is looked upon as a separate bequest, and if a person to whom a share is bequeathed dies without issue the share falls into intestacy of the testator or into residue, if there is a residuary clause. Here, however, the class is unascertained, and some get their shares simply in liferent, while others get theirs in fee, while as regards the sons' shares, there is an express clause of survivorship, and, therefore, if a son died the result would be, not to send his share into intestacy, but that it would accrete to the other grandchildren.

That being so, the case seems to me to present no further difficulty. The fund to be divided is the residue and remainder of William Muir's estate, and when the time for division comes the question is, first, what is the amount of the estate, and, second, who are entitled to share in it. That being so, the share which would have fallen to Annie Elizabeth Muir, had she attained the age of twenty-five or been married, just forms part of the residue which is undivided. The result therefore is that the first question here must be answered in the negative, because the share which would have come to the deceased daughter is neither intestate succession of the testator nor of herself.

The second question is, "Did no right to the fee of a share of the residue of the late William Muir's estate vest in the said Miss Annie Elizabeth Muir, and does the whole of said residue fall to be divided, in terms of the said trust-disposition and settlement, among the other children of the said William Campbell Muir or their issue, to the exclusion of the said Annie Elizabeth Muir, or anyone claiming through her?" and that falls to be answered in the affirmative. The third and fourth questions are superseded by the answers given to the first and second.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Find and declare that the share of the residue of the late William Muir's estate which, under his trust-disposition and settlement, would have been set apart for Miss Annie Elizabeth Muir in liferent and for her children in fee, had she attained the age of twenty-five years or been married, did not become, on her death without leaving issue, either intestate estate of the said William Muir or intestate estate of the said Miss Annie Elizabeth Muir: Find and declare that no right to the fee of a share of the residue of the late William Muir's estate vested in the said Miss Annie Elizabeth Muir, and that the whole of the said residue falls to be divided in terms of the said trust-disposition and settlement among the other children of the said William Campbell Muir or their issue, to the exclusion of the said Annie Elizabeth Muir or anyone claiming through her."

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THE LORD ADVOCATE, Pursuer (Respondent).—*Sol.-Gen. Darling—A. J. Young.*

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MRS ELLEN LAIDLAY AND OTHERS (Laidlay's Trustees), Defendants (Reclaimers).—*D.-F. Balfour—J. C. Lorimer.*

July 12, 1889.  
Lord Advocate v. Laidlay's Trustees.

*Revenue—Inventory-duty—Share in trading company—Foreign.*—Fourteen persons in Great Britain and two in Calcutta entered into a partnership for "carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta, or shipment for realisation in Europe, of such produce."

By the contract of copartnery the business of the firm in India was to be carried on by managing agents in Calcutta who were required to be partners, and they alone were entitled to use the firm's name. A firm in London were declared to be the agents of the partnership in Europe to whom the produce of the firm was to be consigned and the proceeds of the sales in India were to be remitted. The London agents were to make the advances necessary for carrying on the business, and held a mortgage over the assets, which were vested in trustees in Great Britain. They were also named arbiters in any questions between partners or their representatives.

A committee of the partners in England was appointed to advise with the agents both in London and Calcutta, and, subject to the approval of a general meeting of the partners, to decide on all matters affecting the partnership.

It was further provided that on the death of a partner his representatives should not "become a partner," and that his interest in the profits and losses of the partnership should cease on the 30th September next after his death, and that his share should be "ascertained and dealt with in manner following,—that is to say, if the . . . representatives of such . . . deceased partner shall desire to sell such share to any of the partners, or to any other person, such other person to be approved by the committee, the same may be sold accordingly for such price or value as may be agreed upon." If not sold within six months, "the fair value of the share shall be determined by" the London agents of the firm, "and upon the representatives executing such transfer or assignment as hereinafter mentioned, but not otherwise, the trustees of the partnership shall pay or cause to be paid or secured as hereinafter mentioned the sum so determined. The trustees had the option of paying by half-yearly instalments in three years, the unpaid portion being "secured by a mortgage of the entirety of the share so sold." Upon the representatives receiving such payment they were bound "to execute to the said trustees of the partnership, or to a purchaser approved by the committee, a transfer or assignment of the entire share of" "the deceased partner in the partnership property." "The funds to be paid by the said trustees of the partnership shall be provided by the partners ratably."

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The executors of a deceased partner, residing in the United Kingdom, sold his shares to his three sons, also residing there. In the inventory of moveable estate belonging to the deceased in the United Kingdom, the executors did not enter the value of the deceased's shares in the partnership. In an action at the instance of the Inland Revenue against the executors concluding for additional inventory-duty in respect of the value of the shares, the Court held that whether the partnership was to be regarded as an Indian or a British partnership, the additional duty was exigible on the ground that the executors being precluded by the contract from holding shares in the partnership, the right vested in them was a right to a sum of money recoverable in this country, *dis*. Lord Shand, who held that the right vested in the executors at the deceased's death was a share in an Indian company, and that that share was not liable for inventory-duty in the United Kingdom.

*Opinion, per Lord Fraser, that the partnership was English.*

Exchequer  
Cause.  
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M.

JOHN WATSON LAIDLAY of Seacliff died on 8th March 1885.

His widow Mrs Ellen Laidlay and others, his trustees and executors, gave up an inventory of his personal estate in the United Kingdom.

At the end of the inventory under the head "abroad" there was stated a sum of £25,221, 4s. 3d. said to be "the deceased's share in the real and personal estate as a partner in the firm of Robert Watson & Company, Calcutta, as valued by the agents of the company."

The deceased's share in the nett balance of the partnership assets was not included in the inventory as estate in the United Kingdom, and no inventory-duty was paid on it.

The deceased held three one-thirty-second shares in the firm, which, under an agreement taking effect as from 8th September 1885, were transferred by his trustees and executors one to each of his three sons, the price paid for each share being £9000.

On 20th February 1888, the Lord Advocate, on behalf of the Inland Revenue, raised an action against Mr Laidlay's trustees and executors for payment of £756 as additional inventory-duty in respect of the deceased's share in the business of Robert Watson & Company.

The pursuer averred;—(Cond. 4) "The firm of Robert Watson & Company was an English company, and was domiciled in England, not in India. The articles of partnership under which it was constituted were executed in London, and all the parties to it were, with the exception of two, resident in the United Kingdom. The whole partnership assets were held in the name of three trustees residing there, two of whom were partners, and these two partners, with other three partners, also resident at home, formed a committee of management, who took charge of the conduct of the business. The head office of the partnership was in London, and, as provided by the articles, there were two sets of agents. The European business was conducted through the London agents. The produce of the partnership was also consigned to them, or, if sold in India, the proceeds were remitted to them forthwith. The meetings of the partners took place in this country. Balances of the firm's affairs were struck, and profits were distributed yearly, payment being made to the partners by Matheson & Company."

He further averred;—(Cond. 5) "The deceased's interest or share in the assets of the partnership was estate situated in this country."

In answer to cond. 4 the defenders stated;—(Ans. 4) "Denied that the firm of Robert Watson & Company was an English company domiciled in England. The articles were executed where the partners respectively happened to be at the time. Two of the partners were resident in Calcutta and signed there. Of the persons who held the partnership property as trustees (subject to the mortgage to the bankers), two only were partners of Robert Watson & Company, and the other was a partner of Matheson

& Company. The five partners forming the committee of advice were at No. 173.

the time resident at home, but they had not the active management of the concern. The head office of the partnership was not in London, but in Calcutta, as provided by article 14. In conformity with the said articles of partnership, the business of Robert Watson & Company was carried on by Jardine, Skinner, & Company, the 'managing agents in Calcutta,' in communication with Matheson & Company, the financial agents and bankers in London, who were creditors and mortgagees of the company. The business books of the company were kept at Jardine, Skinner, & Company's office in Calcutta, where the annual balance-sheets were prepared, and the profits appropriated to the partners by the managing agents. They annually made up and transmitted to London a report and abstracts of accounts shewing the business and profits of the year, and in the case of each partner, his share of profits and the state of his partnership account. These reports and accounts were certified by the managing agents, and upon receipt by Matheson & Company, were forwarded to each partner. The profits were passed by the managing agents to the credit of the partners in the books of the firm at Calcutta, in proportion to their shares. The profits were paid to the partners through Matheson & Company, the financial agents and bankers of the company."

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In answer to cond. 5 they stated;—"Denied that the deceased's share or interest was estate in Great Britain. It was estate locally situated in India, and as such the defenders were called upon, and, under the advice of Indian counsel, paid probate-duty in India."

The pursuer pleaded;—(1) In respect that the said partnership was truly an English company, the interest or share of a deceased partner in the partnership assets is liable to inventory-duty.

The defenders pleaded;—(1) On a sound construction of the articles of association of Robert Watson & Company and the acting of parties in conformity therewith, the share of the late John Watson Laidlay in the said concern does not form a part of his personal or moveable estate or effects in the United Kingdom, within the meaning of the statutes regulating inventory-duty. (2) The business of Robert Watson & Company being chiefly carried on in India, where their principal office is, the share and interest of John Watson Laidlay therein at his death was locally situated in India within the meaning of the said statutes, and is not liable to inventory-duty.

The nature of the business of Robert Watson & Company (which was a common law partnership) was defined in article 2 of the articles of partnership of August 1877, and was as follows:—"The business shall be the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta, or shipment for realisation in Europe of such produce."\*

\* The following articles of the contract of partnership were of importance in the case:—" (5) The partnership term (subject to the 32d clause) shall be for five years commencing on the 1st day of October 1877 and thenceforth for a further term of five years unless a majority of the partners shall at least six months before the expiration of the first term otherwise declare by letter delivered to the managing agents in Calcutta. . . . (8) The said style or firm of 'Robert Watson & Company' may be used by Messrs Jardine, Skinner, & Company or other, the managing agents for the time being appointed in their stead, and under the special or general authority in writing of such managing agents, but not otherwise by the Mofussil manager in all dealings and transactions, and in all actions and suits by and against the company, and in all other matters and proceedings which can be conducted in the name of the said firm, but the

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A joint minute of admissions was lodged for the parties, in which it was admitted that of the parties (sixteen in number) who signed the articles of 1877 two were resident in India, and executed them there.

partners or any of them as such shall not be at liberty to use the said style or firm for any purpose or on any pretext whatsoever. In case of any action, suit, or other proceeding by or against the said partnership, the names of the trustees thereof for the time being may be used. (9) The following persons, viz. James Dalrymple, John Watson Laidlay, Graham Moore Robertson, Charles Binny Skinner, and John Matheson Macdonald shall constitute a committee to advise with the agents both in London and in Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the interest of the partnership, and also to decide as to calling, when necessary, a meeting of the partners. Any three of the committee shall constitute a quorum, and in case of vacancy the majority of partners shall supply the same. (10) Messrs Jardine, Skinner, & Company are hereby constituted the managing agents of the partnership in India, and the entire business of the partnership there shall be carried on by them as such managing agents subject to the provisions herein contained, but only so long as the said firm of Jardine, Skinner, & Company, or some or one of the partners therein shall, in their or his own right, hold or be entitled to at least two thirty-second shares in the property of the partnership hereby constituted. . . . (11) Messrs Jardine, Skinner, & Company, as such managing agents, shall have all powers necessary for the efficient carrying on of the business thereof, and are hereby expressly empowered (but subject to the opinion of the committee whenever it shall have been expressed) to decide whether all the said branches of business shall be carried on, or which of them, and to what extent. . . . (14) All necessary books of account of the partnership shewing the receipts and payments and assets and liabilities of the partnership shall be kept by Messrs Jardine, Skinner, & Company, as the managing agents, at their usual place of business in Calcutta, and shall be at all times open for the inspection of the partners respectively. . . . (15) As soon as practicable after the 30th day of September in each year and the realisation of the produce of the season, the managing agents in Calcutta shall prepare a general account or balance-sheet shewing the result of the operations of the partnership during the year ending on that day, and the net profit or gross loss, after paying or providing for all the outlay, expenses, and engagements of the year of every kind, shall be appropriated as follows:—The profits to the extent of 8 per cent on the capital shall be carried to the account of the respective partners in the books of the partnership, in proportion to their respective shares; the excess of the profits beyond 8 per cent shall be set apart and paid to the London agents, to form and afterwards maintain a reserve fund not exceeding £50,000, and after the same shall have been formed, to keep it up to that amount. All surplus profits, when the reserve fund amounts to £50,000, shall be carried to the credit of the several partners in proportion to their respective shares. . . . (18) As a remuneration for the trouble as managing agents of the partnership business, Messrs Jardine, Skinner, & Company shall be entitled to receive a commission of 2½ per cent on the proceeds of sale of the indigo and silk and other produce to be produced in the concerns of the partnership in each year, whether the same shall be sold in Calcutta or shipped for realisation in Europe, they paying thereout all the Calcutta charges and expenses of managing the business of the partnership, as provided in the 13th clause. (19) The said Messrs Matheson & Company are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them, and all the produce of the partnership shall be consigned to them, or if sold in India, the proceeds shall forthwith be remitted to them. The said Messrs Matheson & Company shall supply the necessary funds for the current advances of each season, whether for working the estates, the production of indigo, silk, or other produce, and the same shall be on the security of the mortgages and covenants contained in the indentures of mortgage and confirmation hereinbefore referred to. . . . (21) No partner or partners shall contract any debt, or draw,

It was further admitted,—“(2) The meetings of the committee named No. 173. and appointed by No. 9 of the articles of 1877 took place in London, in the office of Matheson & Company, the London agents of the partnership, and were summoned by Matheson & Company, acting in concert with the chairman of the committee, who was resident in England. The committee

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accept, or indorse any bill or note, or transact any business in the name of the partnership, nor shall any of the partners, not being a majority of the partners, in any manner interfere with the conduct of the business of the partnership by Messrs Jardine, Skinner, & Company, or Messrs Matheson & Company respectively, but all powers for controlling, regulating, ordering, and managing the affairs of the partnership, which, consistently with the provisions of these presents, may be exercised by all the partners for the time being, may be exercised by a majority of the partners. (25) The bankruptcy, insolvency, or death of any partner shall not cause a dissolution of the partnership as among or between the other partners, nor shall any trustee or assignee of any such bankrupt or insolvent partner, or the representatives of any deceased partner become a partner in respect of any share of such partner, but the interest of such bankrupt or insolvent partner in the profits and losses of the partnership shall cease as from the 30th day of September preceding or being the date of the order declaring his bankruptcy or insolvency, and the interest of such deceased partner or his representatives in the said profits and losses shall cease on the 30th day of September next after his decease, or if he shall die on the 30th day of September, then shall cease on such day of his decease, and the share of such bankrupt, insolvent, or deceased partner shall be ascertained and dealt with in manner following,—that is to say, if the trustees, assignees, or representatives of such bankrupt, insolvent, or deceased partner shall desire to sell such share to any of the partners, or to any other person, such other person to be approved by the committee, the same may be sold accordingly, for such price or value as may be agreed upon, but if such trustees, assignees, or representatives shall not desire to sell such share, or shall not, within six calendar months after such bankruptcy, insolvency, or death, find a purchaser whom the committee shall approve, and complete the sale to some other partner, or to such other person, then, and in such case, the fair value of the share of such bankrupt, insolvent, or deceased partner, on the 30th day of September on which his interest is to cease, as aforesaid, shall be determined by Messrs Matheson & Company, and upon such trustees, assignees, or representatives executing such transfer or assignment as hereinafter mentioned, but not otherwise, the trustees of the partnership shall pay or cause to be paid or secured, as hereinafter mentioned, the sum so determined as aforesaid, and such payment may be made either as to the whole amount in cash or (at the option of the trustees) by equal half-yearly instalments, extending over any period not exceeding three years, reckoning from the 30th day of September on which the interest of such bankrupt or insolvent or deceased partner's share is to cease, as hereinbefore provided, together with the interest thereon at the rate of £5 per cent per annum, and such instalments of unpaid purchase-money shall be secured by a mortgage of the entirety of the share so sold, and the trustees or assignees of such bankrupt or insolvent partner or the representatives of such deceased partner shall be bound, upon such valuation being made by the said Messrs Matheson & Company, and upon or before receiving such payment or security as aforesaid, to execute to the said trustees of the partnership, or to a purchaser thereof, approved by the committee, transfer or assignment of the entire share of the bankrupt, insolvent, or deceased partner in the partnership property, and in the case of a deceased partner, the trustees of the partnership or purchaser taking his share as aforesaid shall enter into a covenant with the representatives to indemnify the estate of such deceased partner from all liabilities in respect of the share so taken. The funds to be paid by the said trustees of the partnership shall be provided by the partners rateably.” By article 35 Messrs Matheson & Company were irrevocably appointed arbitrators to determine any dispute between partners or their representatives in relation to the contract of copartnership, or matters not provided for therein.

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as a rule met prior to the annual meeting of the partners to consider the business to be laid before the meeting, and at other times when any business required it, of which they were informed by Matheson & Company, to whom the regular advices as to the state of the business were addressed by the managing agents in India. A minute-book of meetings and correspondence was kept for the committee, of which Matheson & Company were the custodiers. The minute-book in use from and after 1st October 1877 is produced and admitted as correct (No. 18 of process).<sup>\*</sup> The committee discharged the duties devolving upon them under the said articles, and were in correspondence with the managing agents in India, as shewn by the said minute-book. The committee was composed of men who were conversant with Indian affairs; and in addition to arranging the business to be laid before the general meetings of the partners, they advised upon the desirability of any transaction referred to them for consideration and report by the partners or by the managing agents in India.

(3) The financial year of the partnership closed, in terms of article 15, on 30th September in each year; and as soon as possible thereafter, Jardine, Skinner, & Company, on the footing that there was sufficient profit, passed a dividend at the rate of 8 per cent to the credit of each partner's account in the books of the partnership. Messrs Matheson & Company were advised thereof, and requested to make, and did make, payment of the dividend to the partners respectively. This payment was generally made in or about the month of December. As soon as the result of the year's operations was ascertained, and after receiving the particulars of the London account from Matheson & Company, Jardine, Skinner, & Company made up detailed accounts of such operations, and if there was any profit above the 8 per cent and the contribution to the reserve fund provided for under the articles of copartnery, they passed the same to the partners' accounts, in proportion to their respective interests in the concern. Those accounts, along with a statement of each partner's own private account, including his share of profits, were sent to Matheson & Company, who transmitted abstracts of the accounts and printed statements and reports relative thereto to the partners, along with the statement of their private account. These accounts were generally circulated by Messrs Matheson & Company about June or July in each year; and within a few days after they remitted to each partner his share of the final dividend, or passed same to the credit of his private account with them, if he had such. The partners resident in Great Britain were generally in the habit of holding an annual meeting in the course of each summer, when convenient to the general body of the partners, and irrespective of the distribution of the accounts and dividend. These and other meetings were held at Messrs Matheson & Company's office, and the notices summoning the same were issued sometimes in name of the committee, but more generally by Matheson & Company themselves. At these annual meetings the partners discussed the accounts and the general prospects of the company. Decisions were given by the general body of the partners, at their annual meeting, upon points connected with the business submitted to them for that purpose by the managing agents in India through the committee. Where the assent of a majority of partners was required, it was provided by article 27 that such might be given by letter in writing. This assent was usually obtained at the annual meeting of the partners in London, and communicated by the committee to the managing agents in India, but in one or two cases the assent was given by letter addressed to the chairman of the committee and communicated in the same

<sup>\*</sup> This minute-book contained entries of minutes and correspondence down to 30th September 1881.

way. . . . (5) The firm of Jardine, Skinner, & Company, of Calcutta, No. 173. or some or one of the partners therein, in their or his own right, held two shares in the property of the partnership, as required by article 10. Matheson & Company were not required to hold, and did not hold, any shares, but a partner of Matheson & Company was one of the three trustees resident in this country in whom the property of the partnership of Robert Watson & Company was vested, in terms of the articles of partnership. (6) Jardine, Skinner, & Company, as managing agents in India, conducted the practical working of the indigo and silk concerns and zemindaries for the production and manufacture of indigo, silk, and other produce. In terms of article 11, they appointed and discharged the whole staff of servants in the employment of the company in India, and exercised the powers therein conferred in reference to actions and other proceedings, and they also, under the general powers of the said 11th article, took on lease land and other heritable subjects for the purposes of the business, and granted leases of heritable property belonging to the company. They also contracted loans, and bought and sold land and other property for the purposes of the business. Reference is made to the minute-book from and after 1st October 1877 (No. 18 of process) as shewing the relations of the committee and partners to these actings of the managing agents in India. . . . (8) In virtue of article 14, all necessary books of account of the partnership, shewing the receipts and payments and assets and liabilities, were kept by Jardine, Skinner, & Company as the managing agents in India, at their usual place of business in Calcutta, and these were open to the inspection of the partners respectively, or any person or persons specially appointed for that purpose by any of the said partners respectively, as provided for in the article. These business books were separate from the ordinary business books of Jardine, Skinner, & Company. . . . (10) The produce of the partnership estates was either realised by Jardine, Skinner, & Company, and the proceeds remitted to the London agents, or it was consigned to the London agents for realisation in Europe, all in terms of article 19. In the latter case, Matheson & Company transmitted to Jardine, Skinner, & Company statements shewing the realisation for entry in the business books of the partnership in India, which statements were entered accordingly. In carrying out the said article 19, Matheson & Company were, during the whole period of the partnership under advance to Robert Watson & Company, as the outlay was chiefly at the beginning of each season, and from the nature of the business no season's accounts could be closed until from six to nine months after the next season had begun. (11) The reserve fund mentioned in article 15 was uninvested, and existed merely as a floating balance in favour of the firm in the hands of Matheson & Company."

On 15th March 1889 the Lord Ordinary (Fraser) pronounced this interlocutor:—"Decerns and ordains the defenders to exhibit upon oath or affirmation, and to record in the proper Sheriff Court in Scotland a full and true inventory, or additional inventory, of all the personal or moveable estate and effects of the deceased John Watson Laidlay not contained in any inventory hitherto exhibited, and that within fourteen days from this date, and continues the cause, reserving the question of expenses."\*

\* "OPINION.—The claim is for inventory or probate-duty, and the answer to that question depends upon whether or not the property of the deceased is held to be situated in India or in the United Kingdom. This property consisted of a share in the real and personal estate as a partner in the firm of Robert Watson & Company of Calcutta, which was sold after the death of Mr Laidlay to his sons at the price of £27,000.

"The firm of Robert Watson & Company consisted at the time of the death

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The defenders reclaimed, and argued ;—The partnership was an Indian partnership. All the books were kept there, and the balance-sheets were

of Mr Laidlay of sixteen partners, and its business was 'the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realisation in Europe of such produce.' The whole work done under the partnership in the production of the articles dealt in was done in India. Managing agents, in the persons of Jardine, Skinner, & Company, were appointed to superintend the works in India with very extensive powers, and it was declared that all the produce of the concerns of the partnership should be received and disposed of by them. All the necessary books of account of the partnership were to be kept by them, but they were subject to the control of a committee of five members, who had also very extensive powers. They were to advise with the agents both in London and in Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the interest of the partnership. The minute-book, which has been produced, indicates how close was the supervision which they exercised. Besides the agents in Calcutta, the partnership had also London agents, viz., Matheson & Company, to whom all the produce of the partnership sent to Europe for sale was to be consigned, and if such produce were sold in India, the proceeds were to be forthwith remitted to Matheson & Company by Jardine, Skinner, & Company.

"Now, the deceased Mr Laidlay had three shares in this partnership, and the question comes to be whether these shares shall be held as an asset in his possession in Scotland, where he was domiciled and where he died, or whether they shall be held as an asset situated in India, in which latter case no inventory-duty as under the statutes mentioned on record could be claimed. The contract of copartnery provides for the case of the death of a partner. In such a case it is declared that his interest in the partnership shall cease as at the 30th day of September after his decease,—that is, his representatives shall be entitled to claim profits made between the date of the death and the 30th of September, but not after the latter date, though they are entitled to the value of the deceased's interest in the partnership. Such value may be realised in various ways, as provided by the 25th article of the contract of copartnery. If the representatives of the deceased shall desire to sell the share to any of the partners or to any other person, such other person to be approved by the committee, the same may be sold for such price as may be agreed upon. But if they do not desire to sell, or cannot find a purchaser approved by the committee, then the fair value of the share is to be paid to them by the trustees for the partnership.

"The first of these modes of dealing with Mr Laidlay's shares was adopted. By an agreement between Mr Laidlay's executors and three of his sons, executed partly in England and partly in Scotland, the executors agreed to sell to these sons Mr Laidlay's three shares at the price of £9000 for each share, and the purchasers being approved of by the shareholders, they became partners in room of their deceased father.

"Now, the Lord Ordinary is of opinion that the executors were not entitled to deal with Mr Laidlay's shares in the partnership without giving up an inventory and obtaining confirmation thereto. If the shares had not been sold to the sons, and if the mode of realisation was payment by the trustees to Mr Laidlay's representatives, this would simply be payment by a debtor to his creditor of a simple contract debt, and the mode in which such a debt is regarded is illustrated by the case of *Fernandes' Executors* (8th February 1870, L. R. 5 Chan. Appeals, 314), the rubric of which is as follows :—'A chartered bank whose head office was in England, but whose business was chiefly carried on in India, was ordered to be wound up, and the Indian assets were remitted to this country. A creditor domiciled in India proved his debt, received a dividend, and died, leaving a will, which was proved in India. After his death a final dividend became payable. Held (reversing the decision of the Master of the Rolls) that the dividend ought not to be at once remitted to the executors in

made up there. The committee which met in London was one for advice No. 173. merely, and their functions were limited to subjects on which their advice was asked by the Indian committee. The centre of the business, July 12, 1889. and the place where the firm carried on its business, was India, and a Lord Advocate v. Laidlay's share of a deceased partner in a concern was an asset in the country to Trustees. which the company really belonged.<sup>1</sup> The assets of the company were almost entirely in India,—indeed, during a large part of the year there was a large debit balance in this country owing to the way in which the trade was carried on. The claim of Mr Laidlay's representatives was one to a share of the assets of an Indian company, and therefore need not be given up in an inventory in the United Kingdom.

Argued for the pursuer;—The company was an English company. The great majority of the partners were resident in the United Kingdom, and thirty out of thirty-two shares were held by partners resident here. The whole capital of the company was vested in trustees, all of whom

India, but could only be paid to them on their producing a properly stamped English probate.' Lord Gifford in delivering judgment said,—'Probate-duty, as we all know, attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicile of the testator. The moneys now in question are *bona notabilia* in London, and I have no hesitation in saying that this Court cannot authorise the payment of them to a person who, if he were to receive them and administer them, would be going directly in the teeth of the Act of Parliament, and doing a thing for which, if the Crown chose to proceed against him, he would be liable to a penalty. Upon these grounds I am obliged to say that there can be payment only upon production of an English probate.' And Mr Hanson, in his Treatise on the Probate, Legacy, and Succession Duties Acts (p. 161), further expresses himself as follows:—'The duty is payable in respect of the whole amount which the representatives of a deceased partner in an English firm are entitled to recover and receive from the surviving partner in this country, on account of the share of the deceased, notwithstanding that the partnership assets, or any part of them, are situate abroad; for the legal interest in the partnership property vests in the surviving partner, who is liable to account for and pay to the representatives of the deceased partner the amount which may ultimately appear due to him after the assets have been realised and the partnership debts discharged, and this liability is in the nature of a personal debt, and situate therefore, like other debts, within the jurisdiction of that country where the debtor resides.' No doubt, in the present case, the profits were earned with the manufacture in India of the articles dealt in, but these profits were obtained not entirely by the exertions and the skill of the Indian managers. They were the servants and bound to obey the instructions of the London committee. Then, further, these profits were all remitted to London, and they were distributed there. Sir James Hannen, in the case of *Ewing* (25th January 1881, 6 Prob. Div. 19), says,—'The share of a deceased partner in a partnership asset is situate where the business is carried on, and shares in a company are locally situate where the head office is.' But the question is more complex when the business is carried on at two places—one at the place of manufacture of the article dealt in, and the other the place of the governing and directing body. One does not get much aid from the latter part of this opinion, for the question always returns, which is the head office, and as regards the present case the Lord Ordinary must hold it to be London."

<sup>1</sup> *Ewing*, 1881, L. R., 6 Prob. and Div. 19; *Keynsham Blue Lias Lime Co. v. Baker*, 1863, 33 L. J. Exch. 41; *Aberystwith Promenade Pier Co. v. Cooper*, 1865, 35 L. J. Q. B. 44; *Calcutta Jute Mills Co. v. Nicolson*, 1876, L. R., 1 Exch. Div. 428; *Lloyd v. Inland Revenue*, March 12, 1884, 11 R. 687; *Colquhoun v. Brooks*, 1888, L. R., 21 Q. B. D. 52; *Werle v. Colquhoun*, 1888, L. R., 20 Q. B. D. 753; *Attorney-General v. Bouwens*, 1838, 4 Meas. and Wells, 171; *Fernandes' Executors*, 1870, L. R., 5 Chan. App. 314.

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resided in the United Kingdom, and the whole management of the trade of the firm was subject to the supreme control of the committee in London. The claim which Mr Laidlay's representatives had against the company was under sec. 25 of the articles merely a claim for a sum of money, and not a claim for a proportional part of the assets of the company. That claim was one which there could be no doubt could be recovered in this country, and in this view it was immaterial whether the company was an Indian or an English partnership.

At advising,—

LORD PRESIDENT.—The late John Watson Laidlay of Seacliff, in the county of Haddington, died on the 8th of March 1885. The defenders are his trustees and executors, and they gave up an inventory of his personal estate, upon which they obtained confirmation in April 1885. That inventory shewed a nett personal estate in the United Kingdom amounting to £294,345, and upon that amount stamp-duty was paid. But at the end of the inventory, under the head “abroad,” there was a sum stated of £25,221 which is said to be “the deceased's share in the real and personal estate as a partner in the firm of Robert Watson & Company, Calcutta, as valued by the agents of the company,” and it is alleged and admitted that “the value of the deceased's share or interest in the nett balance of the partnership assets was not included in the inventory as estate in the United Kingdom for payment of inventory-duty, and inventory-duty has not been paid upon it.”

This company of Robert Watson & Company was a common law partnership. It was not in any respect a statutory or corporate body, and therefore the rights and interests of the partners depend of course entirely upon the provisions of the contract. The contract was executed in August 1877, and the nature of the business is determined by the second article. “The business shall be the carrying on and working of indigo and silk concerns, and zemindaries for the production or manufacture or working of indigo and silk, and other produce, and for the sale in Calcutta, or shipment for realisation in Europe, of such produce.” There were sixteen partners in the concern. Fourteen of these were resident in the United Kingdom, and held thirty shares in the concern, and two were resident in Calcutta, and held one share each, the shares amounting in all to thirty-two. The shares were declared by the contract to be personal estate.

For carrying on the business there were several provisions made. In the first place, there were three trustees in whom the property of the concern was vested, and these were all resident in the United Kingdom. There was also a committee of five, all resident in the United Kingdom, and their duties are specified in the 9th head of the contract. They “shall constitute a committee to advise with the agents both in London and in Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the interest of the partnership, and also to decide as to calling when necessary a meeting of the partners.”

The financial agents were Messrs Matheson & Company of London, and their duties are described in the 19th head of the contract, “Messrs Matheson & Company are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them, and all the produce of the partnership shall be consigned to them, or if sold in India, the proceeds shall forthwith be remitted to them. The said Messrs Matheson & Company shall supply the necessary funds for the current advances of each season, whether for

working the estates, the production of indigo, silk, or other produce, and the same shall be on the security of the mortgages and covenants contained in the indentures of mortgage and confirmation hereinbefore referred to. Any further expenditure of moneys, whether for the purchase of new concerns or for land tenures, or for advances made to secure leases of property, or for any extraordinary expenditure under the heads of law proceedings, land surveying, machinery, or otherwise, shall be provided in such manner as the managing agents shall from time to time determine, either by a rateable contribution from the partners, which they hereby agree to make, or by charge on the profits, or by advances from the said Messrs Matheson & Company."

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The managing agents were of course resident in Calcutta, because there the business of the company was to be carried on, in so far as concerned the production of the produce, which was to be either disposed of in India or sent home, and these gentlemen were to have a commission of  $2\frac{1}{2}$  per cent upon the sales. Their powers and duties of course in carrying on the business as managing agents were very large, and just such as we might expect from the nature of the business which I have already stated as appearing from the second head of the contract.

The business was carried on very much in the way that might be expected, and quite in conformity, I think, with the provisions of the contract. There is a minute of admissions regarding this matter, some parts of which it may be necessary to read. The meetings of the committee named and appointed took place in London "in the office of Matheson & Company, the London agents of the partnership, and were summoned by Matheson & Company, acting in concert with the chairman of the committee, who was resident in England. The committee as a rule, met prior to the annual meeting of the partners to consider the business to be laid before the meeting, and at other times when any business required it, of which they were informed by Matheson & Company, to whom the regular advices as to the state of the business were addressed by the managing agents in India. A minute-book of meetings and correspondence was kept for the committee, of which Matheson & Company were the custodiers. The minute-book in use from and after 1st October 1877 is produced and admitted as correct. The committee discharged the duties devolving upon them under the said articles, and were in correspondence with the managing agents in India, as shewn by the minute-book." The financial year ended on the 30th September, and as soon as possible after that the managing agents at Calcutta "on the footing that there was sufficient profit, passed a dividend at the rate of 8 per cent to the credit of each partner's account in the books of the partnership. Messrs Matheson & Company were advised thereof, and requested to make, and did make payment of the dividend to the partners respectively,"—that is, in this country,—“as soon as the result of the year's operations was ascertained, and after receiving the particulars of the London account from Matheson & Company, Jardine, Skinner, & Company” (that is, the managing agents) “made up detailed accounts of such operations, and if there was any profit above the 8 per cent and the contribution to the reserve fund provided for under the articles of copartnership, they passed the same to the partners' accounts.” Then with reference to the annual meeting of the partners, these meetings “discussed the accounts, and the general prospects of the company. Decisions were given by the general body of partners, at their annual meeting, upon points connected with the business submitted to them for that purpose by

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the managing agents in India through the committee." The produce of the partnership estates was either realised by Jardine, Skinner, & Company at Calcutta, and the produce remitted to the London agents, or it was consigned—that is, the produce was consigned—to the London agents for realisation in Europe. "In the latter case, Matheson & Company transmitted to Jardine, Skinner, & Company statements shewing the realisation for entry in the business books of the partnership in India, which statements were entered accordingly. In carrying out the said article 19, Matheson & Company were during the whole period of the partnership under advance to Robert Watson & Company, as the outlay was chiefly at the beginning of each season, and from the nature of the business no season's accounts could be closed until from six to nine months after the next season had begun."

Now, I shall reserve what I have to say in the meantime as to what the nature of this company is,—whether it was a company in the United Kingdom, or a company in India,—but it appears to me that the decision of this case depends not so much upon that consideration as upon the provisions made for the way in which the representatives of a deceased partner are to be dealt with, which is fixed by the 25th article of the contract. That article provides not only for the mode of dealing with a deceased partner's interest, but also with the interest of a bankrupt or insolvent partner; and in the expression of that article these things are so mixed up throughout that the reading of it leads to a little confusion, but I shall take the liberty of stating what I conceive to be the import of this clause as applicable to the case of a deceased partner only, omitting all reference to the case of a bankrupt or insolvent partner.

Now, with reference to the death of a partner it is provided, in the first place, that the death of a partner shall not cause a dissolution of the company; in the second place, the representatives of a deceased partner are not to become partners of the company; in the third place, the interest of a deceased partner ceases at the termination of the current financial year—that is to say, on the 30th September after his death; in the fourth place, the value of the deceased partner's share at 30th September is to be determined by Matheson & Company. and on the executors executing a transfer to the trustees of the deceased's share and interest in the concern, the trustees shall pay the ascertained value to the executors in cash, either in whole or by half-yearly instalments, in the option of the trustees, extending over a period of not more than three years, interest running at the rate of five per cent on the unpaid instalments. The trustees undertake also to indemnify the executors and the executry estate of liabilities incurred by the deceased as a partner; in the fifth place, the executors may, if they prefer it, within six months after the 30th of September, sell the shares of the deceased to any of the partners, or to any other person to be approved by the committee, at such prices as they can obtain therefor.

Now, this last is the course which was adopted in the present case. The three shares held by the deceased in the firm under an agreement taking effect on the 8th of September 1885 were transferred by the executors, one to each of his sons, Andrew Laidlay, Robert Watson Laidlay, and Alfred Hope Laidlay, the agreed-on price paid for each share being £9000. Now, though the executors did not become partners, and were not entitled to become partners, it will be observed that they have a right to transfer the shares to the other partners,—to the company in short, or if they prefer it, to sell them at such a price as they can obtain. Now, this right of transferring

the deceased's shares, or selling and transferring them, does not in the slightest degree imply that the executors were vested with the property of these shares. It is expressly provided that the executors are not to become partners, and therefore they could not sell the shares in their character of partners. It is a power of sale, and nothing else, just analogous to those powers of appointment with which we are quite familiar in many trust-deeds; and it is perhaps still more clearly analogous to a power which is given in the Companies Act of 1862 to executors without becoming partners of the company to sell the shares of the deceased, as provided for by the 24th section of the Act of 1862, and the 14th head of the Table A. What the executors have a right to do under this 25th head of the contract is to sell that which originally belonged to the deceased, but which upon his death no longer belonged either to him or his representatives. In short, the right of the deceased partner came to an end at his death, saving, of course, his right to the balance upon the current financial year; but from his death the share in the partnership concern was no longer *in bonis defuncti*, and formed no part of the executry estate. Now, it seems to me to follow from this that that which the executry estate possessed under the operation of this clause was a right of claim against the trustees of the company for a sum of money; in short, the trustees became indebted to the executors in a sum of money, or the executors by means of a sale realised a sum of money; and in either case that sum of money was a debt due to the executors by their debtors in this country. It seems to me, therefore, as the result of the whole examination of this contract, the manner in which the business was carried on, and the nature of the business itself, that even if it cannot be pronounced with certainty that this is an English or a British company, or a company belonging to the United Kingdom, and carrying on business in the United Kingdom, it still is perfectly clear that the £25,221, the sum which the Crown demands shall enter the inventory of the deceased's estate, is a sum of money recoverable and recovered in this country by persons resident and domiciled here—I mean that both the creditor and the debtor in that money are resident in this country. That, I think, brings the money within the operation of the statutes regarding inventory-duty as being executry estate in the United Kingdom; and therefore I am for adhering to the Lord Ordinary's interlocutor.

**LORD MURE.**—I have nothing to add to the exposition which your Lordship has given of the position of this case as shewn mainly in the articles of partnership and the minutes of admission of the parties in regard to the question raised. I therefore simply state that I concur with your Lordship in thinking that the question here raised depends entirely, or at all events mainly, upon the true construction of the 25th section of the articles of copartnership, and that reading that carefully I can come to no other conclusion than that the claim which was made by the executors of the deceased partner was a claim for payment of a sum of money in England to be paid by the trustees for the company in this country. And upon that ground the sum so due to the estate of the late Mr Laidlay must enter the inventory as the Lord Ordinary has found.

**LORD SHAND.**—I think the question raised in this case is very well stated in two passages of the Lord Ordinary's opinion. "The claim is for inventory or probate-duty, and the answer to that question depends upon whether or not the property of the deceased is held to be situated in India, or in the United Kingdom. This property consisted of a share in the real and personal estate as a

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partner in the firm of Robert Watson & Company of Calcutta, which was sold after the death of Mr Laidlay to his sons at the price of £27,000." And in a subsequent part of his opinion his Lordship says,—“The deceased Mr Laidlay had three shares in this partnership, and the question comes to be whether these shares shall be held as an asset in his possession in Scotland, where he was domiciled, and where he died, or whether they shall be held as an asset situated in India, in which latter case no inventory-duty as under the statutes mentioned on record could be claimed.” I am of opinion, differing from the Lord Ordinary, and I understand from all of your Lordships, that the property was an asset of the deceased's estate situated in India, and which is therefore not liable for probate-duty in this country.

The deceased, as explained in article 1 of the condescendence, seems to have been possessed of very considerable wealth. The inventory of his personal estate in the United Kingdom is given up as £294,345, 6s. 8d., and has borne already a stamp-duty of £8832. At the end of the inventory, under the head “abroad,” there is stated a sum of £25,221, 4s. 3d., said to be “the deceased's share in the real and personal estate as a partner in the firm of Robert Watson & Company, Calcutta, as valued by the agents of the company.” That sum was not given up for inventory-duty, but I rather suppose that this note appended as to estate abroad is given in terms of some enactment in the statutes which requires a full disclosure of the personal estate to be made, in order that the Crown may consider whether they have or have not a claim for duty upon it.

Having regard to the terms of the contract of copartnery of this company, and the minute of admissions in regard to the actings under it, and to the statements and admissions generally on record, I have come to the conclusion without difficulty that the company was an Indian company, and not an English company in any proper or reasonable sense, that it was an Indian company having its capital, its property, and its whole assets in India, and carrying on its business in India, and from Calcutta as its centre, where alone it had its head office. The Lord Ordinary seems to have taken the view, although his note is not so distinct on the subject as might be desired, that the head office of the company was in London, and that London was the centre of its business. The earlier part of his opinion leaves it doubtful whether he did not regard the company as having its business centre in Calcutta, but in the concluding sentence, after referring to a passage in the opinion of Sir James Hannen in the case of *Ewing*, his Lordship says,—“One does not get much aid from the latter part of this opinion, for the question always returns, which is the head office, and as regards the present case the Lord Ordinary must hold it to be London.” If I had concurred with the Lord Ordinary in so thinking, I should have been for affirming his Lordship's judgment. I do not understand that your Lordships agree with the Lord Ordinary in that view. The judgment which is to be pronounced proceeds, I think, not on the view, so far as I understand your Lordships' opinions, that this was an English company. If, however, it is an Indian, and not an English company, then I think it follows that the funds in question are Indian assets, and as such are not subject to probate in this country.

Now, as I regard this question of fact, whether these are Indian assets, as being really at the root of the proper decision of the case, I must, with your Lordship's leave, notice—perhaps with some degree of detail—the provisions of the contract of copartnery of the company which affect that question, and which I think bear out the opinion I have expressed. In the first place, I find that in

the narrative of the contract which was entered into in 1877 as a renewal of an older contract about to expire in that year, or rather as a new contract framed upon the basis of the former contract, this is directly set forth in the preamble, "that whereas the capital of the said partnership consists of real and personal estate in India, which by virtue of an indenture," &c., had been held by other parties named, it was thereby declared that this property should be vested in three persons thereby named and appointed as trustees for the said partnership. On the face of the deed it is thus clearly expressed, and the whole of the deed otherwise shews that the capital of the company consisted of real and personal estate locally situated in India, and nothing else. Article 2 of the contract provides that the business is to be the "manufacture or working of indigo and silk, and other produce," and the sale in Calcutta, or shipment for realisation in Europe, of indigo, silk, and other produce. That describes the business which the company were carrying on, and carrying on clearly as I think from its head office in Calcutta, for any sales which were made of produce from India sent home to Europe for the purpose of realisation were sales made by the Indian house through the London agency, the accounts for which had at once to be sent back to Calcutta, to enter the books there, and to form part of the general balance of the company. So much for the capital and business of the company.

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Then as regards the management of the company, nothing is more clear than that this was a company that was being carried on and managed entirely at Calcutta as its centre. There is one peculiarity in the deed that I do not remember to have seen in the case of any common law copartnership before, though I daresay it may be common enough in these Indian companies—I mean the provision that none of the partners individually are entitled to interfere in the business. There is an express provision to that effect in section 21,—“No partner or partners shall contract any debt, or draw, accept, or indorse, any bill or note, or transact any business in the name of the partnership, nor shall any of the partners, not being a majority of the partners, in any manner interfere with the conduct of the business of the partnership by Messrs Jardine, Skinner, & Company, or Messrs Matheson & Company respectively.” As the partners have no right to interfere in the business, it is provided that there shall be certain managing agents, or I should rather say, managing partners of the company. They are appointed by this deed, viz., Jardine, Skinner, & Company of Calcutta, one of the provisions of the deed being that this firm or its partners must hold two shares of the company. Therefore, the company at Calcutta has its managing partners there. It further appears that all the powers which partners usually have in managing their own business are conferred upon Jardine, Skinner, & Company. They are acting in Calcutta in the management of the business, just as partners would do if they were themselves conducting the business, with one exception, and that is, that from time to time they may consult, if they desire it, a committee of three or four of the partners who are in London, but who appear to me to exercise no function except that of a consulting committee. The views I have now stated of the contract are, I think, borne out by the sections from 8 to 15 of the contract. Section 7 provides that “the style or firm of the partnership shall be Robert Watson & Company”; section 8 that “the said style or firm of Robert Watson & Company may be used by Messrs Jardine, Skinner, & Company or others, the managing agents for the time being appointed in their stead,” and they alone are entitled to use the said style or firm, or to authorise its use for



No. 173. any company purpose, and for instituting or carrying on any suits on behalf of the company. Article 10 provides that "Messrs Jardine, Skinner, & Company are hereby constituted the managing agents of the partnership in India, and the entire business of the partnership there shall be carried on by them as such managing agents, subject to the provisions herein contained." Section 11 is perhaps the most important on this subject, and it provides that "Messrs Jardine, Skinner, & Company, as such managing agents, shall have all powers necessary for the efficient carrying on of the business thereof, and are hereby expressly empowered (but subject to the opinion of the committee whenever it shall have been expressed) to decide whether all the said branches of business shall be carried on, or which of them, and to what extent. The said managing agents shall also determine the amount of the outlay to be expended in the business and concerns of the partnership in each year, and the mode and terms of disposal of the produce thereof, and have power to appoint and remove all persons in the employment of the partnership in India, and to give to such persons all such powers, including a power of substitution, as the said Messrs Jardine, Skinner, & Company may from time to time think proper. And further, the said Messrs Jardine, Skinner, & Company are hereby authorised to enter into all contracts necessary for the carrying on of the business of the company, to institute and defend all suits in which the partnership may be concerned, and also to compromise any such actions or suits, and to compound any debts due to the partnership or other claims and demands, and to refer any claim or demand of or against the partnership to arbitration, and generally to manage the said estate, and conduct all the affairs in India of the said partnership, and to do and execute all such acts, matters, and things as they shall deem necessary for the aforesaid purposes." It is further provided that moneys which have been borrowed from Matheson & Company, as to whose position I shall say a few words immediately, "for the purpose of the partnership and for carrying on the said concerns, shall be drawn for by Messrs Jardine, Skinner, & Company only," "and all the money which shall be required to be remitted to the various concerns of the partnership shall be supplied by Messrs Jardine, Skinner, & Company, and all the produce of the concerns of the partnership shall be received and disposed of by them." Then there is a provision that in regard to Jardine, Skinner, & Company's counting-house premises, they are to bear the expense of that themselves. Then comes this important provision in regard to the books of the company—and in passing I may say it has always been regarded in these cases as the determining or leading element in the question where the head office is to be found, that you shall ascertain where the books of the company are kept, and where the balance-sheets are struck,—(section 14) "All necessary books of account of the partnership, shewing the receipts and payments and assets and liabilities of the partnership, shall be kept by Messrs Jardine, Skinner, & Company as the managing agents at their usual place of business in Calcutta, and shall be at all times open for the inspection of the partners." Then follows a provision with reference to the balance-sheet, and even in the striking of the balance-sheet the partners do not interfere, nor have Matheson & Company in London anything whatever to do with that. The provision as to the balance-sheet is (section 15)—"As soon as practicable after the 30th day of September in each year, and the realisation of the produce of the season, the managing agents in Calcutta shall prepare a general account or balance-sheet, shewing the result of the operations of the partnership during the year ending

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on that day, and the nett profit or gross loss, after paying or providing for all the outlay, expenses, and engagements of the year of every kind, shall be appropriated as follows,—the profits to the extent of 8 per cent on the capital shall be carried to the account of the respective partners in the books of the partnership, in proportion to their respective shares ; the excess of the profits beyond 8 per cent shall be set apart and paid to the London agents to form and afterwards maintain a reserve fund.” Then article 18 provides,—“As a remuneration for the trouble as managing agents of the partnership business, Messrs Jardine, Skinner, & Company shall be entitled to receive a commission of 2½ per cent on the proceeds of sale of the indigo and silk and other produce to be produced in the concerns of the partnership in each year, whether the same shall be sold in Calcutta or shipped for realisation in Europe, they paying thereout all the Calcutta charges and expenses of managing the business of the partnership.” Now, that settles, I think, the position of Jardine, Skinner, & Company. They are, no doubt, to act subject to the opinion of a certain committee that meets in London, but, I think, it appears that it was only to a very limited extent that there was any opinion or advice ever given to them by this committee. We have had before us the minute-book for a number of years, and it seems to me that they have scarcely interfered in the business at all, and if they did interfere it was only when their advice was asked. They were gentlemen of experience in Indian matters, and could give the managers of the company—the partners who were carrying it on—the benefit of this experience by their advice. Such matters as the settlement of very important litigations that had arisen in regard to heritable property belonging to the company, or the like, are brought before them, and little if anything else, as appears from the minute-book which has been printed, and so very unimportant does the business appear to have been that from 1881 to the present day there is not a minute of any business done recorded in the book.

Then, what is the position of Matheson & Company, and the office they have in London? I describe them I think properly when I say that they are financial and commercial agents for the company in London. The company in its operations requires in the early part of each season a large advance of money, and Matheson & Company agree to make that advance, and as moneys come in in the course of the sales of produce, the managers of the company carrying on its business in India remit from time to time the sums which they are able to give towards the reduction of the balance in Matheson & Company's books against the company, towards which of course also is placed the proceeds of sales made in Europe. So far as I can see, Matheson & Company had practically nothing else to do, at least nothing else of importance, with this company, except that when the committee or the partners were at any time called together to talk over the business that was going on, they found a room for the purpose in Matheson & Company's premises. I think that this was the position which Matheson & Company held is quite clear from sections 19 and 20 of the contract. The 19th section provides that “the said Messrs Matheson & Company are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them, and all the produce of the partnership shall be consigned to them, or if sold in India, the proceeds shall forthwith be remitted to them. The said Messrs Matheson & Company shall supply the necessary funds for the current advances of each season, whether for working the estates, the production of indigo, silk, or other produce, and the

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Matheson & Company, as agents of the company in this country, are thus paid a sum of 2½ per cent, mainly because they are advancing in a great measure the funds which from time to time are required for carrying on the company. They are the agents in London merely of a company which is carrying on its business in Calcutta. They have no right or power to use or sign the company name or firm—a circumstance of itself I think sufficient to shew that their office is not the head office of the company, but the office of agents only. On the other hand, Messrs Jardine, Skinner, & Company are the managing partners at the head office of the business.

It is only necessary that I should notice farther that in addition to these officials there are several trustees named, being the persons to whom I have already alluded in referring to the preamble of the contract, but these trustees have no functions other than to hold the property. They hold the property in trust. It was necessary to give some persons a title to hold the property, just as is done in the case of the large insurance companies we have in this city. Certain trustees are named, in whom the property is vested in trust. Beyond the holding of that property, I do not see that these trustees had any functions or duties whatever. They are not persons who intromit with the money in any way whatever in the conduct of the business.

Now, such being the terms of the contract, and the way in which the contract was worked, there appears to me to be no doubt that the company is not an English company, but that it is an Indian company, carrying on its business in India, and which has its head office in Calcutta. The assets of the company are Indian assets, and the share which any person has in the copartnery is a share of an Indian business. Mr Laidlay when he died was a partner in this Indian business. Part of his personal estate, therefore, was locally situated in India, that estate being his share in this business. Whether his right is to be regarded as being a certain proportion or share of the company's capital and assets, or whether we regard the company (as it is in Scotland) as a separate *persona*, which it is not in India, and his right is to claim a share in the business, the assets of which belong to the company, the result is the same. The asset or right has as its subject property in India. It is a share in a business carried on in India. That being so, I confess myself unable to see that by his death all this was changed, and that what was an Indian asset immediately before his death instantly became an asset of his estate locally situated in Scotland in consequence of his death. I think it quite proper to put the test proposed in the

argument—I think the proper test in a question of this kind—viz., was confirmation necessary to enable the executors to deal with that part of the testator's estate? and I answer that question in the negative. The estate or (as I see in the English cases estate of this kind is called) the *bona notabilia* being situated in India, probate there would necessarily be required in order to authorise realisation, and we see from the defenders' statement on record that probate in India was taken out accordingly. What has happened is this, that Indian estate and no other has been realised. Now, I cannot see that the mode in which the property or right vested in Mr Laidlay was realised could convert it in the persons of the executors realising it from Indian estate into Scotch estate. What in point of fact occurred was this, that under section 25 of the contract of copartnership, which empowers the executors of partners who die to dispose of their shares in the company, the shares of Mr Laidlay were sold and disposed of by the executors to persons who assumed precisely the rights in the partnership assets or business which Mr Laidlay had. There were sons of Mr Laidlay who were anxious to get his share of the business apparently, and they agreed to take it and to pay for it, and accordingly the share or interest which Mr Laidlay had in this business was bought by these sons and transferred to them. The subject of that sale, however, surely was Indian estate, or Mr Laidlay's right to shares of an Indian business which was Indian estate—*bona notabilia* situated in India. It was a sale. It has been suggested that there was no right in the assets of this company at the time of sale. It is true the executors were not entitled to become partners of the company, but they were entitled to sell or otherwise to receive from the company the value of Mr Laidlay's interest in the business. I ask what was sold? The interest of Mr Laidlay in this Indian firm was the subject of the sale. Accordingly, you have nothing here but the deceased's executors realising his interest in that Indian company, and therefore you have them realising an asset situated in India. Suppose this sale had happened to be to two gentlemen residing in Calcutta instead of being to the sons of Mr Laidlay at home, would the value of the property or interest have required to enter a Scotch confirmation in order to make it a good sale—a sale by persons having a title? I answer, plainly not; and the liability for probate-duty cannot depend upon the accident of whether the purchaser happens to be in this country or in India. The question is not from whom does the purchase money come, but where is the subject of the purchase belonging to the executry estate—the interest in the Indian business—situated?

But, as your Lordship pointed out, there is a farther provision in this contract, which, however, was not brought into operation in this case, by which, if the shares had not been sold, the company themselves, or the other partners, would have retained the interest of Mr Laidlay, as a shareholder in the company, and paid out the value of it. "The fair value of the share" is to be determined by Messrs Matheson & Company and paid over to the executors. In point of fact that was not done. What was done was simply the executors realising by a sale to partners who assumed the deceased's place in the copartnership. But suppose the company had themselves taken and paid for the shares, it does not appear to me that it would have made the slightest difference in the case. The company say, we will not allow executors to come into our copartnership, but surely the interest in the copartnership of the gentleman who has gone out remains, and though that interest is converted into a sum of money, it is a sum of money which represents his interest in an Indian firm, whether you call it assets, or a

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share of the assets of the firm, or his right to a share in the company. It is said that, if the company had so taken over the share, this would have created a contract debt,—and I suppose that would be so,—but that contract debt was not in respect of a share or interest in an English company but of an Indian company, and though the money might by arrangement or by contract be paid in this country, for the convenience of all concerned, the right or property in respect of which the payment would be made was situated in India. I am unable to see that if a man sells, either to a third party or to the company itself, a share of an Indian business, he is not thereby realising, as part of his estate, an asset which is situated in India. Article 25 of the contract no doubt bears that “the trustees of the partnership shall pay, or cause to be paid or secured, as hereinafter mentioned, the sum so determined”; but the obvious meaning of that is merely that they are to authorise payment. The funds of the company are all in the hands and under the management of the managing partners in India, who may no doubt require Matheson & Company to make advances when required. And the contract, in that article, goes on to provide at the close of it, “the funds to be paid by the said trustees of the partnership shall be provided by the partners rateably.” What is that but the purchase by the remaining partners of this company of Mr Laidlay's share in the Indian business? And in that view of the case the question always comes back to this, What is the nature of the asset sold or taken over? Is it an asset situated in India or not? It is said these trustees are in this country, and it is a payment from one person in this country to another. Well, if the trustees lived in India, would it make any difference? I apprehend not. Although it is a payment by one set of partners in this country to another, what is the payment in respect of? It is a payment in respect of a share in an Indian business. Therefore, it is an Indian estate, and therefore it is not liable to probate-duty in this country.

I have only farther to add that I think every one of the authorities referred to by the Lord Ordinary, or that were referred to in the argument, support the view that I have now stated. I have looked over them. The case of *Fernandez's Executors* was one of a contract debt, and the decision proceeded entirely on the view to which I should now give effect. A gentleman in India was receiving dividends from England. He died, and his executors desired to get the unpaid dividends free from probate-duty, but it was held that though a number of the assets of the company were in India the duty must be paid, because the company was an English company, and had its head office in England. That is precisely the principle which I apply to this case. Mr Hanson, in the passage which was referred to by Sir James Hannen in the case of *Ewing* (6 Prob. & Div. 19), says, at p. 160 of his book on Probate-Duties,—“Property which consists of shares in or claims upon any company or society must be taken to be locally situate in the place where the company has its head office, and to be *bona notabilia* accordingly.” And the passage which Lord Fraser has quoted in his note is to the same effect. Finally, in the case of *Ewing* Sir James Hannen says, with reference to an asset of Mr Ewing which was said to be situated in England, “I am not aware that the point has been the subject of judicial determination, but all analogies seem to lead to the conclusion that Scotland is the local situation of this asset of Mr Ewing. Thus the share of a deceased partner in a partnership asset is situate where the business is carried on, and shares in a company are locally situate where the head office is.” Now, the Lord Ordinary in quoting these authorities properly applied them, because he concluded his opinion by saying,—“The ques-

tion always returns, which is the head office, and as regards the present case the Lord Ordinary must hold it to be London." If he had held that the head office of the company was in Calcutta his judgment would have been against the Crown. I do not understand that your Lordships hold that the head office of Robert Watson & Company is in London; and if the head office be in India, as I certainly hold it to be, then, according to all the authorities, a share of the business is an asset in India of the person who holds it. I am, on these grounds, of opinion, and although differing from your Lordships I am clearly of opinion, that this fund is not subject to probate-duty in this country.

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LORD ADAM.—The late Mr Laidlay died possessed of three shares in the company of Robert Watson & Co. These shares were sold by his representatives to his three sons, each getting one share, at the price of £27,000; and the question is whether or no this sum so realised by the trustees, and paid to them in this country, ought to have been included in the inventory of the moveable estate given up by the trustees in this country. As I understand the plea maintained against the giving up of these shares in this country is this, that they were shares in an Indian company, and being shares in an Indian company the assets were locally situate in India, and therefore did not require to be given up, and ought not to be given up in this country, but in India. Now, for my part I have not found it necessary to make up my mind at all whether the Lord Ordinary is right in saying that this is an English company, or whether Lord Shand is right in saying that it is an Indian company, because my opinion is entirely founded upon the 25th section of the contract of co-partnership, and would be the same whether this company is to be considered an Indian company or an English company. I think the 25th section is clear enough upon a little examination; and it appears to me that the most important section in it is the first, which provides that the representatives of a deceased partner shall not "become a partner in respect of any share of such partner," but the interest shall cease from the 30th of September after the partner's death. Now, there is a clear statement as matter of contract between the parties that the partnership should not be dissolved by the death of a partner, and that the representatives of the deceased partner should have no right whatever to become partners of the company. It humbly appears to me to follow from that, that in no view could the representatives of a deceased partner make up a title to the three shares which belonged to the deceasing partner. They could by no possibility do this, and so acquire a right to the property, or a share of the property, of the company of Robert Watson & Co. They had no such right under this contract. And accordingly it humbly appears to me that this is, if I may say so, where the fallacy of Lord Shand's judgment lies; because if it be the case, as I think it is, that these representatives never acquired themselves, and never could acquire, a right to the property of the company, which is clear from the contract, I think it follows that it does not matter in the least where that property is situated, whether it is held to be situated in India, or whether it is held to be situated in this country; because unless the representatives had a right of property in the assets of the company, I think it follows as a necessary consequence that the *locus* of the property of the company is immaterial in the case. That being so, the question comes to be what is to be done with these shares, and what right the representatives of these shares have. That right is set forth in the 25th section, that if they

**No. 173.** choose they may sell within six months after the death of the partner to a partner approved of by the committee, or if they do not choose to sell, they may have the value of the shares assessed or estimated by Messrs Matheson & Co., and the fair value having been so ascertained, the trustees, who are in this country, are to pay to the representatives of the deceased partner the amount or value of the shares as so ascertained. Now, in my humble opinion that is nothing but a contract debt against this company for a sum of money. It is not a claim or a sale of a right to a proportional part of the property of the company wherever it is situated. That is not the nature of the claim. In my humble opinion it is clearly and simply a claim of debt for a sum of money which the representatives have by this clause of the contract against the trustees in this country for payment of a sum of money. If that be so, I think there is no further question in this case about the local situation of the assets of the company. They are not selling, and have no power to sell, any right of property to these assets. That is not what is done here. But Lord Shand says there is no difference between that case and the sale of the same subject or the same right for a sum of money to the sons. It is the sale of a right to a sum of money paid to the executors in this country, and being a sum due and paid to them in this country, I can see nothing in this case different from the ordinary case of an asset in this country, realised in this country, and properly realised in this country, by the representatives of the deceased. That being so, I think it falls under the ordinary rule, and must be given up as an asset in this country. On that short ground I concur with your Lordship.

THE COURT adhered.

DAVID CROLE, Solicitor of Inland Revenue—W. M. MORRIS, S.S.C.—Agents.

**No. 174.** A. W. GORDON (Young's Judicial Factor), Pursuer (Respondent).—*M'Kechnie—J. Wilson.*  
**PETER WESTREN AND OTHERS (Williams' Trustees), Defenders (Reclaimers).—Strachan—R. L. Orr.**

July 16, 1889.  
 Gordon v.  
 Williams'  
 Trustees.

*Judicial Factor—Title to sue—Right to recover arrears of rent uplifted by third party.—Held that a judicial factor appointed on certain heritable subjects "with all the usual powers" had no title to sue a person for rents uplifted by him prior to the factor's appointment.*

*M'Grigor v. Beith, May 24, 1828, 6 S. 853, followed.*

**1ST DIVISION.** IN 1819 John and David Young acquired, for a copartnership of which they were partners, certain subjects in Leith, consisting of four small houses, as part payment of a debt from a bankrupt estate. After their death the subjects were almost entirely neglected, until in 1862 Mr Williams, the proprietor of the adjoining tenement, put them into repair, and collected the rents, which he continued to do until his death in March 1887. After his death his testamentary trustees gathered the rents of the subjects, and paid the feu-duty and taxes.

Ld. Wellwood.  
 C.

In August 1887 a petition was presented in the Court of Session by Mrs Ellen Waite, wife of Samuel Waite, Darlington, praying for the appointment of Alexander William Gordon, writer, Edinburgh, as judicial factor on the heritable subjects in question, "and that with all the usual powers; and, in particular, with power to sue for and receive the arrears of rents due from said subjects, he always finding caution in common form." The petitioner stated that she "is one of the next of kin of the said John and David Young; and until it has been ascertained who

is their heir-at-law, desires that a judicial factor be appointed on the said property, with power to recover the rents and arrears of rents thereof, and to preserve the subjects from dilapidation." On 2d December following Mr Gordon was appointed judicial factor, "with all the usual powers." No. 174.  
 July 16, 1889.  
 Gordon v. Williams' Trustees.

Thereafter Gordon, as judicial factor, brought an action against Mr Williams' trustees for an account of their intromissions with the rents of the subjects in question and for payment of £500, or of such other sum as should be found to be the balance of their intromissions. He stated that Williams had drawn the rents of the subjects without any title or warrant of possession; that the present rental of the subjects was £15, 15s., which was a fair rent, and that it had been drawn by the defenders and their author from 1862 without there ever having been an accounting therefor.

The defenders admitted that the rents had been collected as stated by the pursuer, and that they were ready to account for them to the persons in right of the subjects. They further alleged,—“The persons at whose instance the petition for the pursuer's appointment as judicial factor was presented are not the heirs to the property, and have no right to the debt sued for in this action. They do not represent either John or David Young, both of whom died leaving children, while the persons at whose instance the pursuer was appointed are the representatives of a sister. Besides, the pursuer was only appointed judicial factor on the heritable property, to which any right he may have is exclusively limited, while the sum sued for is a debt due to the representatives *in mobilibus* of John and David Young, who now claim right thereto. In consequence of these conflicting claims the defenders have been obliged to raise an action of multiplepoinding, in order that all parties claiming right to the said fund may be convened, and their right thereto judicially determined.”

The defenders pleaded, *inter alia* ;—(1) No title to sue. (2) In respect of the said action of multiplepoinding, the defenders are entitled to have the present action sisted until the right to the fund is determined therein, and to have this action conjoined therewith.

On 21st June 1888 the Lord Ordinary (Wellwood) repelled the defenders' first and second pleas, and ordained them to lodge accounts of their intromissions.\*

The defenders reclaimed, and argued ;—What was sued for here was not arrears of rent, it was rather a sum of money which had come in the regular way into the hands of the defenders, who were holding it for the heir. The property had been deserted for many years. If the defenders were to meet the demand of the pursuer and the heir were afterwards to come and ask payment, the defenders would be bound to pay him a second time. They were thus not in safety to pay to the pursuer. The terms of the pursuer's appointment involved at the most that he was entitled to recover the rents and arrears of rent from the tenants themselves and to

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\* “OPINION.—The defenders' plea to title is rested on the ground that the pursuer has no title to sue for arrears of rent which were paid before his appointment to the defenders. In the circumstances, I think the plea is ill founded. The authorities relied on by the defenders, *Swinton v. Gawler*, 20th June 1809, F.C., *M'Grigor v. Beith*, 6 Sh. 853, were cases in which the rents had been paid, before the factor's appointment, to persons who had a colourable title to receive them, *e.g.* as heir or executor. Here, while the defenders and their author may have acted excusably in collecting the rents, they had no colourable title. They really acted as self-appointed factors *loco absentis*, and were therefore bound to account to the pursuer, on his appointment, for their intromissions, deducting, it may be, sums *bona fide* expended on repairs, taxes, &c.”



No. 174. preserve the subjects from dilapidation. The case of *M'Grigor*<sup>1</sup> was in point, and the judicial factor here, as there, was endeavouring to turn his factory into a trust for creditors.

July 16, 1889.  
Gordon v.  
Williams'  
Trustees.

Argued for the respondent;—The case of *M'Grigor*<sup>1</sup> was distinguished from the present. There the rents which were sought to be brought within the factory were in the hands of a person who had a good title to them, and who had uplifted them by desire of one of the children of the deceased. That was further a case of sequestration, as opposed to a judicial factory. That was also the state of the fact in *Gawler's*<sup>2</sup> case. The rents of which the judicial factor there sought to obtain possession had been uplifted by the executor of the deceased in good faith before the sequestration. But here the defenders had had no title to uplift the rents, and were vitious intromitters,<sup>3</sup> and the defenders had no title to hold the rents they had so collected as against the judicial factor appointed for the purpose of preserving the estate. Besides the estate was for the purposes of this case moveable, the rents being partnership property. In a sequestration the theory was that a judicial factor should not get what was in the hands of others having a good title.

LORD PRESIDENT.—The only question of the smallest difficulty in this case is the question relating to the title of the judicial factor to sue the action of count and reckoning. The title of that officer depends upon the terms of the extract of his appointment. It is stated in the petition for his appointment that the petitioner, Mrs Waite, "is one of the next of kin of the said John and David Young, and until it has been ascertained who is their heir-at-law, desires that a judicial factor be appointed on the said property, with power to recover the rents and arrears of rents thereof, and to preserve the subjects from dilapidation." Accordingly, the prayer is that Mr Gordon should be appointed judicial factor on the heritable subjects in question, "with all the usual powers; and, in particular, with power to sue for and receive the arrears of rents due from said subjects, he always finding caution in common form." The interlocutor appointing Mr Gordon to be factor, the terms of which appear from the extract, bore that he was to be factor "with all the usual powers." That interlocutor accordingly was not in terms of the prayer of the petition, because it did not give him in particular power to sue for arrears of rents. Whether that fact is of importance or not, I am not prepared to say. Special powers were not necessary to enable him to protect the subjects for the heir; one of the few usual powers belonging to a factor is to collect the rents from the tenants; but in the present case, the rents sought to be recovered are not now due by the tenants, but the persons who are sued are intromitters with the rents who are liable to account to the heir; and the question is whether such a factor is entitled to proceed against these intromitters for recovery of these rents without special powers.

I can see no ground for a distinction between this case and that of *Beith* (6 S. 853). That was a case of a sequestration, but I do not think that fact makes any difference. The factor could not sue for anything under the terms of his appointment but the rents, and the only thing he can sue for here is the rents in the hands of the tenants. If the fact that there was a sequestration in that case and not in this is immaterial, as I think it is, we must look at the

<sup>1</sup> *M'Grigor v. Beith*, May 24, 1828, 6 S. 853.

<sup>2</sup> *Swinton v. Gawler and others*, June 20, 1809, F.C.

<sup>3</sup> *Fraser's Thoms' Judicial Factors*, pp. 13 and 66.

way in which the Court disposed of the case of *Beith*. The defender pleaded that although the judicial factor "might be entitled to recover arrears from tenants, he had no title to sue third parties, intromitters with rents prior to his appointment." That is the very class of debt which the present factor wishes to recover. The ground of judgment in *Beith's* case is well expressed by Lord Glenlee. "This is an attempt to turn a factor into a trustee for creditors. If, after the date of the factory a party intromits with rents, the factor may have some ground for suing him, but he never can bring an action against all and sundry for previous intromissions."

No. 174.  
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I therefore think that, looking to the authority of that case, and the very sound principle upon which it was decided, the title to sue in the present case ought not to have been sustained, and that the action ought to be dismissed.

LORD MURE concurred.

LORD SHAND.—I have also come to be of the same opinion with your Lordship. No doubt persons who intromit with the rents of a property, and have drawn these rents, as the defenders have done in this case for many years, are bound to account for them to the proper heir who has at length appeared. On the other hand, the title of the judicial factor is a limited one; it is a title to preserve and look after the estate, and to intromit with the rents. He would be entitled to sue any tenants still in possession who were in arrear, for this would be covered by the terms of his appointment. But it is a totally different matter when he proposes to sue other persons who have intromitted with the rents by uplifting them from the tenants, at least without special powers, and I do not think the pursuer had any right to involve the estate in litigation for recovery of rents in that position.

LORD ADAM concurred.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea in law for the defender, and dismissed the action.

LACHLAN M'INTOSH, S.S.C.—ALEXANDER GORDON, S.S.C.—Agents.

JOHN MURE BOWIE AND OTHERS (Bowie's Trustees), First Parties.—

No. 175.

*Jameson—C. N. Johnston.*

MRS MARIZZA BOWIE OR PATERSON, Second Party.—*Sym.*

JOHN MURE BOWIE AND OTHERS, Third Parties.—*Jameson—*

*C. N. Johnston.*

July 16, 1889.  
Bowie's Trustees v. Paterson.

*Succession—Power of Apportionment.*—A lady who had a power of apportionment of a fund provided by her husband in their marriage-contract in liferent to herself and in fee to the children of the marriage, became party to a bond and assignation in security, whereby one of the sons, in security of a loan, assigned his interest under the marriage-contract to the lender, and his mother, in farther security, apportioned to her son one-fifth of the fund and declared the apportionment to be irrevocable. She died leaving no other deed expressly bearing to be an exercise of the power. By her trust-disposition and settlement she left a legacy of £100 to one of her daughters, and appointed the residue of her estate to be divided equally among her children other than this daughter, declaring that these provisions should be in full satisfaction "of all claims competent to them on my decease, whether legally or under my marriage-contract, or in any other manner of way." In a special case, *held* that the bond and assignation in security contained a valid exercise of the power of apportionment to the extent of one-fifth of the fund; that the trust-disposition and settlement dealt with the lady's

No. 175. own estate only, and not with the fund subject to the power, which consequently was as regarded four-fifths unapportioned, and to that extent fell to be divided equally among all the children, excluding the son to whom the fifth had been apportioned.

July 16, 1889.  
Bowie's Trustees v. Paterson.

2D DIVISION.  
M.

THE late William Bowie, by his antenuptial contract of marriage with Miss Annetta Antonia Louisa Thurburn, dated 7th September 1840, *inter alia*, bound himself to provide and secure by insurance on his own life or otherwise the principal sum of £4000 sterling, and to take the rights and securities thereof to himself and his then promised spouse, and to the survivor, in conjunct fee and liferent for her liferent use only, and to the child or children of the marriage in fee; and it was farther declared that, in case there should be more than one child of the said intended marriage, it should be in the power of the said William Bowie, at any time of his life, to divide and proportion, as he should think proper, among the said children, the above provision in their favour, and in case of his death without making any such division, this wife, if she should survive him, was to have the same power; and failing any such division, the provision was to be divided among the said children equally.

By mutual trust-disposition and settlement, dated 9th May 1849, and registered 13th March 1857, Mr and Mrs Bowie, on the narrative of the foresaid antenuptial contract of marriage and obligation above mentioned, and that the said William Bowie had effected two policies of insurance on his life, amounting together to £3000, assigned the same to his said wife in liferent, in the event of her surviving him, and to the child or children of the marriage in fee, under the like powers of apportionment, and failing its exercise among the children equally.

Mr Bowie died on 5th January 1856, without having exercised the power of apportionment reserved to him under these deeds. He was survived by his wife and by six children.

Mrs Bowie died on 23d January 1888 leaving a trust-disposition and settlement, dated 12th May 1877, by which she conveyed her whole estate, heritable and moveable, real and personal, then belonging, or that should belong, to her at the time of her death, to trustees for the purposes therein specified. One of the purposes was for implementation, so far as the same might not have been implemented, of the obligations by her contained in the antenuptial contract of marriage. By the trust-disposition and settlement Mrs Bowie also directed her trustees to pay to her daughter Mrs Marizza Bowie or Paterson the sum of £100 sterling, and to pay the residue of her whole estate, heritable and moveable, to or for behoof of her whole children who survived her, other than the said Marizza Bowie or Paterson, in such shares or proportions as she should direct and appoint by any writing under her hand, failing which, in equal shares, "which provisions in favour of all my said children shall be in full satisfaction to them of legitim and executry, and of all claims competent to them on my decease, whether legally or under my said marriage-contract, or in any other manner of way." Mrs Bowie left moveable estate to the amount of £9584, 10s. 11d.

Mrs Bowie left no other testamentary writing or other writing under her hand dealing with her estate, but she had become party to a bond and assignation in security, dated 2d November 1883, granted by her son John Mure Bowie in favour of the Scottish Life Assurance Company for the sum of £500, whereby the said John Mure Bowie assigned to the company, in security of the loan, All and Whole his right and interest, present and future, in and to the sums of money and others held in trust under the mutual disposition and settlement, in so far as the same might then belong or thereafter become payable to him. The bond

and assignation in security then continued as follows, viz.:—"And I, the said Annetta Antonia Louisa Thurnburn or Bowie, having regard to my right of apportionment or disposal of the funds and others held in trust as aforesaid, and considering that I have, for the farther security of the said company, agreed to exercise now in favour of my said son the said John Mure Bowie the rights and powers conferred upon me by the said mutual settlement . . . . Therefore I have apportioned, and do hereby apportion, to the said John Mure Bowie, and to his heirs and assignees, a sum of not less than one-fifth part or share of the foresaid sum of £4000" (provided as above in the marriage-contract) ". . . And in case of the trustees in whom the said funds and property are now or shall be vested being unable from any cause to implement the foresaid apportionment, which I hereby declare to be irrevocable, except with the consent of the said company, then I bind and oblige myself, out of my own proper means and private estate, to make payment to the said John Mure Bowie or his foresaids at my death of such sum as may be requisite to make up his share to the amount above apportioned to him."

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On the death of Mrs Bowie her daughter, Mrs Marizza Bowie or Paterson, applied to the trustees under the mutual settlement, requesting them to divide the whole of the marriage-contract funds and estate into six equal shares, and to make payment to her of one share thereof along with her five brothers and sisters. She maintained that both her father and her mother died without exercising their power of apportionment. The trustees maintained that Mrs Bowie by her trust-disposition and settlement, and the bond and assignation in security, validly exercised the power of appointment reserved to her under the marriage-contract and mutual disposition and settlement, and that the funds and estate held by the trustees should be divided into five shares, one-fifth whereof should be paid to John Mure Bowie, and the remaining four-fifths divided equally among the other four children, excluding Mrs Paterson.

This special case was accordingly presented, the trustees under the mutual settlement being the first parties, Mrs Paterson being the second party, and the other children of Mr and Mrs Bowie (or their representatives) the third parties.

The following were the questions:—" (1) Whether the first parties, the said trustees, are bound to divide the trust-estate equally among the whole children of the marriage of Mr and Mrs Bowie? or (2) Whether the deeds referred to contain a valid appointment of one-fifth of the said trust-estate in favour of John Mure Bowie, the balance being unappointed? or (3) Whether the said deeds contain a valid appointment of the whole trust-estate, to the effect of excluding the party of the second part from any right to a share of the same, and dividing it among the parties of the third part as follows, viz., one-fifth to John Mure Bowie, and four-fifths equally among the other four children of Mr and Mrs Bowie, or those in their right?"

Argued for the first and third parties;—I. There was a good apportionment, to the effect of giving John Mure Bowie one-fifth of the fund, leaving the other four-fifths to be divided equally among Mrs Bowie's four children other than John Mure Bowie and Mrs Paterson. It was the intention of Mrs Bowie to give Mrs Paterson nothing beyond the £100 out of what she had power to test upon, whether her own estate or that subject to the power. That £100 would come out of Mrs Bowie's own estate. The donee of a power might exercise it by a general settlement, making no reference to the power.<sup>1</sup> It was no matter that the testatrix

<sup>1</sup> Smith v. Milne, June 6, 1826, 4 S. 679; Hyslop v. Maxwell, Feb. 11, 1834,

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had estate of her own which might of itself satisfy the words of her will. She was entitled to mass it with that over which she had the power, and must be presumed to have done so. II. In any view, there was a good appointment of one-fifth to John Mure Bowie in the bond and assignation in security even if the remainder of the fund was unappointed.

Counsel for the second party was not called on on the first point. On the second it was argued for the second party that there was not a good appointment even of one-fifth. The alleged appointment was either a matter of contract as between the parties to the assignation, in which case it was conditional and temporary, and would fall if the loan were paid up to the assurance company, or otherwise it was a testamentary appointment contained in that assignation. If so, it was recalled by the settlement of Mrs Bowie, which, though dated before the assignation, took effect at Mrs Bowie's death in 1888, and as between her and John Mure Bowie recalled the alleged appointment, for it revoked "all deeds of a testamentary character formerly executed by me."

LORD YOUNG.—There is no real difficulty here. The whole case lies in a nutshell. The fund settled by the husband under the marriage-contract is given to the wife in liferent should she survive her husband, and to their children in fee. The husband had a power of apportioning the fee, and in the event of his failing to exercise this power, the wife had a similar power, and failing her exercising it, the fund was to be divided among the children equally. The husband never exercised the power of apportionment conferred on him, and the question is whether a bond and assignation in security granted by one of the sons on 2d November 1883, to which the wife became a party, contains an effectual exercise of the power by the wife. I see no reason to doubt that it does. It bears to be an exercise of the power to the extent of one-fifth of the fund. It was no doubt executed for a special and temporary purpose, but nevertheless I think it is a good exercise of the power to the extent of one-fifth. Then is there any further exercise of the power? None is suggested except this lady's will; but her will contains nothing of the kind. It gives a legacy of £100 to one of her daughters. It is now admitted that that legacy is to be paid out of her own estate. And then there is only the direction to divide her estate equally among her children, but that is no exercise of the power at all. I am therefore of opinion that this fund has been apportioned to the extent of one-fifth to John Mure Bowie, and that the remainder has not been apportioned at all.

LORD RUTHERFURD CLARK, LORD LEE, and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"The Lords . . . are of opinion that the deeds . . . contain a valid appointment to John Mure Bowie of one-fifth of the estate held by the trustees under the antenuptial contract of marriage, and that the remaining four-fifths of said estate fall to be divided in five equal shares among the party of the second part and the parties of the third part other than the said John Mure Bowie,—that is to say, one-fifth to Mrs Marizza Bowie or Paterson, one-fifth to the trustees and assignees under the indenture of settle-

ment on the marriage of Mrs Annetta Antonia Louisa Bowie or No. 175.  
 Edwards, wife of William Henry Edwards, one-fifth to the trustees  
 under the marriage-contract of Mrs Elizabeth Thurburn Bowie July 16, 1889.  
 or Hopcroft, one-fifth to Robert Thurburn Bowie, and one-fifth to Bowie's Trustees v. Pater-  
 Henrietta Isabella Bowie: Find and declare accordingly." son.

MACRAE, FLETT, & RENNIE, W.S.—WILLIAM FRASER, S.S.C.—Agents.

JOHN BROWN, Pursuer (Respondent).—*Strachan—A. S. D. Thomson.* No. 176.  
 J. S. VIRTUE & COMPANY, LIMITED, Defenders (Reclaimers).—*Salvesen.*

*Process—Reclaiming note—Interlocutor assigning day for adjustment of* July 16, 1889.  
*issues.*—In an action for damages for wrongous dismissal, the Lord Ordinary Brown v.  
 pronounced an interlocutor closing the record and assigning a day for the adjust- Virtue & Co.,  
 ment of issues. The defender reclaimed against this interlocutor, and moved Limited.  
 that the cause should be sent to a proof before the Lord Ordinary. The Court  
 refused the reclaiming note on the ground that such a reclaiming note, even if  
 competent, was inconvenient, as the interlocutor reclaimed against left the Lord  
 Ordinary's discretion as to the mode of proof unexercised.

*Opinions* reserved as to the competency of the reclaiming note.

JOHN BROWN, lately manager for J. S. Virtue & Company, Limited, 2<sup>d</sup> Division.  
 publishers, brought an action against them for damages for wrongous dis- Ld. M'Laren.  
 missal. I.

On 26th June 1889 the Lord Ordinary (M'Laren) pronounced this  
 interlocutor:—"Closes the record on the summons and defences, Nos. 1  
 and 5 of process, and assigns this day week for the adjustment of issues."

The defenders reclaimed, and moved the Court to order the cause to be  
 tried before the Lord Ordinary without a jury.

The pursuer objected to the competency of the reclaiming note.

The defenders argued;—The reclaiming note was competent under sec.  
 28 of the Court of Session Act, 1868.\* The interlocutor reclaimed against

\* Section 27.—"Procedure after record closed, and adjustment of issues.—  
 The Lord Ordinary shall at the time of closing the record require the parties  
 then to state whether they are ready to renounce further probation; and if  
 they are ready to do so the counsel for the parties shall sign a minute to that  
 effect on the interlocutor sheet; and the Lord Ordinary shall, in the interlocutor  
 closing the record, pronounce a finding that further probation has been re-  
 nounced, and shall appoint the cause to be debated.

"If the parties shall not agree to renounce further probation, the Lord Ord-  
 inary shall appoint the cause to be debated summarily at the end of the motion  
 roll on a day to be then fixed, before which day the parties shall respectively  
 lodge the issue or issues, if any, which they propose for the trial of the cause;  
 and the Lord Ordinary, after hearing parties, shall, on the said day, determine  
 whether further probation should be allowed; and if he shall consider that it is  
 necessary, he shall determine whether it is to be limited to proof by writ or oath,  
 and if not, whether it is to be taken before a jury, or in whatever manner of  
 way:—(1) If the Lord Ordinary considers that the cause may be disposed of  
 without further probation, he may, without any adjournment, hear the parties  
 upon their pleas, and dispose of them as appears to him just. (2) If the Lord  
 Ordinary considers that further probation should be allowed, but that it should  
 be limited to proof by writ or oath, he may pronounce an interlocutor to that  
 effect, and at the same time determine how such proof is to be taken, and make  
 such order as may be necessary. (3) If the Lord Ordinary shall think that fur-  
 ther probation should be allowed, and that it should be taken before a jury, he  
 may, without adjournment, proceed to adjust issues for the trial of the cause, and  
 pronounce an interlocutor approving of the issue or issues which have been so  
 adjusted; provided that if the parties consent, and the Lord Ordinary approves,

No. 176. was in fact, if not in form, an allowance of proof, and that was a six days' interlocutor. Reclaiming notes against such interlocutors were recognised in practice.<sup>1</sup> The Lord Ordinary had applied his mind to the question whether the trial should be before a jury, and had decided the matter; to send the case back to him was therefore absurd.

July 16, 1889.  
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Limited.

Argued for the pursuer;—This reclaiming note, even if competent, was quite superfluous, for when the Lord Ordinary had adjusted the issues the whole cause might be brought up by reclaiming note.

LORD JUSTICE-CLERK.—This reclaiming note may be technically competent, but it is not of a class to be encouraged. It is a reclaiming note against an interlocutor closing the record, and assigning a day for the adjustment of issues. Such an interlocutor in no way precludes the Lord Ordinary from considering and deciding the question whether the cause is to be tried on issues or before himself alone without issues. That question is still open. The result of allowing this reclaiming note, therefore, might be first that there is this reclaiming note on the question whether issues should be allowed, and then another reclaiming note, after the Lord Ordinary has adjusted the issues, upon the form of the issues. I see no reason why the Lord Ordinary should not have an opportunity of finally exercising his discretion in the matter before the case comes here, and I am therefore for refusing this reclaiming note.

LORD YOUNG.—I am of the same opinion. I abstain from expressing any opinion on the competency of such a reclaiming note as we have here, but I think that a reclaiming note against such an interlocutor ought at once, and as of course, to be dismissed, because, if competent, it is only accidentally so.

The requirements of the Act of Parliament have not been exactly followed

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it shall be competent to direct the cause to be tried by jury without adjusting any such issues, and such cause shall be tried as nearly as may be in the same manner in which causes are tried in which issues have been adjusted according to the present law and practice. (4) If the Lord Ordinary shall think further probation should be allowed, but that such probation should not be taken before a jury, he may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken or inquiry to be made, and make such order as may be necessary for giving effect to such interlocutor."

Section 28.—"Review of certain interlocutors of the Lord Ordinary.—Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section, except under subdivision (1), shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court by whom the cause shall be heard summarily; and when the reclaiming note is advised, the Division shall dispose of the expenses of the reclaiming note, and of the discussion, and shall remit the cause to the Lord Ordinary to proceed as accords: Provided always, that it shall be lawful to either party within the said period, without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired: Provided also that nothing herein contained shall be held to prevent the Lord Ordinary or the Court from dismissing the action at any stage upon any ground upon which such action might at present be dismissed according to the existing law and practice."

<sup>1</sup> *Mason v. Stewart*, Feb. 21, 1877, 4 R. 513; *Little v. North British Railway*, July 4, 1877, 4 R. 980; *Blair v. Macfie*, Feb. 2, 1884, 11 R. 515; *Scottish Rights of Way and Recreation Society v. Macpherson*, Oct. 23, 1886, 14 R. 7; *Cook v. Wallace & Wilson*, March 7, 1889, *supra*, p. 565.

in this case. The Lord Ordinary after closing the record should have asked the parties whether they renounced probation; if they did not, as I suppose would be assumed here, the Act provides,—“If the parties shall not agree to renounce farther probation, the Lord Ordinary shall appoint the cause to be debated summarily at the end of the motion-roll on a day to be then fixed, before which day the parties shall respectively lodge the issue or issues, if any, which they propose for the trial of the cause, and the Lord Ordinary, after hearing parties, shall on the said day determine whether farther probation shall be allowed.” The more regular course, therefore, would have been to appoint a day on which the cause was to be summarily debated before the Lord Ordinary, and not to appoint a day on which issues were to be adjusted. But the Lord Ordinary did appoint a day for the adjustment of issues, and “this day week” from the date of the interlocutor was the day appointed. Then the statute goes on,—“If the Lord Ordinary shall think that further probation should be allowed, and that it should be taken before a jury, he may, without adjournment, proceed to adjust issues for the trial of the cause, and pronounce an interlocutor approving of the issue or issues which have been so adjusted.” So that on that day week, if he had been of opinion that the cause was one to be tried by a jury, he would have adjusted issues for the trial. Then the statute says that such an interlocutor shall be final unless the parties, or one of them, shall present an interlocutor to one of the Divisions of the Court, before whom the cause shall be debated summarily. If, therefore, on that day week the Lord Ordinary had adjusted issues, it would have been open to either party to reclaim. Why then should it be necessary to reclaim against this interlocutor appointing issues to be adjusted? I think it is an extravagant reclaiming note. The case must go back to the Lord Ordinary. I say nothing about the course he is to follow. It is open to him to decide anything he pleases after hearing the parties, and whichever of the parties he decides against may reclaim against his judgment. I am, without hesitation, for dismissing this reclaiming note, and with expenses.

LORD RUTHERFURD CLARK and LORD LEE concurred.

THE COURT refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed.

H. B. & F. J. DEWAR, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

THE SWEDISH MATCH COMPANY, LIMITED, Pursuers (Appellants).—  
*Jameson—Younger.*

JOHN SEIVWRIGHT, Defender (Respondent).—*J. C. Thomson—Watt.*

*Company—“Capital.”*—The prospectus of a public company set out,—“Share capital, £100,000, in 20,000 shares of £5 each. First issue 80,000, in 16,000 £5 shares. In addition to the above shares, £30,000 of six per cent debentures to be issued. . . . The consideration to be paid by the company for the whole of the before-mentioned property, together with the goodwill, has been fixed by the vendor at £90,000, of which £55,000 is payable in cash, and the balance, £35,000, in fully paid-up shares, debentures, or cash, or partly in each, at the option of the directors . . . . This will leave for working capital, stock, and extension of plant, £20,000.”

An applicant for 120 shares added to his letter of application the condition,—“If all capital subscribed for.” At the date of allotment the 16,000 shares were allotted, except certain shares which the company had the option of allotting to the vendor in lieu of cash, as part payment of the price of the

No. 176.

July 16, 1889.  
Brown v.  
Virtue & Co.,  
Limited.

No. 177.

July 16, 1889.  
Swedish  
Match Co.,  
Limited, v.  
Seivwright.



No. 177. works, &c., sold to the company, and a portion of the debentures offered to the public had not been taken up. In an action for payment of calls against the applicant, *held* that the whole capital had been subscribed for in the sense of his letter of application, and that he was in consequence liable in payment of the calls.

July 16, 1889.  
Swedish  
Match Co.,  
Limited, v.  
Seivwright.

2D DIVISION.  
Sheriff of  
Aberdeen-  
shire.

I.

JOHN SEIVWRIGHT, Berlin warehouseman, Aberdeen, applied for and had allotted to him 120 shares of the Swedish Match Company, Limited, in terms of the prospectus. To his letter of application he appended the words,—“If capital all subscribed for.”

The following is an excerpt from the prospectus:—“Share capital, £100,000, in 20,000 shares of £5 each. First issue £80,000, in 16,000 £5 shares. . . . In addition to the above shares, £30,000 of six per cent debentures, secured as a first charge upon the property and undertaking of the company, to be issued, . . . The consideration to be paid by the company for the whole of the before-mentioned property, together with goodwill, has been fixed by the vendor at £90,000, of which £55,000 is payable in cash, and the balance £35,000 in fully paid shares, debentures, or cash, or partly in each, at the option of the directors, but the vendor desires to have allotted to him the largest possible number of shares, having regard to the rules of the Stock Exchange relating to quotations. This will leave for working capital, stock, and extension of plant, £20,000.”

In an action raised by the company in the Sheriff Court at Aberdeen against Seivwright for payment of calls, the defender, *inter alia*, averred;—(Stat. 4) “Defender believes and avers that when said alleged allotment of one hundred and twenty shares was made to him, the whole of said first issue of £80,000 was not applied for nor subscribed, and was not allotted. The defender believes and avers that the amount subscribed for and allotted at that date amounted to about £67,000 only. The condition under which his application was made not being fulfilled, no valid allotment was made to him, and his application therefore fell.”

The defender pleaded;—(3) The defender’s said application having been made conditional to the capital being all subscribed for, and this condition not having been fulfilled at the date of said alleged allotment to him, he is entitled to repudiate the said allotment, and to be assoilzied from the conclusions of this action.

A proof was allowed. It appeared from the evidence that of the first issue of 16,000 shares 13,563 had been allotted to the general public by the date of the defender’s letter of allotment. Of the remainder, it was in the option of the company to allot 2400 to the vendor in part payment of the price of the works, &c., made over to the company, but no actual allotment of these 2400 shares appeared to have been made at the date of the allotment to the defender. The balance of thirty-six shares was retained in case of inaccuracies, in accordance with the usual practice. It was not disputed that if the vendor’s shares were to be held as allotted the whole 16,000 shares had been allotted.

The whole of the £30,000 of debentures had not been subscribed for at the date of the allotment to the defender.

On 12th November 1888 the Sheriff-substitute (Dove Wilson) “Finds that the defender applied for shares in the pursuers’ company upon the condition that the capital was subscribed for: Finds that the capital has not been all subscribed for; and therefore assoilzies the defender from the conclusions of the action,” &c.\*

\* “NOTE.— . . . I now come to inquire what the meaning of the con-

On 18th January 1889 the Sheriff (Guthrie Smith) adhered.\*  
 The pursuers appealed.  
 At advising,—

No. 177.

July 16, 1889.  
 Swedish  
 Match Co.,  
 Limited, v.  
 Seivwright.

LORD JUSTICE-CLERK.—I regret that I cannot agree with the view of either of the Sheriffs. I take the stipulation in the defender's letter of application, "if capital all subscribed for," to apply alone to the capital which was then offered for subscription. I cannot accept the Sheriff-substitute's view that it was intended to refer to the whole capital of the company, whether then issued for subscription or not; nor can I accept the view of the Sheriff that the word

dition is. The pursuers treat it as if it meant that the shares were to be taken if the whole of the first issue was subscribed for. That is not what it says, and I can see no ground for so interpreting it. It says distinctly, 'if capital all subscribed for,' and the meaning of that is plain. It matters little to the defender whether the capital was issued in one or half a dozen different issues, but it mattered a good deal to him whether the whole or only a part was taken up. If the whole were taken up, it would not be necessary to call up the full amount of each share, whereas it might be if only part were taken up. In the prospectus the capital was distinctly stated at £100,000, and the condition in the application could have reference to nothing except that. It may be argued that the word 'capital' in the condition must be taken as equivalent to first issue, inasmuch as nothing else was being offered at the time for subscription. This argument is insufficient. The words 'capital' and 'first issue' are not equivalent, and the prospectus is silent as to when the second issue was to be made. It was free to the pursuers to deal with the defender's application as they pleased, and if they thought fit to entertain an application conditional upon all the capital being subscribed for they must abide by the condition. Only £80,000 in round numbers has been subscribed for in place of the £100,000 mentioned in the prospectus. Plainly, therefore, if I have rightly understood the condition, it has not been complied with. . . ."

\* "NOTE.—The defender, in applying for shares, made it a condition that he should not be bound to take them unless the 'capital was all subscribed,' and the first question in the case is, what is the meaning of the word 'capital,' as used by him in his letter of application? The Sheriff-substitute has read it 'share capital,' and if such is its meaning, I should have thought that it could only relate to the shares about to be issued, not the shares which the company was empowered to issue, but which they might never find it necessary to issue. In other words, the application would mean, 'If all the shares which you are now offering to the public are taken up, I am willing to take so many,' and as they all were taken up, the defence would fail. But, in my opinion, this is not the sense in which 'capital' is used in the documents which have now to be considered. The proposals contained in this prospectus in substance and effect amounted to this. The company were to buy certain match factories in Sweden for £90,000, payable £55,000 in cash, and £35,000 in shares. The shares to be first issued were only for £80,000, and as it would require £10,000 more to pay off the vendor and £20,000 for working capital, or together £30,000, this was to be raised by debentures, which were offered for public subscription in the same prospectus and along with the shares. Unless the promoters were able to raise the whole £110,000 by debentures and shares, they would not be able to go on. When, therefore, the defender stipulated that the whole capital should be subscribed, he must have meant both share and debenture capital, and it is in favour of this view, and also of his perfect *bona fides*, that in his letter of 3d December 1887, acknowledging the letters of allotment, he desires to be informed if all the shares and 'debentures had been subscribed for by the public.' It is not disputed that this was not the case. The shares had been taken, but not all the debentures, and I therefore affirm the Sheriff-substitute's judgment, although I am unable to agree with him in the grounds on which he has proceeded. . . ."

**No. 177.** "capital," while it was intended to include only the amount then offered for subscription, included not merely the share capital, but a large amount of debentures. According to the ordinary use of language debentures are not capital. They may sometimes be so treated as to be fairly called capital, but that is not the case here. These debentures were issued on the ordinary footing of the company receiving money from the public on loan, in consideration of paying a fixed percentage for its use. So understanding the word "capital," we must take the case on the footing that the amount of the capital to which the defender's letter of application referred was 16,000 shares, and if these 16,000 shares were all truly subscribed for within the time mentioned in the letter, then the condition is fulfilled, and the defender is bound.

July 16, 1889.  
Swedish  
Match Co.,  
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Seivwright.

Now, there is no doubt that 13,000 odd shares were subscribed for by the public before the day of allotment, and as regards the balance, the question is whether the 2400 allotted to the vendor must be held to be shares subscribed for or not. In my opinion they were. They were shares which the company could allot to the vendor if they pleased. He was not in a position to insist on having them allotted to him, for the company might have paid him in cash if they had the money, but he was bound to take the shares if the company chose to allot them to him. I think therefore that the whole capital of the company was subscribed for in the sense of the defender's letter of application, and that he is in consequence bound.

**LORD RUTHERFURD CLARK.**—I agree.

As to the meaning of the word "capital," I think that there cannot be two opinions, and that the Sheriff was quite wrong.

I further think that all the capital was subscribed for by the day of allotment, because the company were then in a position to issue the 16,000 shares of which the capital consisted to persons who were under obligation to take them. These persons were first, members of the public who had applied for shares in the ordinary way, and secondly, the vendor who was bound to take the shares allotted to him.

**LORD LEE** concurred.

**LORD YOUNG** was absent.

**THE COURT** pronounced this interlocutor:—"The Lords having heard counsel for the parties on the appeal, find in fact (1) that on 29th November 1887 the defender paid to the pursuers' bankers £60, being 10s. per share on 120 shares of £5 each in the pursuers' company, and made application to the pursuers for an allotment to him of that number of shares, in terms of letter of application by the defender, of that date, No. 7 of process; (2) that at said date, the amount of capital issued by the company was £80,000 in 16,000 shares of £5 each; (3) that it was a condition of the defender's application that the said 16,000 shares should be subscribed for before allotment to him of the shares applied for; (4) that on 30th November 1887, 120 shares were allotted by the pursuers to the defender; (5) that at the last-mentioned date said 16,000 shares were subscribed for, and the said condition was thereby purified; (6) that it is not proved that the defender was induced to apply for said shares by misrepresentations on the part of the pursuers; (7) that, by his said letter of application, the defender undertook to pay the further instalments upon his shares

as follows, namely, £1, 10s. on allotment, £1, 10s. in a month, and No. 177. £1, 10s. in two months: Find in law that the defender is liable in payment to the pursuers of said instalments, with interest from the dates when they respectively became payable: Therefore sustain the appeal; recall the judgments of the Sheriff and Sheriff-substitute appealed against; ordain the defender to make payment to the pursuers of the sum of £540, with interest as concluded for: Find the pursuers entitled to expenses in the inferior Court and in this Court; remit to the auditor to tax the same and to report, and decern."

July 16, 1889.  
Swedish  
Match Co.,  
Limited, v.  
Seivwright.

JOHN BELL, W.S.—ANDREW URQUHART, S.S.C.—Agents.

JAMES CREEVY, Pursuer (Appellant).—*Rhind*—A. S. D. Thomson.  
HANNAY'S PATENTS COMPANY, LIMITED, Defenders (Respondents).—  
C. J. Guthrie—Salvesen.

No. 178.

July 16, 1889.  
Creevy v.  
Hannay's  
Patents Co.,  
Limited.

*Reparation—Master and Servant—Statute—Construction of statute—Factory and Workshop Act, 1883 (46 and 47 Vict. cap. 53), secs. 2, 3.*—The Factory and Workshop Act, 1883, enacted (by sec. 2), that it "shall not be lawful to carry on a white lead factory unless such factory is certified by an inspector to be in conformity with this Act," and (by sec. 3) that a white lead factory shall not be so certified unless certain conditions specified in the schedule to the Act have been complied with.

At the date of the passing of the Act the expression "white lead" denoted carbonate of lead, a substance very soluble and therefore dangerous to the health of workmen engaged in its manufacture. After the passing of the Act there was invented a process by which a sulphate of lead having the same appearance and fitted for the same uses could be manufactured. It was sold as white lead. It was nearly insoluble, and was not dangerous to the workmen engaged in its manufacture, if certain simple precautions were observed.

A workman who, when engaged in a sulphate of lead factory, suffered from lead-poisoning sued his employers, whose factory was not certified under the Act, for damages, founding on their alleged neglect to conform to the provisions of the Act and to take the various precautions specified in the schedule. *Held*, after a proof (*diss.* Lord Lee), that the sulphate of lead was not "white lead" within the meaning of the Act, and that the provisions of the Act, in regard to white lead factories, did not apply; *et separatim*, that it had not been proved that the pursuer's illness was caused by the failure of the defenders to take proper precautions for the protection of their workmen.

JAMES CREEVY, a labourer, was employed by Hannay's Patents Com-  
pany, Limited, Glasgow, from July 1887 to June 1888.

2D DIVISION.  
Sheriff of  
Lanarkshire.  
I.

In September 1888, having left the service of Hannay's Patents Company, Creevy raised an action in the Sheriff Court against them for £250 as damages for bodily injury alleged to have been received through their fault.

The pursuer averred that the defenders carried on the manufacture of white lead, or at least of a product similar in appearance thereto, and of the same dangerous character, and that they had failed to comply with the conditions of the Factory and Workshop Act, 1883\* (46 and 47 Vict.

\* The Factory and Workshop Act, 1883, 46 and 47 Vict. cap. 53, enacts (sec. 2), that after 31st December 1883 "it shall not be lawful to carry on a white lead factory unless such factory is certified by an inspector to be in conformity with this Act.

"Sec. 3 (1) A white lead factory shall not be certified to be in conformity with this Act unless the scheduled conditions, that is to say, the conditions specified in the schedule to this Act, as amended by any order of a Secretary of State

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*Creery v.*  
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*Limited.*

cap. 53, sec. 3), in consequence of which he had begun to suffer from lead-poisoning after working in the factory for about six months, and had continued so to suffer till compelled to leave off working. He further averred alternatively that the defenders, being engaged in the manufacture of a dangerous product, had failed to take such precautions as were necessary to prevent injury to those engaged in the manufacture thereof.

The pursuer also averred that during the first six months of the period during which he was employed at the works of the defenders the conditions of the schedule were not complied with, in respect that the factory was not properly ventilated, but that thick vapour was allowed to arise during the drying process; that the place set apart for the men to wash was not satisfactorily constructed or kept clean, and that a pipe conveying white lead into the condenser passed through that room, and was in a condition so leaky as to allow fumes of white lead, and sometimes even white lead, to escape into the room; that no towels were supplied, and that hot water, soap, and brushes were not regularly supplied, and that the brushes even when supplied were not in a fit condition; that no place separate from the working-rooms was provided for meals; that no overall suits, head coverings, or respirators were supplied; and that acidulated drink was not regularly supplied.

He further set forth that during the last five months of his service these matters were in certain respects improved, but that the defects were not completely remedied.

The defenders denied that they had violated any statutory or other duty to the pursuer. They explained that they manufactured "a white pigment by means of a patented process which is analogous in other respects to the process of smelting lead, and the product which they make of lead, though popularly known as 'white lead,' does not contain the same chemical properties as ordinary white lead. The defenders' product is a pure sulphate of lead, which is a non-poisonous salt of lead, and is innocuous." They averred further that the pursuer failed to follow the

under this section, and including any conditions added by any such order, have been complied with.

"(2) A Secretary of State may at any time by writing under his hand revoke, alter, add to, or modify, all or any of the conditions specified in the schedule to this Act."

Sec. 4 provides for the obtaining by the occupier of a white lead factory, "after inspection to ascertain whether the scheduled conditions have been complied with, of a certificate that the factory is in conformity with the Act."

The Act further provides (sec. 6), "that the occupier of a white lead factory who carries it on without such a certificate shall be liable in a penalty," and (by sec. 7), "that such special rules shall be established in every white lead factory for the guidance of the persons employed therein as may appear best calculated to enforce the use by them of the requirements provided under the Act, and generally to prevent injury to health in the course of their employment."

By sec. 11 printed copies of the special rules were to be posted up in the factory in conspicuous places.

The schedule referred to provides,—"(1) The stacks and stoves in the factory must be efficiently ventilated. (2) There must be provided for the use of the persons employed in the factory sufficient means of frequently washing hands and feet with a sufficient supply of hot and cold water, soap, towels, and brushes. . . . (4) There must be provided for the use of the persons employed in the factory (but not in any part of the factory where any work is carried on) a proper room for meals. (5) There must be provided for every person working at any tank an overall suit with head covering, and a respirator or covering for the mouth and nostrils. (6) There must be accessible to all persons employed in the factory a sufficient supply of acidulated drink."

medical advice he received from the doctor at the works, that he refused to make use of the appliances supplied by them to prevent lead poisoning, and in particular refused to wear a respirator and overalls. They explained that he had injured his hand by an acid, which caused the skin to come off, and that he continued to work with his hand in that condition, and so was peculiarly susceptible to lead poisoning. No. 178.  
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Patents Co.,  
Limited.

The defenders pleaded, *inter alia* ;—(1) The pursuer's health not having been injured through the fault or negligence of the defenders, they are entitled to absolvitor. (2) The pursuer's injuries having been caused or materially contributed to by his own fault or negligence, the defenders are not liable to him in damages. (5) The defenders not being bound by the conditions prescribed in the Act founded on, are entitled to absolvitor.

A proof was led. With regard to the nature of the substance manufactured by the defenders, it appeared that the substance manufactured and known as white lead at the date of the passing of the Act was carbonate of lead, which was commonly called "white lead." Certain of the requirements laid down by the schedule had relation to the chemical nature of the substance. Thus the object of the supply of acidulated drink to the workmen, mentioned in the 6th condition in the schedule, was to turn the carbonate of lead which might have got into the system of a workman into sulphate of lead. The danger of the carbonate of lead was that it was soluble when in contact with the acids in the juices of the body, and the object of the acidulated drink was to turn it into sulphate of lead, which is nearly insoluble, after which, by other medicines if necessary, it could be carried out of the body. The defenders, by a process for which they held a patent, had succeeded in producing at a price cheap enough to compete with carbonate of lead a sulphate of lead of somewhat the same appearance, and suited for the same uses, which they sold as Hannay's White Lead. It was admitted that this substance, though it was only soluble to the extent of one part in 23,000, was not absolutely non-poisonous, but the skilled evidence led for the defenders shewed that it was only poisonous to a very slight extent, and in a different way from the ordinary white lead or carbonate of lead, and that with reasonable cleanliness on the part of those using it, and the use of respirators to prevent it entering the lungs, it was perfectly safe. The defenders' manager admitted that up to the time pursuer was injured he had understood that their product fell under the denomination of white lead, and that they were bound to have the precautions scheduled in the Act, and to have special rules. The defenders had no certificate such as the Act required in white lead factories, but they had applied for one before the pursuer was injured, and they had published in the works an abstract of the Act.

The evidence was conflicting as to whether the defenders had supplied the articles required to be provided by the Act, assuming it to apply, but a majority of the Court were of opinion that they had done so.

The pursuer was proved to have suffered in health while in the defender's employment, and his symptoms were those of lead-poisoning. The defenders' witnesses attributed his illness to his refusing to wear the respirator supplied to him, notwithstanding that their secretary and manager had both urged him to do so. Alternatively, they attributed his illness to his having a sore upon his hand, and having absorbed lead by that means, in consequence of unnecessarily placing his hand in contact with lead instead of using the tools supplied to him.

There was evidence that other workmen had suffered from lead-poisoning during the same period as the pursuer.

It was proved that for at least a part of the time during which the pur-

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July 16, 1889.  
 Creevy v.  
 Hannay's  
 Patents Co.,  
 Limited.

suer was in the service of the defenders, the "meal-room" was also used as a store, so that there was not a separate place for meals. It was, however, proved that the pursuer did not take his meals at the works, but at his home.

Mr Hannay, the director of the defenders' company (whose evidence is quoted, *infra*, in the opinion of Lord Lee), deponed in his examination that he had been informed by an inspector of factories that he was not working under the White Lead Act (*i.e.*, the Factory and Workshops Act, 1883), but under the Factory Act, *i.e.*, the Factory and Workshop Act, 1878, 41 Vict. c. 16. No inspector, however, was called as a witness.

It was proved that the first condition mentioned in the schedule to the Act of 1883, viz., that the stalks and stoves in the factory must be efficiently ventilated, was inapplicable to the defenders' works, as they had no stalks or stoves.

On 5th January 1889 the Sheriff-substitute (Spens) found that while engaged in the defenders' works the pursuer contracted lead-poisoning, but found it not proved that the lead-poisoning was due to the fault of the defenders. He therefore assolizied the defenders.\*

The pursuer appealed to the Court of Session, and argued;—(1) The pursuer suffered from lead-poisoning. The substance the defenders manufactured was white lead. They called it such; it was made from lead; it served the same purposes as ordinary white lead. The one question therefore was whether they used the appropriate precautions and had obtained the appropriate certificate. The latter they admittedly had not done. The proof shewed that they had failed in the former. They had, however, admitted the obligation to use proper preventive measures by their partial use of them, and indeed their manager admitted that he had thought himself bound to supply them. It was said that they did not make the white lead of commerce, which they defined to be carbonate of lead, but a new kind of lead which was a sulphate. But the statute did not define white lead as a carbonate, or indeed in any way. It was a statute to guard against dangers in making "white lead." Besides, the sulphate as well as the carbonate was injurious (even if the defenders succeeded in proving that it was much less so). Its consequences were therefore within the mischief which the Act was passed to remedy. The statute ought on ordinary principles of statutory construction to be construed so as to strike at the danger arising from this new substance as well as those arising from the older substance.<sup>1</sup> (2) Even if the statute were held to be inapplicable, the pursuer's case at common law was that the defenders were in fault in not providing sufficient precautions for the safety of their men. In either view of the case, it lay on them to prove the defence that the pursuer received his injury, which was certainly the result of lead-poisoning, from his own fault, and in this they had failed.

Argued for the defenders;—The Factory and Workshops Act, 1883, did not apply. When it was passed, carbonate of lead was the only white lead of commerce. The precautions of the Act were intended as precautions against a carbonate. But the defenders' white lead was a sulphate, and never in the whole process was a carbonate. For that reason the sixth precaution—that as to acidulated drink—could not apply. Nor

\* In a note the Sheriff-substitute stated his opinion that the statute did not apply to the defender's factory.

<sup>1</sup> Dwaris on Statutes, 2d ed. p. 525; Maxwell on Statutes, 2d ed. pp. 93 and 327; Taylor v. Goodwin, 1879, L. R., 4 Q. B. D. 228; Reg. v. Smith, 1870, L. R., 1 Crown Cases Reserved, 266; Lane v. Corton, 12 Modern Reports, 473 (Holt, C. J., at 485).

could the first, for it was to ensure the ventilation of stalks and stoves, of which none were used in producing the sulphate. The necessities of the manufacture of the old white lead were not the same as those of the manufacture of the new substance. It was not "white lead" within the meaning of the Act. That reduced the inquiry to one whether the defenders had discharged their common law obligation to take reasonable precautions in the circumstances, and the proof shewed that the manufacture of the sulphate was so little a cause of danger that if the pursuer had used the means supplied he would have been perfectly safe, and that his injury arose from his not doing so.

At advising,—

**LORD YOUNG.**—This is an appeal from the Sheriff-substitute in an action of damages, by a workman in a factory for injury to his health in consequence of neglect on the part of his master to use proper measures in his premises for the health of his workmen. The action is raised both under the Statute 46 and 47 Vict. c. 53, regulating the manufacture of white lead, and also at common law. The Act 46 and 47 Vict. c. 53, requires certain precautions to be taken by those having white lead manufactories, which the defenders are said to have neglected.

There are two questions raised with reference to the statute, as far as this case is based on the statute. The first is whether the statute is applicable to the defenders' work, and the second is, if it is so, whether the state of the pursuer's health is attributable to the defenders' neglect of its provisions.

The judgment of the Sheriff-substitute is against the pursuer on both these questions, and it is to the effect that the statute is not applicable, this not being a white lead factory. The article manufactured is a kind of white lead no doubt. It serves as a substitute for it, but the weight of the evidence is I think to the effect that this article is not white lead within the meaning of the Act—is not of the character of the white lead to which the Act applies. That is a question on which I should have been unable to form a judgment without the evidence of scientific people, or of people versed in this trade and this article, but that evidence is that this is not white lead, or possessed of those dangerous qualities in its manufacture which the statute contemplates in making the provisions it does applicable to white lead factories.

I therefore agree with the Sheriff-substitute that the statute is not applicable.

The second question is whether, if the statute is applicable, the injury to the pursuer's health is attributable to a failure on the defenders' part to comply with its provisions, and on that question I agree with the Sheriff-substitute that it is not. I think all the provisions required by the statute were taken by the defenders, and that the state of the pursuer's health is not attributable to neglect on the defenders' part, supposing the statute is applicable.

That disposes of the case under the statute. As to the case made at common law, I am of opinion that it is not proved as matter of fact that the damage is attributable to any fault on the defenders' part, or that they neglected any reasonable and therefore proper precautions.

I therefore think the action is unfounded in fact, not being supported by the evidence, and that the judgment of the Sheriff-substitute should be affirmed.

**LORD RUTHERFURD CLARK** concurred.

**LORD LEE.**—I think that this case is attended with difficulty, but I have been unable to arrive at the same conclusion with your Lordships.

No. 178.  
July 16, 1889.  
Creedy v.  
Hannay's  
Patents Co.,  
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No. 178. The facts which I consider to be proved are these : 1st, That the work carried on at the defenders' factory is the production from lead of a white pigment which they call "white lead." 2d, That the production of this pigment as there carried on is attended with the danger known as "lead-poisoning." 3d, That the pursuer, as well as other men employed in the works, suffered from such lead-poisoning. 4th, That it is not proved that the pursuer's illness was caused by his own fault or by any fault to which he materially contributed. 5th, That the lead-poisoning of the pursuer is reasonably accounted for and must, on the evidence, be ascribed to, the fault of the defenders in neglecting to observe the provisions of the Factory and Workshops Act, 1883, which was considered by the managers, to whom the matter was left, to be applicable.

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With regard to the obligations undertaken by the defenders in employing their workpeople, I observe that Mr Hannay, the patentee of the process, and the defender's director, states in answer to the question how far the requirements of the Act were carried out at the works, "That has always been left more to the manager and heads of the departments, but I have given general instructions to see that everything was given to the men that they wanted." And Mr Tervet, the manager, states,—“I understood then we were compelled by the Act of Parliament and by the special rules to have the respirators, and that the men should wear them. Up to the time the pursuer was injured I was certainly of the opinion that this product of ours fell under the head of white lead.”

It is also proved by the manager's evidence, and by the facts of the case, that the product as manufactured at these works is not non-poisonous.

If therefore I could upon any technical ground reach the conclusion that the Act applies only to the production of carbonate of lead, I should think that employers in the position of the defenders, who knew the necessity of precautions and proposed to take them, incurred an obligation at common law to see to the protection of workmen employed by them, on the footing that they accepted the responsibility of using such precautions.

But this is a point which in my view does not require to be decided. For I think that the Factory and Workshops Act, 1883, on a sound construction applies to the defenders' factory. The statute makes it unlawful to carry on a "white lead factory" excepting under the conditions required by the Act. These conditions are not merely the scheduled conditions but such amended, additional, or modified conditions as the Secretary of State under section 3 may see fit to approve of or impose; and it is required further that special rules shall be adjusted for "every white lead factory" to be approved of by the Secretary of State. These special rules are to be framed and transmitted by the occupiers of the particular factory; and provision is made for the publication and amendment of such special rules in the case of each factory, and also for the enforcement of them against the workpeople as well as against the manufacturer.

It is said however, that the expression "white lead factory" in the statute applies only to a factory for the production of carbonate of lead. There is nothing in the interpretation clause to support this limited construction of the expression; but it is said that the article known as white lead at the date of the statute was carbonate of lead, and the sixth of the schedule conditions requiring that "a sufficient supply of acidulated drink" shall be accessible to all persons employed is said to prove that carbonate of lead is in view.

I assume that the ordinary white lead of commerce at the date of the Act was

carbonate of lead, and that it was specially in view of the Legislature at that time. But in my opinion this is not a sufficient ground for holding that the statute used the expression "white lead factory" in any such limited sense.

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The expression "white lead factory" in my judgment requires construction. It may be construed, I admit, as applying only to a factory for the production of what was then commonly called "white lead," viz., carbonate of lead. But it can only be so construed by the aid of evidence that the only white lead of commerce then known was carbonate of lead. I think, however, that the expression by itself is capable of including, and may reasonably be construed as applicable to, any factory for the production of any white lead the manufacture of which is attended with the risks which were intended to be corrected. My opinion is that to every such factory the enactment is applicable that it shall not be carried on excepting under conditions approved of by the Secretary of State and subject to the statutory inspection.

I apprehend that the general rule is well settled, that a remedial statute of this kind is to be interpreted if possible so as to apply to all forms of the mischief against which it is directed. I do not say that the words can be disregarded. But I think that the sense is chiefly to be regarded, and that, if the words admit of it, that meaning is to be accepted which renders the statute applicable rather than such a limited meaning as would make the statute easily evaded, and indeed inapplicable to any but one mode of producing the mischief.

The defenders' white lead, though not carbonate of lead, and not so soluble nor so poisonous, is in my opinion a kind of white lead the manufacture of which according to their process produces the same injurious consequences; and I think that the principle of construction applied in the case of *The Queen v. Smith* (1 Crown Cases, p. 266), and also in the case of *Taylor v. Goodwin* (4 Q. B. Div. p. 228), is sufficient to bring it within the scope of the Factory and Workshops Act, 1883, as to white lead factories.

It was argued that the evidence negatived this view, because Mr Hannay states that the inspector informed him that he was working under the Factory Act and not under the White Lead Act. Even if the inspector had been examined and had deponed upon oath to his opinion that the statute was inapplicable, I could not myself have attached much weight to his opinion in the absence of cross-examination and of information as to the position of the inspector. If it was merely one of the local inspectors of factories (as to whose qualifications the statutes make no very strict provision) it would be entitled to very little weight either upon the legal or upon the chemical questions which have been raised.

But as mere hearsay by the witness Mr Hannay I feel bound to reject the statement as altogether incompetent and valueless.

The only other argument against the application of the statute which I think it necessary to notice is that some of the scheduled conditions are inapplicable to this factory, particularly Nos. 1 and 6. But I think that the third clause of the Act contemplates the case of a factory as to which the Secretary of State may find it necessary to revoke, alter, or modify "all or any of the conditions specified in the schedule," and to adapt the statutory conditions to the circumstances of the particular factory.

If the Act of 1883 is applicable to the defenders' factory the position of the case is this; that the defenders have carried on the work without enforcing its provisions or obtaining any special rules for the management of the works and the government of their workpeople. In such circumstances it appears to me

No. 178. that they are not entitled to blame the workpeople for not asking for things, or for not using things which were supplied. Therefore even if there were more evidence than there is that everything was supplied which could be wanted, I should think that the defenders were in fault in not enforcing the provisions of the Act, and in neglecting to provide themselves with the statutory means of doing so, and I should hold, in the absence of any other proved cause of the pursuer's illness, that their negligence in this respect was the cause of the lead-poisoning from which the pursuer and others suffered.

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But I think it right to say that in my opinion the evidence of the sufficiency of the ventilation of the drying-house, and the supply of clothing and of cleansing accommodation, is far from satisfactory. There is a considerable weight of evidence against the defenders on these points.

The attempt to prove that the pursuer's illness must have arisen from an injury to his hand has in my opinion entirely failed.

On these grounds I should have held it proved that the pursuer's illness was caused by the fault of the defenders.

LORD JUSTICE-CLERK.—I concur with the majority of your Lordships. At the time the Act was passed on which the pursuer founds there was only one known article of commerce called white lead. That was an article of well-known properties and composition. Carbonate of lead was the only salt of lead which up to that time had been produced in such quantities and at such a cheap rate as to be applicable to the purposes for which white lead is used. We know the properties of that white lead and the risks accompanying its manufacture on account of its being highly soluble and in certain parts of the process fuming in a manner highly injurious to the human system. It was therefore thought desirable that regulations should be made by statute to protect workmen engaged in its manufacture. Now, these regulations must have had a bearing upon the chemical composition and properties of the article. That this was so is clear from what was prescribed to be done. For example, in every white lead manufactory there must be supplies, in convenient places in the works, of acidulated water for the men to drink, to counteract any poison they may have taken in by their breath or swallowed, so that the soluble carbonate may be turned into the insoluble sulphate and thus be rendered innocuous.

It is perfectly plain that where an Act prescribes such precautions having reference to a chemical product, it may be not only inexpedient but dangerous to bring under the Act another product which for commercial convenience may be known by the same name but is of different chemical composition. Here the substance produced in the defender's process is a sulphate, and to supply more sulphuric acid could not only do no good but might do harm. No doubt, as Lord Lee has pointed out, the Home Secretary has power to modify the requirements of the statute in certain cases, but I should be much surprised if he were advised to apply to a new product regulations which he is entitled to make for the old one. I think nothing can be more clear than that the whole legislation dealing with the manufacture of white lead had reference to the manufacture of one particular salt, and should not be applied to a new and different chemical product.

The new article is called white lead because unless it were so called it would not be bought as a substitute for the old substance. It is called so not because of its composition but to indicate that it may be used as a substitute for the old white lead of commerce. Formerly no one could supply a safe and cheap

sulphate substitute for the dangerous carbonate of lead, whereas if such a sulphate were once produced at a cheap rate it would effect not only a saving in price but would also lessen the danger to those persons who have to use a salt of lead as a pigment. Now, by an ingenious process this sulphate has been produced at a sufficiently cheap rate, and it is called "white lead," with the maker's name in front. That is not conclusive of the question, but I think the majority of your Lordships are right in holding that this is not white lead in the sense of the statute, and that the statute does not apply.

Now, as to the common law, I am not satisfied that in the manufacture of ordinary sulphate of lead there is any risk if workmen take ordinary precautions for themselves. I think the defenders supplied all sufficient appliances, except that up to a certain date they had no proper separate room for the men to take their meals in. Had it been the case that the pursuer suffered in health from taking his meals in an unsuitable room, it might have been held that the defenders were responsible. But this defect in the arrangements could not have been the cause of any injury to the pursuer, who invariably went home to his meals.

On these grounds I agree with the majority of your Lordships that the judgment in the Court below was right.

THE COURT pronounced the following interlocutor:—"Find in fact (1) that the substance manufactured by the defenders is not white lead within the meaning of the Act 46 and 47 Vict. c. 53; and (2) that it is not proved that the injuries sustained by the pursuer in his health and constitution resulted from any neglect or failure on the part of the defenders to take proper precautions for the protection of their workmen: Find in law that the provisions of the foresaid Act are not applicable to the factory of the defenders, and that they are not liable, either under said Act or at common law, to compensate the pursuer for the said injuries: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff-substitute appealed against: Of new assolkzie the defenders from the conclusions of the action: Find them entitled to expenses in this Court," &c.

W. OFFICER, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

MRS MARGARET HAMILTON OR BELL AND OTHERS, Pursuers.—*Murray.*

JAMES HAMILTON AND OTHERS (Hamilton's Trustees), Defenders.—

*C. S. Dickson.*

No. 179.

July 16, 1889.  
Bell v. Hamilton's Trustees.

*Proof—Secondary evidence—Skilled witnesses—Value of colliery.*—In an action of reduction of a *mortis causa* trust-settlement and codicil on the ground of facility and circumvention, the Court granted a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of certain collieries—a large share in which belonged to the trust-estate—the object being to obtain evidence of their value for the purposes of the pursuers' case.

JAMES HAMILTON, a coalmaster in Glasgow, died on 27th August 1888, when he was seventy-five years of age, leaving a trust-disposition and settlement, dated 7th April 1874, with two codicils appended, dated 7th May 1877 and 18th December 1882. Under these deeds the truster provided for an equal division of the annual proceeds of the undivided residue among his whole children (three sons and three daughters), issue of a predeceasing child taking their parent's place, and upon a dissolution

1ST DIVISION.  
C.

No. 179. of the firm of Hamilton, McCulloch, & Company, who owned several collieries, and of which firm the truster was the leading partner, he provided for an equal division of his realised share among his whole children.

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By a codicil of 14th June 1888, and a trust-disposition and settlement of 6th July 1888, the truster reduced his daughters' provisions to a life-rent of a sum of £5000.

The daughters, or their representatives, brought an action of reduction of the last two deeds against the trustees, alleging that their father had been induced to sign them by the fraud and circumvention of one of his sons.

The pursuers stated the value of the truster's estate at the time of his death at £120,000. The defenders stated it at £50,000.

An issue was adjusted, and the cause was set down for trial at the sittings at the close of the Summer Session.

The pursuers moved the Court for a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of the collieries by two mining engineers "in order to estimate the value of the said plant, machinery, and collieries."

The defenders opposed the motion, urging that the pursuers would get all the information to which they were entitled from the balance-sheets of the business, the inventory of the deceased's personal estate, and the business books of the firm. All that could reasonably be asked, or was required at this stage, was a general view of the value of the collieries, so as to compare the estimates by the truster and his sons respectively. An inquiry of the kind asked might be competent if the deeds were reduced, but not at the present stage. In any case, the working plans ought not to be put into the hands of other parties.

THE COURT granted the motion.

CARMICHAEL & MILLER, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 180. ANDREW MURRAY AND OTHERS (Miss Duthie's Trustees), First Parties.—*Dundas.*

July 17, 1889.  
Duthie's Trustees v. Forlong.

MRS CATHERINE LOW OR FORLONG, Second Party.—*Jameson—Fraser.*

*Succession—Trust—Payment.*—A testatrix, in her trust-disposition and settlement, left the residue of her estate to certain persons named, equally, the said shares of residue to vest at the death of the testatrix, "declaring that the share falling to any of the said residuary legatees who are females and may be married at the time of my death shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors." *Held* that the fee of the shares of females who were married at the death of the testatrix vested in them at her death, and that they were entitled to immediate payment thereof.

*Observed per* Lord Young, that the directions regarding investment were void from repugnancy.

2D DIVISION.  
M.

MISS ELIZABETH CROMBIE DUTHIE, Aberdeen, died on 30th March 1885, leaving a trust-disposition and settlement and a number of codicils, by one of which codicils she left the residue of her estate to a number of persons named equally, the said shares of residue to vest at the death of the testatrix, "declaring that the share falling to any of the said residuary legatees who are females and may be married at the time of my death shall be held by my said trustees, or invested for their behoof,

exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors." No. 180.

July 17, 1889.  
Duthie's Trustees v. Forlong.

This was a special case presented by (1) Miss Duthie's trustees, and (2) Mrs Catherine Low or Forlong, one of Miss Duthie's residuary legatees.

The questions of law were,—“1. Are the parties of the first part entitled or bound to make immediate payment in cash to the party of the second part of the share of residue bequeathed to her under the said trust-deed of settlement and codicils? Or, 2. Are the parties of the first part bound to hold the capital of the said share of residue until the death of the second party, paying to her in the meantime the annual proceeds, and on her death to make over the capital to her heirs or executors?”

The first parties maintained that they were not in safety to pay over to her the fee of the share of residue falling to Mrs Forlong, while she maintained that she was entitled to immediate payment notwithstanding the declaration above quoted.

Argued for the first parties;—No doubt the trustees here had alternative courses open to them. They might either hold or invest, but on the first alternative the second party had to meet the recent case of *Christie's Trustees*,<sup>1</sup> on the second alternative she had to meet the former case of *Duthie*.<sup>2</sup> The case was not within that of *Jamieson*.<sup>3</sup>

The second party was not called on.

LORD JUSTICE-CLERK.—I think that this case is ruled by that of *Jamieson*, not by that of *Christie*.

LORD YOUNG.—I am of the same opinion. I think this lady must have her money, but I am not surprised that the trustees should have brought this case into Court. Indeed it was their duty to do so. It is a very nice question. A very small difference of expression determines the point whether a direction intended for the benefit of the proprietor shall be disregarded as repugnant to the truster's intention, or whether it is operative and may be carried out. If the property is given to any one, any direction as to the mode of dealing with it would be generally void from repugnancy. There are cases, of which *Christie's* may be taken as an example, although not by any means a perfect one, where the giver may constitute a protection by keeping the fund out of the hands of the object of his bounty, and putting it under the care of managers of his own appointment. There are such cases in which it would certainly be operative, but here there is no operative restraint upon the proprietor. I think the property is here distinctly and absolutely given, and that the restrictions as to exclusion of *jus mariti* and preserving the capital for the beneficiaries' own heirs and executors are not operative, and cannot be given effect to. They are repugnant to the gift proper.

LORD RUTHERFURD CLARK and LORD LEE concurred.

THE COURT pronounced this interlocutor:—“Answer the first of the questions stated in the case in the affirmative, and the second question in the negative: Find and declare accordingly.”

SCOTT MONCRIEFF & TRAIL, W.S.—F. J. MARTIN, W.S.—Agents.

<sup>1</sup> *Christie's Trustees v. Murray's Trustees*, July 3, 1889, *ante*, p. 913.

<sup>2</sup> June 5, 1878, 5 R. 858.

<sup>3</sup> *Jamieson v. Lesslie's Trustees*, June 19, 1889, *ante*, p. 807.

No. 181.

WRIGHT & GREIG, Pursuers (Respondents).—*Murray—Ure.*GEORGE OUTRAM & COMPANY, Defenders (Reclaimers).—*C. S. Dickson.*

July 17, 1889.  
Wright &  
Greig v. Out-  
ram & Co.

*Reparation—Slander—Newspaper report of proceedings in Court of Justice—Issue.*—In an action of damages against the proprietors of a newspaper for slander alleged to be contained in a report in the newspaper of proceedings in a Court of justice, the pursuers averred that certain statements reported to have been made in Court were not made, and that these statements were false and calumnious. The pursuers proposed the following issue:—Whether the defenders published in the newspaper a paragraph in terms of the schedule annexed: “Whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers,” &c., “to the loss, injury, and damage of the pursuers?” The defenders contended that the pursuers were bound to put malice in the issue, and proposed as a counter issue whether the report was a fair and accurate report of the proceedings. The Court *approved* the proposed issue, and *disallowed* the counter issue as unnecessary.

2D DIVISION.  
Ld. Kyllachy.  
1.

IN March 1889 Wright & Greig, wholesale wine and spirit merchants in Glasgow, brought an action against the *Glasgow Herald* newspaper for damages for alleged slander.

The pursuers averred that in 1884 they had engaged a person named Smyth to act as their traveller, and to manage their office in London; that in 1887, having discovered Smyth to be behind in his accounting with them, they had taken a bill from him for £619, 14s. 9d., being the amount due by him to them; that in February 1888 they had dismissed him from their service; and that in June 1888 he became bankrupt. (Cond. 5) “Upon the 22d January 1889 an application was made by Smyth in the London Bankruptcy Court for an order of discharge. The pursuers had instructed their London solicitor, Mr Wilde, to appear on their behalf before the Registrar and oppose Smyth’s application for discharge. Mr Wilde accordingly appeared on the pursuers’ behalf. Smyth was examined, and he and Mr Wilde having addressed the Registrar, the latter pronounced judgment, suspending the order of discharge for fifteen months; and on the following day, the 23d January 1889, there appeared in the *Glasgow Herald* a paragraph, purporting to give a report of the proceedings in the London Bankruptcy Court relative to Smyth’s discharge, which contained, *inter alia*, the following passages:—‘In examination by Mr Wilde the bankrupt stated that he came to London in 1884 as traveller for Messrs Wright & Greig of Glasgow. He remembered giving them a bill for £619. He did not know that that represented moneys received by him and not handed over. All he knew was that they were very hard up, and he had financed them from time to time. It was not right for Mr Wilde to make the wide allegations he had done against him. . . . The bankrupt, in addressing the Court, said that there was not the slightest truth in the allegations made by the petitioning creditors. It was a matter of account between them, he having made advances to them from time to time to enable the business to be carried on, and being repaid when the accounts came in.’” (Cond. 6) “The said paragraph gives a false and misleading account of the proceedings which took place in the London Court of Bankruptcy on the occasion in question. The bankrupt did not say, as is represented in the said paragraph, that the pursuers ‘were very hard up, and he had financed them from time to time.’ Nor did he say, as is represented in the said paragraph, that ‘he had made advances to the pursuers from time to time to enable their business to be carried on.’ These statements were utterly false and calumnious, and, in point of fact, were not made by the bankrupt.” (Cond. 9) “The said paragraph was, in the particulars set forth, false, misleading, and calumnious. It was not a fair and impartial report of

the proceedings in the Bankruptcy Court, but was incorrect and one-sided, in respect that it contained the statements above mentioned, which were not, in fact, true or made by the bankrupt; and, further, it suppressed statements made by the bankrupt and by the solicitor for the pursuers in the course of the proceedings, which corrected and put the true complexion on the whole transactions between the pursuers and the bankrupt—an entirely different complexion from that which the said paragraph gave to the public.”

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In answer the defenders averred that their report was a fair and honest summary of what took place in the public Bankruptcy Court in London.

The pursuers pleaded;—(1) The defenders having slandered the pursuers, by printing the said false and calumnious statements, are liable in reparation and damages, as concluded for. (2) The defenders having slandered the pursuers by the publication of a garbled, partial, and one-sided report of the said proceedings in the London Bankruptcy Court as condescended on, are liable in reparation and damages, as concluded for. (3) The said report, not being a fair and accurate account of the said judicial proceedings, was not privileged.

The defenders pleaded;—(1) The pursuers' statements are irrelevant. (2) The pursuers' material averments being unfounded in fact, the defenders should be assoilzied. (3) The defenders not having slandered the pursuers as alleged, should be assoilzied. (4) The said notice, being a fair summary of the proceedings in a public Court, and having been published without malice, is privileged, and the defenders should therefore be assoilzied.

The pursuers proposed the following issue:—“Whether, on or about the 23d January 1889, the defenders published in the *Glasgow Herald* an article or paragraph in the terms of the schedule hereunto annexed: Whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers were in financial difficulties, and were being financed by means of accommodation bills and advances of money by a person named Smyth, to the loss, injury, and damage of the pursuers?”

The defenders proposed the following counter issue:—“Whether the statement printed in the schedule hereto is a fair abridgment of the proceedings in the Court of Bankruptcy, in London, on 22d January 1889?”

On 18th June 1889 the Lord Ordinary (Kyllachy) approved of the issue, and disallowed the counter issue.\*

\* “OPINION.— . . . I have come to the conclusion that the pursuers' issue may stand as proposed; and further, that no counter issue is necessary.

“I think it clear that the innuendo in the issue is relevant—the innuendo being that the reports in question represented ‘that the pursuers were in financial difficulties, and were being financed by means of accommodation bills and advances of money by a person named Smyth.’ I cannot doubt that it is defamatory to make and publish such a statement with respect to a commercial firm, and I do not consider that the case of *Robertson*, upon which the defenders relied, raised any question at all analogous to the present. I further think it is not doubtful that the innuendo is borne out by the reports complained of. In point of fact, the innuendo is almost a literal echo of certain expressions in the report. And, with respect to the defenders' criticism upon the pursuers' record, it may be true that the record should, as matter of pleading, have not only set out the report complained of, but should have also set out in terms the proposed innuendo. But I do not consider that that is matter of substance. The record might easily be amended to make it square with the issue, but I cannot see that that is necessary. I therefore think that the action lies, and that an issue must be granted; and, moreover, that this issue sets out quite a relevant and proper innuendo.

“But then comes the question whether the terms of the issue otherwise are such as are suitable to a case of this description. The defenders contended that, upon



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The defenders reclaimed, and argued;—(1) The pursuers' issue went beyond their record, for there was no innuendo set forth on the record, and the words in the report founded on were certainly not libellous in themselves. But (2) further, they could not fairly bear the innuendo set forth in the issue. It was not libellous to say of a business man that at some past time he had been in financial difficulties (assuming that the report fairly read meant that, which it did not); to cause him any damage the statement must refer to his present condition,<sup>1</sup> but the issue was "were" in financial difficulties, and "were" being financed. (3) If, however, the report contained a slander, it was a fair and accurate report of what took place in a Court of Justice, and consequently the pursuer must take an issue of malice<sup>2</sup>; at least the defenders were entitled to have their counter issue allowed in order to put the point sharply before the jury.

Argued for the pursuers;—It was plainly a libel to say falsely of a business man or firm that he was in financial difficulties. If it was necessary that the innuendo should be averred on record, the pursuers were willing to amend,\* and they were also willing to amend the issue so as to refer to both the present and the past. "Were" was ambiguous, and did not in the issue refer to the past, but the pursuer was willing to insert "had been or."† There was no presumption that a newspaper report was fair

the pursuers' statement, it sufficiently appears that this was a newspaper report of a public proceeding—that it was therefore *prima facie* privileged—and that being so, that the pursuers were bound to put in issue, and to prove, that the report was not fair and accurate. Now, I am not of that opinion. I do not consider that any privilege attaches to a newspaper report as such; neither am I aware of any presumption, either in law or in fact, that a newspaper report is fair and accurate. The privilege attaching to a newspaper report only, I think, arises where the report is fair and accurate, and the fairness and accuracy of the report must be proved, and cannot be assumed; although, no doubt, when the fairness and accuracy of the report is proved, the privilege becomes an absolute privilege, and is a complete defence to an action. I am therefore of opinion that the pursuers are not bound to take any other issue than the ordinary issue, putting the question whether the report contains false and calumnious statements to their damage.

"That leaves only the question of the necessity of the counter issue, and I do not think that either party pressed seriously for such an issue; and I am very unwilling to introduce into this department of practice a complication for which it is admitted there is no precedent. For my own part I do not consider that a counter issue is, in a case of this kind, appropriate. In the general case where a slander is published or circulated, the person who publishes or circulates the slander is held to adopt it, and is constructively in the same position as the slanderer. But the case of a fair and accurate newspaper report is different. There the newspaper is neither actually nor constructively the slanderer, and the newspaper's defence, I think, quite fairly arises by way of denial of the pursuer's issue. In that view no counter issue is necessary. The Judge who tries the case will be bound to tell the jury that, if it appears that the report is a fair and accurate report of a public proceeding, the pursuers have failed to prove their issue, and the defenders are entitled to a verdict. . . ."

<sup>1</sup> *M'Laren v. Robertson*, Jan. 4, 1859, 21 D. 183.

<sup>2</sup> *Richardson v. Wilson*, Nov. 18, 1879, 7 R. 237; *Riddell v. Clydeedale Horse Society*, May 27, 1885, 12 R. 976.

\* The pursuers obtained leave to amend cond. 6 of their record by deleting from "in point of fact" to the end of the article, and inserting in place "falsely and calumniously represented the pursuers to be persons who were in financial difficulties, and had been or were being financed by means of accommodation bills and advances of money by the said Smyth."

† The issue was amended so as to read ". . . the pursuers had been or were in financial difficulties, and had been or were being financed . . ."

and accurate, and consequently the defenders were not entitled to require No. 181.  
malice to be put in issue; if they proved their report to be fair and accurate it would be for the Judge at the trial to direct the jury as to their privilege. The counter issue ought not to be allowed. It was an unprecedented course to use a counter issue as the means of directing the attention of the jury to a particular point; that was the duty of the Judge at the trial.

At advising,—

LORD JUSTICE-CLERK.—I agree with the Lord Ordinary that there is no need for a counter issue, and I also think that the issue as adjusted is sufficient for the trial of the cause. I am entirely against cramming into an issue or counter issue special points with the view of directing the attention of the jury to them as if they were the crucial points of the case. It is the duty of the Judge at the trial to instruct the jury on such points.

LORD RUTHERFURD CLARK.—I agree. I do not think that a counter issue is necessary. If the report of the proceedings in the London Bankruptcy Court turns out to be a fair and accurate report, then the defenders must prevail. It would be impossible in that case to hold that the report is false and calumnious. But I agree that that is a matter for the direction of the Judge at the trial, and not for the issue.

LORD LEE.—I entirely concur in thinking that we should not put anything unnecessary in issue. I think we may decide that there should be no counter issue on this ground, that the issue of the pursuers as it stands sufficiently raises the question whether the words complained of were falsely and calumniously reported, and not merely whether they are in themselves false and calumnious. On the understanding that that is the meaning of the issue, I agree that it is unnecessary to have anything more.

LORD YOUNG was absent.

THE COURT approved of the issue, and disallowed the counter issue.

SMITH & MASON, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

WILLIAM GRAHAM AND OTHERS (Duncan Campbell's Trustees), First Parties.—*G. R. Gillespie.*

JAMES CAMPBELL, Second Party.—*G. R. Gillespie.*

MRS ELIZABETH CAMPBELL OR MACKENZIE AND SPOUSE, Third Parties.—*Sir Charles Pearson—Dundas.*

MRS MARY CAMPBELL OR IRONS AND SPOUSE, Fourth Parties.—*Gloag—Boyd.*

DUNCAN CAMPBELL MACKENZIE AND OTHERS, Fifth Parties.—*Sir Charles Pearson—Dundas.*

CAMPBELL HAY IRONS AND OTHERS, Sixth Parties.—*Gloag—Boyd.*

*Succession—Election—Legitim—Liferent and Fee—Effect of parent's repudiation of liferent on children's fee.*—A testator directed the trustees under his settlement to pay over a sum of £2000 to his son, or in the event of their seeing fit to do so, to retain the said sum in their hands for his behoof, and pay him the interest; to hold the residue of his estate for behoof of his two married daughters in liferent, and their "heirs and successors equally amongst them" in fee; declaring that these provisions should be in full to them of any claims they might have against his estate after his death, "and that in the event of any of my children creating any dispute in regard to these presents, the child so

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acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share in the event of it being that falling to my son in the same manner as I have appointed in regard to the residue of my means and estate, and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or to retain same for his behoof as aforesaid." By a codicil he appointed his trustees, instead of paying over to his son the sum of £2000, "or any other or further sum which may happen to fall to him," to retain said sum in their own hand for his behoof, and pay him the interest annually, such interest to be purely alimentary, "and at his death I appoint my trustees to pay and make over the said sum of £2000 to his heirs and representatives whomsoever equally amongst them."

One of the daughters having repudiated the provisions in her favour and claimed legitim, in a special case *held* (1) that on a construction of the special terms of the deeds the daughter by her repudiation forfeited not only her own rights under the settlement but those of her heirs and successors; (2) that the repudiated share of residue fell to be divided, in terms of the deed, amongst those beneficiaries who had not repudiated; (3) that the trustees were bound to hold one half of the said share of residue for behoof of the other daughter in liferent and her children in fee; and (4) (*dicta*. Lord Rutherford Clark) that the fee of the other half of the said share vested in the son, subject to the directions contained in the codicil.

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DUNCAN CAMPBELL, lessee of the Golden Lion Hotel, Stirling, died on 18th March 1887, predeceased by his wife, and survived by a son, James, and by two daughters, Elizabeth (Mrs Mackenzie) and Mary (Mrs Irons).

Mr Campbell left a trust-disposition and settlement dated 10th March 1881, by which, after giving his trustees power to accumulate the income of the trust-estate (which consisted wholly of personal property), he, in the third place, provided,—“On my means and estates having accumulated as aforesaid, or as soon thereafter as my trustees may find convenient, I direct and appoint my trustees to pay, convey, and make over to my son, James Campbell, presently residing in New South Wales, and his heirs, executors, and representatives whomsoever, the sum of £2000 sterling; declaring, as it is hereby specially provided and declared, that my trustees, should they see fit, and deem it necessary to do so, shall retain said sum in their own hand for behoof of the said James Campbell, and pay him the interest annually derived therefrom, in such portions and at such time or times in the year as they see proper, and of which they shall be the sole and only judges; declaring further, as it is hereby specially declared, that in the event of my trustees retaining said sum for behoof of my said son as aforesaid, the interest to be derived therefrom shall be purely alimentary, and shall neither be liable for the debts of my said son, nor subject to the diligence of his creditors.”

The truster then, in the fourth place, directed his trustees to hold the residue of his estate for behoof of his daughters Mrs Mackenzie and Mrs Irons, “equally between them in liferent for their respective liferent uses allanarly, and on the death of either of my daughters” to “pay and make over the fee applicable to such daughter's liferent to her heirs and successors, equally amongst them, share and share alike, but declaring that no part or portion of the share of said residue falling to the respective heirs of the said two liferentresses shall become payable to any of said respective heirs until such heir shall have attained the age of twenty-one years complete; . . . declaring, as it is hereby specially provided and declared, that the provisions herein conceived in favour of my children are in full to them of all claim competent against my estate, and

that in the event of any of my children creating any dispute in regard to these presents the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share, in the event of it being that falling to my son, in the same manner as I have appointed in regard to the residue of my means and estate; and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or retain same for his behoof as aforesaid."

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By codicil, dated 5th July 1884, the truster directed and appointed his trustees, "in place of paying, conveying, and making over to my son, James Campbell, before designed, the sum of £2000 sterling, or any other or farther sum which may happen to fall to him in virtue of my said trust-disposition and deed of settlement, to retain said sum in their own hand for his behoof, and pay him the interest annually derived therefrom, in such portions, at such time or times in the year, as they see proper, and of which they shall be the sole and only judges; declaring that the interest to be derived from said sum shall be purely alimentary, and shall neither be liable for the debts of my said son, nor subject to the diligence of his creditors; and at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever, equally amongst them, share and share alike."

Mrs Mackenzie claimed her legitim, and received payment thereof.

Questions having in consequence arisen, this special case was presented. The trustees were the first parties; James Campbell, the truster's son, was the second party; Mrs Mackenzie and her husband, and Mrs Irons and her husband, were the third and fourth parties respectively; the minor children (with consent of their curators) and the tutors of the pupil children of Mrs Mackenzie were the fifth parties; and the children of Mrs Irons were the sixth parties.

The second party contended that Mrs Mackenzie's children had no separate or independent interest in the share of residue directed to be liferented by her, but only a contingent and derivative interest in so far as they might happen to be her heirs and successors at her death; that such interest had fallen or been forfeited by their mother's election to claim her legal rights; and that in consequence he was entitled to one-fourth of the residue over and above the special provision of £2000. Alternatively, he contended that he was entitled to be paid the income of one-fourth of the residue during Mrs Mackenzie's life over and above the special provision.

The fourth and sixth parties contended that Mrs Mackenzie's children had no separate or independent interest in the share of residue directed to be liferented by her, but only a contingent and derivative interest in so far as they might happen to be her heirs and successors at her death; that such interest had fallen or been forfeited by their mother's election to claim her legal rights, and that consequently the first parties were bound to hold one-half of the share of residue so forfeited for behoof of the fourth party in liferent, and to pay the fee of the same to her heirs. At all events, these parties maintained that if the rights of Mrs Mackenzie's children had not been so forfeited, the income of the share of the residue destined to her and her heirs and successors vested in the first parties during her lifetime, and fell to be applied by them in compensation of the legitim received by her; or otherwise, that one-half of the said income fell to be paid by the first parties to the fourth party during her

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life; and further, that the said share of the free residue must contribute to satisfy Mrs Mackenzie's claim of legitim.

The fifth parties contended that the prospective rights of Mrs Mackenzie's children were not forfeited by their mother claiming her legal rights, and that the income of the share of residue destined to her and her heirs and successors fell to be accumulated by the first parties during her lifetime for the benefit of the other beneficiaries who had suffered by Mrs Mackenzie's election of her legal rights, in so far as their respective rights had been diminished in consequence of her election, and, *inter alios*, for the fifth parties.

The third parties maintained that, if the rights of Mrs Mackenzie's children had been so forfeited, the fee of the one-half of the share of residue destined to Mrs Mackenzie, of which James Campbell, in consequence of her election, would have the liferent, must be held to have fallen into intestacy of the truster, and fell to be divided amongst his next of kin as at the date of his death, including Mrs Mackenzie.

The questions of law were:—“(1) Are the children of Mrs Mackenzie entitled to have the share of residue directed to be liferented by her set aside for behoof of her heirs and successors at her death, notwithstanding that she has elected to claim her legal rights? (2) If the first question is answered in the affirmative, does the income of the share of residue which would have been liferented by Mrs Mackenzie fall to be accumulated during her lifetime, in order to make up the shares of residue to what they would have been had she not claimed her legitim, or does it fall to be divided between the second and fourth parties, or to whom does it fall to be paid? (3) If the first question is answered in the negative, is the second party entitled to the fee or the liferent of the half of the residue forfeited by Mrs Mackenzie, and are the first parties bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent and her heirs in fee? (4) In the event of the second party being only held entitled under the answer to question 3 to the liferent of the said half of residue, does the fee thereof become intestacy of the testator, and is Mrs Mackenzie entitled to share therein?”

Mr Patten, advocate, was appointed curator *ad litem* to the fifth parties.

Argued for the second party:—(1) In regard to the consequences of Mrs Mackenzie's repudiation of the settlement, the case was not within *Fisher v. Dixon*,<sup>1</sup> and cases of that class.<sup>2</sup> The terms of the deed, according to the only reasonable construction, shewed that it was the testator's intention that if any child repudiated, not only that child but his or her heirs and successors should forfeit their interest under the settlement. (2) The fee of one-half of the share of residue set free by Mrs Mackenzie's repudiation fell to the second party. It was only the £2000 originally given to him which the trustees were directed to hold for his behoof during his life, and to pay over to his heirs and representatives on his death. The repudiated share neither fell into residue nor became intestate succession;<sup>3</sup> it was expressly disposed of by the will; and the concluding clause of the codicil did not apply to the second party's share of it. There was further no room for the doctrine of equitable compensation, the testator having himself directed what was to be done with the repudiated share.

The fourth and sixth parties adopted the argument of the second party on the first branch of the case, but as regarded the repudiated succession

<sup>1</sup> *Fisher v. Dixon*, Nov. 24, 1831, 10 S. 55.

<sup>2</sup> *Jack v. Marshall*, Jan. 21, 1879, 6 R. 543; *Snody's Trustees v. Gibson's Trustees*, Feb. 9, 1883, 10 R. 599.

<sup>3</sup> *Gillies v. Gillies' Trustees*, Feb. 23, 1881, 8 R. 505.

they argued that it fell to be divided among the beneficiaries who had not by themselves or their parent repudiated according to their several interests in the succession, the income of the repudiated share being applied in compensation of the legitim claimed by Mrs Mackenzie.<sup>1</sup>

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The fifth parties argued that their right in the fee was not affected by Mrs Mackenzie's repudiation, and that the liferent set free by her repudiation was to be applied in compensation of her legitim.

The third parties argued that the share set free by Mrs Mackenzie's repudiation fell into intestacy, and that she as one of the heirs *ab intestato* was entitled to a share thereof.

At advising,—

**LORD LEE.**—The first question in this case is, whether the children of Mrs Mackenzie, who claimed her legitim in preference to taking the benefit of her father's settlement, are entitled to have the fee of the share appointed to be liferented set aside for her heirs and successors?

It was not disputed that unless the deed provides otherwise the fee which is directed to be paid to her heirs and successors is not forfeited by the daughter's repudiation of her liferent. The cases of *Fisher v. Dixon*, 10 S. 55, and *Snoddy's Trustees*, 10 R. 599, leave no room for doubt on that point.

But it was contended that the directions of the deed in this case provide for the case which has happened in such a manner as to defeat the interest of the heirs and successors of the daughter who has repudiated.

The declaration is that the child creating any dispute shall forfeit all claims under the deed, "and my trustees are hereby directed to deal with such child's share . . . in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and to pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or retain the same for his behoof as aforesaid."

I think it impossible to doubt that a daughter's share is here dealt with as including the interest of her heirs and successors. For the fee previously appointed to be paid to them is here directed to be otherwise disposed of in the event contemplated. If therefore Mrs Mackenzie has so acted as to create a dispute under the deed (which appears to me to be the case), there is in the event which has happened no direction to pay the fee to her heirs and successors on her death. The original direction to that effect has been superseded. I think therefore that the first question in the case must be answered in the negative.

But a further question is raised as to that portion of the forfeited share which was by the original deed directed to be paid or made over to the son and his heirs, or retained "for his behoof as aforesaid." The difficulty arises in consequence of a codicil executed by the testator on 5th July 1884. It is clear that under the original deed the son took a fee in his portion of the forfeited share, just as he took a fee in the £2000 which was to be paid to him in his own right, subject to certain power of retention. The effect of the testator's original directions as to his interest in the forfeited share are that it was either to be paid to him or retained for his behoof in like manner as the £2000 was to be paid or retained. But the effect of the codicil is to take away from the trustees, both as to the £2000 and also as to the son's half of the forfeited share, the power of paying the money to the son, and to direct them to retain the

<sup>1</sup> Nisbet's Trustees v. Nisbet, Dec. 6, 1851, 14 D. 146.

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amount in their own hands for his behoof. The words of the codicil are, that in exercise of his powers of alteration, "I," the testator, "do hereby direct and appoint my trustees, in place of paying, conveying, and making over to my son James Campbell, before designed, the sum of £2000 sterling, or any other or further sum which may happen to fall to him in virtue of my said trust-disposition and deed of settlement, to retain said sum in their own hands for his behoof, and pay him the interest annually derived therefrom, in such portions, at such time or times in the year, as they see proper, and of which they shall be the sole and only judges; declaring that the interest to be derived from said sum shall be purely alimentary, and shall neither be liable for the debts of my said son nor subject to the diligence of his creditors, and at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever, equally amongst them, share and share alike."

It is noticeable that there is no express revocation of the fee conferred on the son by the original deed, and no declaration that the capital sum is not to be subject to his debts. Nor is there any direction that the capital shall be dealt with at his death in a manner inconsistent with the fee being vested in him.

The direction is only that the sums shall be retained for his behoof to the effect of making the interest available for his aliment.

Now, I think that there is no repugnancy between such a direction and the vesting of a fee. And the result is that there being no revocation, express or implied, of the fee conferred by the deed it remains vested in the son.

I am the more easily induced to reach this conclusion by the consideration that it avoids partial intestacy. For such would be the result of holding that the codicil had the effect of revoking the fee conferred by the deed so far as the sum falling to the son as a part of the forfeited share is concerned.

The fact that the codicil contains an express direction to pay over the £2000 at his death to the son's heirs and representatives whomsoever is not sufficient in my opinion to imply a revocation of the fee of any further sum happening to fall to him under the trust-deed.

It was not then known that any sum would so fall to him; and the testator appears therefore to have left such sum unencumbered by any direction except that it was to be retained so that the interest might be paid to him annually. This, therefore, I think, is a question which falls within the principle which we found applicable to the case of *General Christie's Trustees*, decided the other day [July 3, 1889, *supra*, p. 913].

In my view, therefore, no question arises concerning the disposal of the son's half of said residue. It is disposed of by being vested in the son. But if it had not been so vested, I should have had difficulty in avoiding the conclusion that it formed an intestate portion of the succession in which Mrs Mackenzie would have been entitled to share. The case of *Gillies*, 8 R. 505, to which we were referred, does not appear to me to be applicable.

I am for answering question 1 in the negative; question 3, that the second party is entitled to the fee subject to the directions contained in the codicil, and that the second part of the question should be answered in the affirmative; and by declaring the questions *quoad ultra* to be superseded.

LORD RUTHERFURD CLARK.—Mrs Mackenzie claimed her legal rights, and repudiated the provisions made for her by her father's trust-disposition and settlement. I am clearly of opinion that by so doing she forfeited not only the

provisions in favour of herself personally but also the provisions made for her heirs and successors. In coming to that result, I proceed entirely upon the deed itself, which, in my opinion, can be read as meaning nothing else. I do not proceed upon the case of *Fisher v. Dixon*, and the other cases cited to us, because I think that even if they were applicable they would not necessarily be conclusive the other way, while I think that the words of the deed are conclusive in favour of the view I have expressed.

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With respect to the one-half of the share of the estate set free by Mrs Mackenzie's repudiation, I have great doubts whether Lord Lee's construction is in accordance with a sound reading of the codicil. I think that the effect of the codicil is to restrict the interest of James Campbell to an alimentary liferent only. I do not think the deed can bear any other interpretation.

In that view, the next question is, what becomes of the fee of the sum which, in my opinion, is liferented by James Campbell—does it fall into residue, or is it intestate succession? On that question I desire to exercise my privilege of not expressing an opinion at all, as I do not think it necessary to do so, looking to the opinion which I understand both your Lordships to hold regarding the nature of the primary right.

LORD JUSTICE-CLERK.—I think it is quite plain that if Mrs Mackenzie repudiates the provisions made for her in the will, and claims her legal rights, she thereby forfeits all claims under her father's settlement, both as regards herself personally and also as regards her children. It is, I think, quite plain from the terms of the deed that by her repudiation the fee of her share is absolutely taken away not only from herself, but also from her heirs.

On the other question I have had much greater difficulty, but on the whole I have come to be of the same opinion as Lord Lee. I think if we read the will and the codicil together they do not import an intention to deprive the son, James, of the fee of the share coming to him through Mrs Mackenzie's repudiation of the provisions made for her. By the will the trustees were directed to pay over to James Campbell the sum of £2000, and the alteration in the codicil is to the effect that instead of paying over that sum they are to retain the capital and pay him the interest. There is a confusing direction at the end of the codicil, no doubt—"And at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever." But I do not think that that interferes with the direction in the will as to the disposal of the fee of Mrs Mackenzie's share in the event of her repudiation. There is no direction in the codicil except this, that if any sum should come to the son in consequence of the repudiation of the provisions by either of the daughters, the trustees are to retain that sum in their hands, and pay him the interest annually. There is no disposal of the fee, and as we decided a short time ago in the case of *Christie's Trustees* there may be a fee in a person, although the sum may remain in the hands of trustees who can only pay him over the interest annually. I take it that this case is ruled by that of *Christie's Trustees*.

The questions will be answered as Lord Lee has proposed.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Having considered the special case and heard counsel for the parties thereon, answers the first of the questions therein stated in the negative; and with refer-



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ence to the third question, are of opinion that the second party is entitled to the fee of the half of the residue forfeited by Mrs Mackenzie, subject to the directions contained in the codicil of 5th July 1884; and that the first parties are bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent, and her heirs in fee: Find and declare accordingly, and *quoad ultra*, find it unnecessary to answer the other questions stated in the case: Find the parties to the case entitled to payment out of the trust-estate," &c.

DUNDAS & WILSON, C.S.—W. B. WILSON, W.S.—J. PRINGLE TAYLOR, W.S.—Agents.

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Assurance  
Corporation,  
Limited.

JAMES SHIELLS, Pursuer (Reclaimer).—*Shaw—Forsyth.*  
SCOTTISH ASSURANCE CORPORATION, LIMITED, Defenders (Respondents).—*Jameson—W. Campbell.*

*Insurance—Horse—Policy—Condition—Personal bar.*—A policy of insurance granted to the owner of a horse against its death from accident or from natural disease contained, *inter alia*, the condition—which was declared to be a condition precedent to the owner's right to recover—that in the event of the animal insured receiving any injury, the owner should have it attended at once by a qualified veterinary surgeon, and should forward his report to the insurance company, and that on the death of an insured animal notice should be sent to the company's office accompanied, or followed as speedily as possible, by the report of a qualified veterinary surgeon. It was further provided that notice to an agent of the company should not be sufficient compliance with the condition.

The horse having sustained a compound comminuted fracture of a fore leg, the owner, on the advice of a veterinary surgeon, who was not registered as such, had it killed at once, and by telegraph intimated to an agent of the company that the horse had broken its leg and had been condemned by a veterinary surgeon. This intimation was at once communicated by the agent to the manager of the company, by whom liability was at once repudiated. No report by a veterinary surgeon was forwarded to the company.

In an action against the insurance company *held*, after a proof (*rev. judgment of Lord Trayner, dub. Lord Rutherford Clark*), (1) that as it had been proved that the horse was fatally injured, and that in the circumstances the proper course was to kill it at once, the case was to be taken as one of death and not of injury in the sense of the above condition; (2) that although the notice had been sent to an agent of the company, as it had *de facto* reached the manager timeously, it was sufficient; (3) that the instant repudiation of liability by the company had rendered it unnecessary for the pursuer thereafter to send the report required by the condition, and barred the company from objecting to the want of it.

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ON 19th May 1888 James Shiells, Haddington, obtained from the Scottish Assurance Corporation, Limited, a policy of insurance on an entire horse belonging to him for £100, payable in the event of its death from accident or natural disease within the year following.

The policy bore that it was granted subject to the conditions on the back thereof, "which are to be taken as part thereof, and which, so far as they are to be performed and observed by the insured, shall be conditions precedent to his right to recover thereunder."

Among the conditions of the policy was the following:—" (Condit. 9. Immediately upon any animal or animals hereby insured becoming ill, or upon any indication of approaching illness, or upon their receiving any injury, the insured shall have the said animal or animals at once attended by a qualified veterinary surgeon, and shall forward to the company, addressed to their office at 119A George Street, Edinburgh, within twelve

hours from such illness, ailment, or injury being brought to his knowledge, full particulars of the same, accompanied by the written report of the veterinary surgeon attending. In the event of the death of any animal or animals hereby insured, notice thereof in writing shall be sent to the office of the company as before mentioned within twelve hours after said death occurs, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible, and as soon as reasonably may be after such notice, the insured shall deliver to the company a claim for the loss or damage sustained, containing, as far as may be reasonably practicable, the particulars and the estimated amount thereof, and in support of such claim the insured shall give all such proofs and explanations as may be reasonably required, including the report and certificate of a qualified veterinary surgeon, together with, if required, a statutory declaration of the truth thereof, and in default thereof no claim in respect of such loss or damage shall be payable, unless such notice, claim, particulars, proofs, and explanations respectively shall have been given and produced, and such statutory declaration, if required, shall have been made. It shall not be a sufficient compliance with this condition if such notice, as aforesaid, shall be only given to an agent, inspector, or veterinary surgeon of the company.”

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On the morning of 4th August 1888 the horse was found to have accidentally sustained a compound comminuted fracture of the metacarpal bone of one of its fore legs, and was shot almost immediately.

On the same day Shiells telegraphed to Luke, one of the agents in Edinburgh of the insurance corporation,—“Horse leg broken; condemned by Wishart & Bannatyne.” Luke replied on the next day,—“On getting home last night about ten o’clock I found your telegram . . . I at once went to the other side of the town to see the secretary, and he arranged that, as it was now too late to do anything, I should see the manager to-day, and ask him to meet him this afternoon and arrange immediately what is to be done. I have just left the manager, and he will wire you later what course they are to take, so that you may rely that there will be no delay or want of attention by the company. I am exceedingly sorry to hear what has happened to your horse ‘Roslin Chief,’ and hope you will write me full particulars of the accident, as I may not go out before Friday, but someone else will be out to look after the case.”

On the 6th the company telegraphed to Shiells,—“Telegram Luke received. Not liable broken leg. Veterinary coming to-day. If horse killed without written consent, company no liability.”

On the same day Wood, Shiell’s solicitor, wrote to the manager of the company,—“With reference to the loss and claim under this policy, if you require the claim to be made in a form prescribed by the company, be so good as furnish me with a copy; or if in sufficient form, as already made, kindly say so.”

The manager replied next day,—“In reply to your letter of yesterday, I beg to inform you that there is no claim whatever under the above proposal, in respect that the insured has violated the conditions of his policy, and rendered it entirely null and void. The corporation’s veterinary surgeon was sent to Mr Shiells yesterday, but was astonished to find the animal had been killed without either the sanction or knowledge of the company. Our policies do not cover broken legs, only death; and this is distinctly shewn in the proposal signed by Mr Shiells.”

Shiells then, after some further correspondence, brought an action against the insurance corporation for £100, the sum insured.

The defenders averred;—“On Monday 6th August the defenders caused

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their own veterinary surgeon to go to Haddington, to make the examination necessary for their information. On arriving there he learned (and it is the fact), that the animal had been slaughtered, and that its carcase had been skinned and buried by orders of the pursuer, early on the said Saturday, before the dispatch of the said telegram. By acting in this manner, the pursuer deprived the defenders of the opportunity, to which they were entitled under their contract, of ascertaining the true position of matters, and of considering as to what steps or treatment might be necessary. The defenders, however, believe and aver that the horse would not have died from the accident in question; that by proper treatment it would have recovered from the injury; and that in any case, there was no immediate necessity for killing it. The pursuer failed to perform and observe the conditions of the policy in, *inter alia*, the following particulars: First, he did not have the animal attended by a qualified, that is a licensed, veterinary surgeon; he did not, within twelve hours from the injury being brought to his knowledge, forward to the defenders, addressed to their office in Edinburgh, full particulars of the same, accompanied by the written report of the veterinary surgeon attending; he did not, within twelve hours after the death of the horse, send notice thereof in writing to the said office of the defenders, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible—all as required by condition No. 9. The only intimation of the accident sent by the pursuer to the defenders is contained in the said telegram, and in a letter, dated 6th August, also addressed to Mr Luke, and which letter makes no reference to the fact that the pursuer had killed the horse and buried its carcase. The only veterinary report sent by the pursuer to the defenders is a certificate, dated 6th August 1888, by a gentleman who examined the horse on the morning of the accident, and who is not a licensed, and therefore not a qualified, veterinary surgeon. Second, the pursuer, by killing the horse without notice to the defenders, prevented them from having the horse attended and prescribed for by their own veterinary surgeon, as provided for by condition No. 12.\* Third, the pursuer violated condition No. 8 by skinning and burying the carcase, instead of preserving it for the insurers. Fourth, by killing the horse as aforesaid, the pursuer altered and increased the risk under the policy, and was guilty of failure to take proper and reasonable care of the animal, in violation of conditions Nos. 3 and 7. . . . It is specially denied that the defenders' veterinary surgeon examined, or had any opportunity of examining, the carcase of the horse. All that was exhibited to him was the leg of a horse very much decomposed, which the pursuer stated to be the leg of the horse in question."

The defenders pleaded;—(2) The horse not having died from natural disease or accident within the meaning of the policy, *et separatim*, the horse having died from wilful injury, negligence, mismanagement, or wrongdoing on the part of the pursuer within the meaning of condition No. 2, the defenders are entitled to absolver, with expenses. (3) The pursuer having failed to perform and observe the conditions of the policy in the manner specified in the defences, is not entitled to recover thereunder from the defenders.

A proof was allowed. The facts as disclosed in the proof were as

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\* "(Condit. 12) The company . . . in the case of disease or accident, may send their own veterinary surgeon to attend upon and prescribe for the animal or animals hereby insured, and in such case the treatment and prescriptions of such veterinary surgeon shall be implicitly adopted, otherwise this policy shall become null and void, and the insured shall forfeit all benefit thereunder."

follows:—The horse in question was a stallion, two and a-half years old, No. 183. of high spirit. His weight was about 15 hundredweight. The pursuer on the morning of Saturday, 4th August 1888, found him lying in his stall with a fore leg broken. The pursuer at once sent for Mr Wishart, a partner of the firm of Wishart & Bannatyne, veterinary surgeons, Haddington, in whose premises the horse was stabled. Mr Wishart deponed that his partner, Mr Bannatyne, was licensed as a veterinary surgeon, but that he himself had no licence, but that he had had great experience, and was in constant practice. He further deponed,—“I found the animal lying on his side, with his head to the door, and his off fore leg broken. The animal was in a cold sweat, and must have been very warm at one time—much fevered. . . . I examined the horse carefully. (Q.) And was it in great agony? (A.) It was not suffering very much at the time, but it must have suffered a great deal, from the state of perspiration in which I found it. I formed the opinion that the proper course to take was just to have the animal destroyed. There was no prospect at all of the break being mended. It was a compound fracture of the metacarpal bone, and the bone was protruding through the skin. I was of opinion at the time that it was quite incurable, and I have remained of that opinion. There was a piece of the bone detached. In all cases, the mending of a fracture in a horse's leg is a matter of great difficulty, and the difficulty is greater where the animal is an entire horse, owing to its spirit. In the case of a compound fracture it is incurable, in my judgment. Being of opinion that the injury to the horse in question was fatal, I ordered it to be shot, to put it out of pain.” Mr Bannatyne deponed that between 10 and 11 o'clock on 4th August he examined the carcase,—“I examined the leg. I found a compound fracture of the metacarpal bone. The edge of the bone was protruding through the skin. The bone had been shattered. I found the parties engaged in skinning the horse. I got them to disjoint the leg at the knee, and also to skin the part over the fracture. It was on examining it then that I found the compound fracture. There was a piece of the bone detached. In the case of a horse suffering from a fracture of that description, the proper course would be to destroy the animal, in order to put it out of pain. I consider such a case incurable. I should not think it of any use to try and sling the horse and set the fractured bone.” Other veterinary surgeons gave their opinion that such an injury as that described in the case of a young stallion was incurable, and that the proper course was to destroy it.

On 29th January 1889 the Lord Ordinary (Trayner) sustained the third plea in law for the defenders, and assolizied them.\*

\* “OPINION.—By the policy of insurance founded on in this action, it is provided that the conditions on the back thereof, which are to be taken as part of the policy, shall be, so far as they are to be performed and observed by the insured, conditions precedent to his right to recover thereunder. By article 9 of these conditions it is stipulated—(1) that upon the animal insured receiving any injury the insured shall have the animal at once attended by a qualified veterinary surgeon; (2) shall forward to the company, addressed to their office at 119A George Street, Edinburgh, within twelve hours from such injury being brought to his knowledge, full particulars of the same, accompanied by the written report of the veterinary surgeon attending; (3) in the event of the death of the animal insured, shall send notice to the office of the company as before mentioned within twelve hours after said death occurs; and (4) that it shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company.

“The pursuer failed to observe these conditions. He sent no notice whatever of the injury which his horse had sustained, or of its death, addressed to the

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The pursuer reclaimed, and argued ;—The notice had been duly sent to the defenders in terms of the policy. It was no doubt addressed to one of their agents, but it reached the secretary on Saturday 4th August and the manager on Monday morning, and it could not in the ordinary course of post have reached the head office of the company before Monday. Then it was beyond dispute that the horse was so injured that it became the duty of the owner to have it killed at once. The case therefore was one regulated by the condition of the policy relating to death, and not those relating to injury ; and in the former case it was not essential to send a qualified surgeon's report with the notice ; it was enough if it was sent within a reasonable time afterwards. But to have sent it in the present case would have been a mere formality, for the company had at once intimated that they intended to dispute liability. In any event, Mr Wishart was a qualified veterinary surgeon in the sense of the policy.

Argued for the defenders ;—The policy made the report of a qualified veterinary surgeon essential, and no such report had here been sent. "Qualified" meant registered under the Act 44 and 45 Vict. cap. 62, which Mr Wishart, as was admitted, was not. Then, no notice had been sent to the company. Notice to an agent was by the express condition of the policy insufficient. Further, there had been no certificate of a qualified surgeon sent at any time. These were conditions precedent, the non-compliance with which barred recovery under the policy.<sup>1</sup>

At advising,—

LORD JUSTICE-CLERK.—The facts of this case are few and simple. The pursuer's horse was insured with the defenders' company. It was found on the morning of Saturday, 4th August 1888, with its leg broken, and in such a state that in the opinion of all who saw it, and were, by knowledge, qualified to speak on such a point, although, perhaps, they may not have been "qualified" in the strictly technical and statutory sense, it ought to be killed at once.

The policy under which the horse was insured was a policy under which the defenders were liable only in the case of the death of the animal ; but the policy prescribed two distinct forms of procedure in different events, viz (first), in the case of the illness or injury of the animal, and (secondly) in the case of its death. Now, as regards the procedure to be observed in the first of these cases, I do not think it has any application to the present case. I think that the object of the procedure prescribed in the case of injury is that the company may have an opportunity of observing the progress of the case, and regulating its

office of the company. The notice he did send to Mr Luke, the agent of the company, was not sufficient compliance with the conditions ; and even the notice to Mr Luke was not accompanied by the written report of the veterinary surgeon attending. Further, the horse was not attended by a qualified veterinary surgeon, for, in view of the terms of the Act 44 and 45 Vict. cap. 62, I cannot hold Mr Wishart (however experienced) to be 'qualified.'

"The conditions in question appear to me to be reasonable conditions for the protection of the defenders' company, and their observance on the part of the pursuer having been made by contract a condition precedent to his right to recover under the policy, it follows that his failure to observe the conditions deprives him of the right which by this action he seeks to enforce."

<sup>1</sup> *Standard Life Assurance Co. v. Weems*, Aug. 1, 1884, 11 R. (H. L.) 48; *Life Association of Scotland v. Foster*, Jan. 31, 1873, 11 Macph. 351; *Patten v. Employers Liability Assurance Co.*, Jan. 28, 1887, Ir. L. R., 20 C. P. D. 93; *Gamble v. Accident Assurance Co.*, Jan. 18, 1870, Ir. L. R. 495, 4 Com. Law 204; *Cassell v. Lancashire and Yorkshire Insurance Co.*, May 19, 1885, 1 Times Rep. 495.

treatment, in order to protect themselves in the event of evil results following from an unsatisfactory mode of treatment. But in my opinion the present case was not a case of injury but of death. It was admitted at the discussion that the accident was of such a character that the death of the animal was inevitable, and that the proper—the only humane—course to pursue was to accelerate that inevitable end. The pursuer, under such a policy as this, if he adopts the alternative of putting the animal to death, undertakes the *onus* of shewing that death was inevitable in the circumstances. He undertakes that risk, and if he fails he loses his case. But if he succeeds in proving that the only result—sooner or later—of the injury would be the death of the animal, and that its immediate destruction is the only humane course to follow, then I think that we must take the case on the footing that the animal had been killed outright and not merely fatally injured.

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Now, I think that no one can doubt that the pursuer has proved that the only proper course to follow was to put this animal to death. I think that is proved by the evidence of the pursuer's witnesses, who, whether they were "qualified" or not, were perfectly able to give advice and an opinion on such a matter. But if any doubt remained, it is settled, I think, by the evidence of one of the defender's own witnesses, Mr Gray, a qualified veterinary surgeon, who, when the question was put to him, "Do you think that any veterinary surgeon of experience would have expected that leg to mend," very candidly replied, "No, I don't think it." If, then, that was so perfectly obvious, the pursuer was justified in treating this as a case of incurable injury, and in putting the animal to death. The case so standing upon the facts, it follows that the pursuer, if he complied with the forms prescribed for giving notice in the case of death, is entitled to recover.

It is important to observe that from the first the defenders' company treat this as a case of death and not of injury. On the day of the accident the pursuer sends a telegram to Mr Luke, the agent of the company, with whom he had effected the insurance, in these terms:—"Horse leg broken: condemned by Wishart and Bannatyne." Luke replies to this next day, shewing what he had done on the receipt of the telegram,—“On getting home last night I found your telegram. . . . I at once went to the other side of the town to see the secretary, and he arranged that as it was now too late to do anything, I should see the manager to-day, and ask him to meet him this afternoon, and arrange immediately what is to be done. I have just left the manager, and he will wire you later what course they are to take, so that you may rely that there will be no delay or want of attention by the company.” So that the pursuer, on receiving this letter from Luke, gets intimation that his notice has reached the head office, and is in the knowledge of the secretary and the manager. Now, what do the company do on the receipt of this notice? They send off this telegram, dated the 6th August,—“Telegram Luke received. Not liable broken leg. Veterinary coming to-day. If horse killed without written consent, company no liability.” That telegram shews very plainly that they thought the horse must be killed, and they say they repudiate liability if it is killed without their authority. In my opinion, they were not within their right in taking up that position. It might not, indeed, be a breach of the law to keep the horse alive, notwithstanding the painful and incurable nature of its injuries, until the defenders sent their veterinary surgeon, but it certainly was a breach of the requirements of humanity. The importance of the telegram, however, is

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that it shews the view of the defenders themselves as to the nature, and the only possible result, of the injury. Then, on the same day, the 6th August, Mr Andrew Wood, solicitor, Haddington, writes, on behalf of the pursuer, to the defender's manager,—“With reference to the loss and claim under this policy, if you require the claim to be made in a form prescribed by the company, be so good as furnish me with a copy; or if in sufficient form, as already made, kindly say so.” The only reply to this was,—“In reply to your letter of yesterday, I beg to inform you that there is no claim whatever under the above proposal, in respect that the insured has violated the conditions of his policy, and rendered it entirely null and void. The corporation's veterinary surgeon was sent to Mr Shiells yesterday, but was astonished to find the animal had been killed without either the sanction or knowledge of the company. Our policies do not cover broken legs, only death; and this is distinctly shewn in the proposal signed by Mr Shiells.” So that the company at once took up the position that the pursuer's claim was bad, and that they were prepared to fight it.

Now, what is the condition in the policy on which the defenders found? It is in these terms,—“In the event of the death of any animal or animals hereby insured, notice thereof in writing shall be sent to the office of the company as before mentioned within twelve hours after said death occurs, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible, and as soon as reasonably may be after such notice, the insured shall deliver to the company a claim for the loss or damage sustained, containing as far as may be reasonably practicable, the particulars and the estimated amount thereof, and in support of such claim the insured shall give all such proofs and explanations as may be reasonably required, including the report and certificate of a qualified veterinary surgeon, together with, if required, a statutory declaration of the truth thereof, and in default thereof, no claim in respect of such loss or damage shall be payable, unless such notice, claim, particulars, proofs, and explanations respectively shall have been given and produced, and such statutory declaration, if required, shall have been made. It shall not be a sufficient compliance with this condition if such notice, as aforesaid, shall be only given to an agent, inspector, or veterinary surgeon of the company.”

The first question which arises under this condition is whether the pursuer is not barred from recovering because he has given no notice at all in terms of the condition, in respect that he sent the notice to Luke, the agent of the company, while the last clause of the condition expressly states that the giving of notice to an agent shall not be sufficient compliance with the condition. It is undoubtedly the case that the pursuer sent the notice only to Luke, the agent, and, in so doing, he took the risk of the notice not reaching the secretary of the company, but in point of fact the notice reached the secretary of the company that night, and was passed on to the manager on the following Monday. That being so, I think that there was sufficient compliance with the requirements of the condition regarding the giving of notice.

Then it is said that the notice was not accompanied by the report of a qualified veterinary surgeon. But the condition does not require the notice to be accompanied by such a report; the report may either accompany the notice or be sent within a reasonable time afterwards. But within the time when it would still have been open to the pursuer to send the report in terms of the condition, the

company had intimated to him that they repudiated all liability under the policy, and so had put themselves in the position of making it unnecessary for the pursuer to send them any further notice or report. No. 183.

In these circumstances, I am of opinion that the defenders are liable. I think that the case is one of death, not of injury; I think that the company received due notice in terms of their policy; and I think lastly, that any objection which the company might have had to the irregularity of the proceedings after the giving of the notice is met by their own action in repudiating all liability. July 17, 1889.  
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**LORD RUTHERFURD CLARK.**—I am very glad indeed that your Lordship has been able to propose such a judgment as that indicated in your Lordship's opinion. I doubt whether I could myself have reached it. It rather appears to me that the effect of the judgment is to deprive the company of the benefit of conditions for which they have stipulated in the policy, but the conclusion at which your Lordship has arrived is in itself so fair and reasonable that I refrain from saying anything further against it.

**LORD LEE.**—I agree in thinking that the case as proved was from the first a case of death caused by the horse breaking its leg. It was found in the morning in such a condition that it had to be immediately destroyed. I think that this should be found as matter of fact. If this be the true view, no question arises as to fulfilment of the conditions applicable to mere illness or injury.

The only question is, whether the pursuer fulfilled the conditions, or failed to fulfil the conditions applicable in case of a death?

Here I think the defenders put themselves in the wrong. They knew that the telegram referred to the injury as fatal, or possibly fatal. For they answered,—“If horse killed without written consent, company no liability.” That was a plea in law which I think was good or bad according to the true view of the facts. If the injury was such as rendered necessary the immediate destruction of the horse, it was clearly bad.

In this view of the facts it was unnecessary to give two notices, first notice of injury, and a second of the killing. The notice given was in my opinion sufficient notice of death, and was so dealt with.

But it is said that the notice was not accompanied by a veterinary surgeon's report. The conditions here in question do not require that such report shall in all cases accompany the notice. They provide that it may be sent “as speedily thereafter as possible.” The pursuer by his agent wrote next day asking to be furnished with a form for making a claim, but the defenders answered this by telling him that there was no claim, and practically refusing to receive any claim or any report. After their manager's letter of 7th August it would have been absurd to send any report. The question was reduced to one of law, whether killing without the sanction of the company deprived the pursuer of all claim.

I think, as I have said already, that this question of law depended on a question of fact which the company refused to inquire into, but which has now been inquired into, viz., whether it was necessary to kill the animal, looking to the condition in which he was found.

Now, it was not disputed before us—it was conceded—that the pursuer had established the necessity of putting an end to the horse's sufferings.

The conditions of the policy are not so framed as to exclude a claim in such a case. The manager seems to have thought otherwise, but he was wrong, and



**No. 183.** his mistake has caused the whole difficulty. What the company were entitled to require, and ought to have given the pursuer an opportunity of furnishing, was, in addition to the notice of death, (1) a report by a qualified veterinary surgeon; (2) a claim with particulars; (3) such proofs and particulars as may reasonably be required, including the report and certificate of a qualified veterinary surgeon.

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In the view I take of the case it is unnecessary to decide whether or not the expression "qualified veterinary surgeon" means the same thing as the expression used in some cases, "qualified and registered veterinary surgeon."

I desire to reserve my opinion on that question.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Lord Ordinary: Ordain the defenders to make payment to pursuer of the sum of £100," with interest and expenses.

A. C. D. VERT, S.S.C.—ROBERT C. GRAY, S.S.C.—Agents.

**No. 184.** WILLIAM HAMILTON & COMPANY, Pursuers (Respondents).—*M'Kechnie—Low.*

July 17, 1889. JOB JAMES FREETH AND OTHERS, Defenders (Reclaimers).—*Jameson—Watt.*  
Hamilton &  
Co. v. Freeth.

*Cautioner—Security given by principal debtor to particular cautioner—Consent by co-cautioner—Proof—Parole.*—A cautioner who has obtained from the principal debtor a special security over part of the debtor's estate for the liability he has undertaken is not bound to communicate to his co-cautioners the benefit of that security if he agreed to be cautioner only on the condition of having the security, and if the co-cautioners, when they entered into the cautionary obligation, knew of and consented to that arrangement.

Where one of several co-cautioners, equally bound by the same deed, claimed the exclusive benefit of a security he had obtained from the principal debtor over part of his estate, on the ground that his co-cautioners had orally agreed to this, *held (diss. Lord Lee)* that he was entitled to prove this agreement by parole evidence.

2D DIVISION.  
Lord Fraser.  
M.

IN September 1877 James Pettigrew, proprietor of the Rochsolloch Iron Works, Coatbridge, obtained a cash-credit for £5000 from the Clydesdale Banking Company. There were bound along with him in the cash-credit bond, but truly as co-cautioners *inter se*, John Hendrie, coalmaster, Edward Mather Bell, of the Coatbridge Tinsplate Company, and Job James Freeth, of the Caledonian Tube Company.

Pettigrew operated upon this cash-credit until October 1880, when the bank required a new cash-credit bond with another name or names in place of Hendrie's.

Accordingly on 25th October 1880 a new bond was executed, the cautioners thereto being (in addition to Bell and Freeth) William Hamilton & Company, shipbuilders, Port-Glasgow, as a company or firm, and William and John Hamilton, the individual partners of the firm.

By disposition, dated 11th February and recorded 24th March 1881, Pettigrew, "for certain good causes and considerations," assigned and disposed the Rochsolloch Iron Works and the ground on which they stood to William and John Hamilton.

In October 1887 Pettigrew became bankrupt and his estates were sequestrated.

The bank then called on the Hamiltons to pay the sum due by Pettigrew under the cash-credit bond, which they accordingly did. Having

taken an assignation to the cash-credit bond, the Hamiltons brought an action of relief against Freeth and certain other persons who had guaranteed payment to the Hamiltons of Freeth's debt under the bond. At the date of the action Bell had died insolvent, and nothing could be recovered from his estates.

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The pursuers averred that they agreed to be cautioners only on condition of obtaining the disposition above referred to, and that that was known and assented to by Freeth.

The defenders did not dispute their liability under the cash-credit bond, but they pleaded ;—(2) The pursuers having received from the principal debtor a security over his estate in relief of their obligations under the cash-credit bond, are bound to communicate the benefit of such security to their co-cautioners in all questions of relief against them. (3) The averments as to the agreement of the defenders to the special security being granted in favour of the pursuers are only provable by writ or oath.

The pursuers pleaded ;—(2) The pursuers are not bound to communicate the benefit of the disposition referred to, in respect the same was specially taken for the pursuers' security only ; *et separatim*, the defenders knew this at the time ; *et separatim*, the defenders agreed to this being done.

There was also a question, decided by the Lord Ordinary against the pursuers and not insisted in by them in the Inner-House, as to whether their firm and the two individual partners were three co-cautioners or only one.

A proof was allowed. The parole evidence was contradictory, but in the opinion of the Lord Ordinary, and of the majority of the Judges of the Second Division, it established that the Hamiltons had become parties to the cash-credit bond only on condition of obtaining a disposition to the Rochsolloch Iron Works as a separate security to themselves as a firm and as individuals ; and that Freeth knew of and agreed to this condition.

On 18th January 1889 the Lord Ordinary (Fraser) pronounced this interlocutor :—“ Finds that the disposition of the Rochsolloch Iron Works, granted to the pursuers, was a security for their own behoof, and that they are not bound to communicate the benefit thereof to the defenders until their own claim is satisfied : Finds that, in settling the liability of the cautioners, the defender Freeth and his guarantors are only bound in one-fourth ; and, with these findings, appoints the pursuers, within eight days, to lodge a state in process, bringing out arithmetical results as to the liabilities of the parties, and reserves all questions of expenses.” \*

\* “OPINION.—James Pettigrew, an iron and coalmaster at Coatbridge, obtained a cash-credit with the Clydesdale Banking Company in the year 1877. There were along with him in the cash-credit bond (bound as full debtors and co-obligants, although only co-cautioners) three other persons, viz., John Hendrie, coalmaster, Edward Mather Bell, of the Coatbridge Tinplate Company, and Job James Freeth, of the Caledonian Tube Company, Coatbridge. Pettigrew operated upon this cash-credit from 1877 down to October 1880, when one of the co-obligants, viz., John Hendrie, having become somewhat embarrassed in his circumstances, the bank insisted upon another cash-credit bond being executed, with another name or names in room of Hendrie.

“Such a bond was executed on the 18th, 20th, and 25th of October by Pettigrew, the co-obligants being Edward Mather Bell and Job James Freeth, two of the parties to the first bond, and the fresh names were the pursuers of the present action, William Hamilton & Company, shipbuilders, Port-Glasgow, and William and John Hamilton, the partners of that firm. Pettigrew proceeded to operate upon this new cash-credit, and continued to do so down to the date of his sequestration, in October 1887, at which time the whole sum for which the credit was granted, viz., £5000, had been drawn out, and there was besides a considerable sum for interest due to the bank. The co-obligant Bell died in-

**No. 184.** On 1st February the Lord Ordinary pronounced another interlocutor, decerning against the defenders for £1070, 0s. 10d.

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solvent, and nothing can be got in the shape of a contribution from his estate. The only two solvent persons to the bond of 1880 were the pursuers and Freeth. The bank demanded payment from the pursuers; and, on the 26th of October 1887, they paid, as the sum due to the bank under the cash-credit bond, £5201, 10s. 9d., and took an assignation of the bond from the bank, with all rights of diligence against the co-obligants.

"Freeth, upon being applied to for payment of his share, was unable to meet the demand; but he got certain of his friends (the other defenders in the action) to grant a guarantee in the following terms:—'Jointly and severally, we hereby guarantee to pay to you the proportion payable by Job James Freeth, of the Caledonian Tube Works, Coatbridge, of the sums, principal, and interest paid by you on 26th October 1887, *videlicet*, £5201, 10s. 9d., under the cash-credit bond granted by the Rochsolloch Iron Company, Coatbridge, James Pettigrew, William Hamilton & Company, William Hamilton, John Hamilton, Edward Mather Bell, and Job James Freeth, in favour of the Clydesdale Bank, Limited, dated 18th, 20th, and 25th October 1880, for £5000 and interest; including in this guarantee interest on Mr Freeth's proportion of said sums from the above-named date until the same is repaid to you, at bank overdraft rate.' This action is now brought against Freeth and the guarantors, and certain questions have arisen as to the amount (for liability is not disputed) of the contribution which must be made by Freeth or on his behalf.

"The first question has relation to a demand made by the defenders, to the effect that the pursuers shall communicate to them the benefit of a disposition, which the pursuers obtained from Pettigrew, of property belonging to the latter. The property consisted of the Rochsolloch Iron Works, the business of which was carried on in the name of the Rochsolloch Iron Company, Coatbridge, of which Pettigrew was the sole partner. The disposition, which is absolute in its terms, is admitted to have been a security. By this deed, dated the 11th of February 1881, Pettigrew, for 'certain good causes and considerations,' assigns and disposes to William and John Hamilton, both shipbuilders in Port-Glasgow, and their respective heirs and assignees whomsoever, heritably and irredeemably, All and Whole the Rochsolloch Iron Works, with all the steam-engines, boilers, rolling-mills, &c., in and upon the ground, and specified in an inventory. This disposition was duly recorded in the Division of the General Register of Sasines applicable to the county of Lanark, and the pursuers, William and John Hamilton, now stand invested with the apparent absolute ownership of the works.

"The defenders contend that any collateral security of that kind obtained by one cautioner cannot be appropriated for the covering of his own liability. It is certainly law, that where co-sureties are equally bound by the same deed, and one of them obtains a separate security or advantage from the principal, he is bound to communicate the benefit of it equally with them. For this doctrine there are several express decisions, which are noted in Bell's Principles (section 270), and the general rule cannot be disputed. But then this general rule must be taken with its qualifications. There is nothing wrong in a surety stipulating, before he undertakes the obligation of cautionry, that he shall obtain a collateral security so as to cover himself, and if he takes the proper precautions of making his co-sureties perfectly aware of what he is doing, and they acquiesce in it, then there can be no call upon the cautioner who has so obtained the separate security for his own behoof to communicate the benefit of it to his co-sureties. Professor Bell, in his Commentaries (1 Bell's Com. 349), makes the following observations:—'As to the cautioner who alone has stipulated for security, it is more difficult to determine whether he shall, to his own prejudice, be obliged to communicate the benefit of that security. A near relation, or confidential friend, may not think himself entitled to require security, while a stranger may be well justified in refusing to engage without it. And there seems to be no equity in obliging the latter to communicate the benefit of his

The defenders reclaimed.

The nature of the arguments fully appears from the opinions of the Lord Ordinary and of the Court.

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precaution to one who would not himself have stipulated for it. At least, where such a difference has been openly made between cautioners, and with the knowledge of each other, it is probable that the Court would not communicate the security. But where, the cautioners being originally equal, one gets an advantage over the rest on the demand being likely to arise, or where the security to one is secret, the principle which rules the case is, that the co-cautioners are bound to act, or held to have acted, for the general benefit, so that what is given for the relief of one is to be communicated for the benefit of all.' Here Professor Bell deals with the case of an open, avowed obtaining of the security by one of the cautioners for his own behoof, and indicates his own opinion very plainly as to how it would be decided—which it does not seem to have hitherto been. Now this is the very case disclosed by the proof here. It is proved not merely that Pettigrew called upon the pursuers, beseeching and entreating them to become cautioners in room of the retiring Mr Hendrie—but also the defender Freeth did so. He denies this; but the Lord Ordinary does not believe him, nor does he believe the statements on this subject by Pettigrew, who seemed to give his evidence very much at random. Freeth repeatedly urged the Hamiltons to be cautioners, using as an argument the fact that they would get sufficient security in the Rochsolloch Iron Works, so as to protect them against loss; urging further that he, Freeth, had no security of his own, and did not want it, and could not demand it, because he and Pettigrew and Bell were all mixed up in bill accommodations. He was very much afraid that, if the Hamiltons did not come forward and give the additional name demanded by the bank, that he, Freeth, would be called upon to pay up, and this he could not do because all his capital was embarked in his works. Freeth never took up the notion that the disposition (the existence of which he professed not to know anything about until a recent period) was one in which he could claim any interest until this was put into his head by Pettigrew, just when Pettigrew's bankruptcy was impending. 'I became bankrupt,' says Pettigrew, 'about the middle of October 1887. I told Mr Freeth in May 1887 about my having granted the security over the iron-works, because I was trying at that time to carry through a cash-credit, which subsequently fell through. I was wanting Mr Freeth to become cautioner for me again. (Q.) And, as an inducement to him to do that, that he was secured on the other bond? (A.) No; I told him that if I could not obtain this credit I would have to collapse, and he said he had paid one cash-credit, and he could not pay this. I then told him that he was quite safe—that the works were secured to the cautioners. That appeared to be news to him—I knew it was, because I had never told him before. He was relieved a bit when I told him that.' Now, Freeth being saved, by the intervention of the Hamiltons, from being obliged, in the year 1880, to stop his works and pay up the cash-credit debt, which neither Pettigrew nor the other co-obligants with him could do, turns round and pleads the general rule of law against the carrying out of a fair bargain. Pettigrew untruly represents the Hamiltons as being very willing at once to become cautioners, whereas the real state of the case was that it was with the utmost reluctance they did so, and upon the distinct understanding and condition that they were to have, for themselves alone, the benefit of the security, so far as it would go in repaying any moneys they required to disburse as debtors under the bond.

"The second point in this case is as to whether, Bell being dead and bankrupt, there are here only two co-obligants or four. The obligation in the bond is very explicit. It runs as follows:—'We, the Rochsolloch Iron Company, Coatbridge, as a company or firm, and James Pettigrew, Cairnhill, by Airdrie, the sole partner of said firm, as such partner and as an individual; William Hamilton & Company, shipbuilders, Port-Glasgow, as a company or firm, and William Hamilton and John Hamilton, both shipbuilders there, the individual partners of said company or firm, as such partners and as individuals.' These are the

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LORD RUTHERFURD CLARK.—I need not resume the facts of the case. They are fully and clearly stated by the Lord Ordinary.

The first question is, what is the proportion for which each of the solvent cautioners is liable under the cash-credit bond? The Lord Ordinary has held that there are four cautioners, on the ground that the firm of Hamilton & Company is to be counted as one in addition to the partners. In this finding the pursuers acquiesce, and therefore we may take it as fixed that the liability of each cautioner is for a fourth of the entire debt.

The pursuers hold a security over certain heritable property which belonged to Pettigrew, the principal debtor. It is in the form of an absolute disposition in favour of William Hamilton and John Hamilton, the sole partners of Hamilton & Company. Though the disposition is absolute the pursuers admit that it is in security only. But this admission is under the qualification that it was granted to cover any liability which they might incur under the cash-credit bond. They further aver that they would not have become parties to the cash-credit bond unless they had obtained this security, and that Pettigrew and Freeth agreed that they should have it.

The pursuers have paid the whole debt due to the bank. They propose to apply the security to cover their share of it, and it is just sufficient for that purpose. At the same time they have raised this action to recover the share due by the defender Freeth, which has been guaranteed to them by the other defenders.

In answer the defenders maintain two propositions—first, that the pursuers are bound to communicate to them the benefit of their security, so that it shall be applied in the reduction of the total debt, with the effect that they shall be liable for no more than a fourth of the balance; and second, that at least it shall be applied only to cover the liability of William and John Hamilton, as individuals, to the exclusion of the company. In the latter view they claim that the balance of the security should be applied in equal portions to the reduction of the share due by Hamilton & Company and by Freeth.

I do not doubt the general doctrine that when co-cautioners are equally bound under the same deed, and when one of them obtains a separate security over the estate of the principal debtor, such cautioner is bound to communicate the benefit of the security equally to all. Nor did the pursuers dispute this proposition. Their case is that they are not within the rule, inasmuch as it was agreed between them on the one hand, and Pettigrew and the defender Freeth on the other, that they were to have the sole benefit of the security in so far as requisite to cover their liability.

The defenders have stated a plea that an agreement for such a special security can only be proved by writ or oath. If that plea was well founded they should have opposed any allowance of proof. But they did not do so, nor did they

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words which were made the subject of construction in the case of *Macbride v. Clark, Grierson, & Co., &c.* (24th November 1865, 4 Macph. 73), and the Lord Ordinary is unable to distinguish the two cases. The obligation of the firm was held to have had superadded to it the obligation of each of the partners, as individuals, and, such being the case, the defenders here can only be liable for one-fourth. The firm of William Hamilton & Company is one person, William Hamilton is another person, and John Hamilton is the third person; the defender Freeth making the fourth."

offer any argument in support of their plea. On the contrary, they admitted in the most precise terms that if in the opinion of the Court the agreement was proved by the oral evidence their case necessarily failed.

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In my opinion the defenders were quite right in making this admission. The parole evidence is not adduced for the purpose of contradicting or altering the conditions of any written document, but to prove a separate agreement which was acted on, and which was the condition of the pursuers becoming parties to the cash-credit bond. An agreement so made and so acted on can, in my opinion, be proved by parole.

The obligation to communicate the benefit of such a security does not arise from the deed by which the co-cautioners are bound, which does nothing more than fix the proportions of the debt for which they are respectively liable. It depends on an equity to which the Court in the absence of agreement to the contrary will give effect. But the rule cannot be applied so as to defeat a special agreement.

I do not pursue this topic. It is sufficient for me that the defenders did not maintain the plea to which I have referred, and, as I have said, I think that they were right in not offering any argument on it.

The question then comes to be, whether the agreement has been proved? In this inquiry it is material to observe that the cash-credit bond on which this action is founded was not the first to which Pettigrew and the defender Freeth were parties. There was a previous bond which the bank would have enforced owing to the embarrassed circumstances of one of the cautioners unless the present bond had been granted. In becoming parties to the new bond the pursuers were guaranteeing an already existing debt for which Freeth was liable. The form in which the bond is expressed debars them from taking benefit from this circumstance, nor indeed do they desire to do so. But they found on it as shewing that it was natural that they should stipulate for a special security, and that Freeth should be willing that they should have it. So far, it seems to me that they are right. The alleged agreement was, in the circumstances, a very natural and reasonable arrangement.

When I turn to the proof I cannot doubt that the agreement is established. The Lord Ordinary is clearly of that opinion, and I agree with him. I do not think it necessary to examine the proof. If the evidence of the pursuers is believed the case is clear. The Lord Ordinary has believed it, and has not believed the evidence of the defenders. On a mere question of credibility I should in any case have great hesitation in differing from him. In this case my opinion entirely coincides with his.

There remains the question whether under the agreement the benefit of the special security was limited to William and John Hamilton as individuals, and did not extend to their firm. Again I have no difficulty. I think that it is plain that the Hamiltons stipulated that they should have the benefit of the security to cover any liability which they might incur under the bond either through their firm or individually. Any other interpretation would defeat the evident purpose of the agreement.

**LORD LEE**.—I think that the questions raised in this case are attended with more difficulty than the Lord Ordinary appears to have felt, and I desire to explain the view upon which I am unable to reach the same conclusion.

1. The general rule of law is well stated by the Lord Ordinary,—“Where co-

No. 184. sureties are equally bound by the same deed, and one of them obtains a separate security or advantage from the principal, he is bound to communicate the benefit of it equally to them.”

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This rule is founded on principles of equity which are too obvious to need explanation, and it implies that no one who undertakes a suretyship jointly with others, and by a deed which binds them all in like terms, is entitled to obtain from the principal debtor, and therefore to the prejudice of his co-obligants' rights of relief, a collateral security for himself alone, unless he does so with the consent of his co-cautioners.

The opinion of Professor Bell, to which the Lord Ordinary refers, appears to me to be to this extent clear. His only hesitation appears to be as to the efficiency of an unequal arrangement though “openly made between cautioners.” Upon that point I see no reason to doubt that if the arrangement is clear, and is proved by competent evidence, it must receive effect. For there is nothing unlawful in an arrangement whereby one of the cautioners with the consent of all concerned shall receive a special security.

I must, however, give it as my opinion that the consent of the co-cautioners to an arrangement which is so greatly at variance with the ordinary obligations and rights of relief among cautioners cannot be proved by parole evidence. It is said that the plea on this subject was not maintained to the effect of excluding proof. But the interlocutor sheet shews that proof was only allowed after a discussion in the Procedure-roll, and before answer. And when I asked a question on the subject during the discussion, it was stated by counsel that the point was not given up, although it seemed to be thought unnecessary to argue it. Such proof was disallowed in the case of *Macphersons v. Haggart*, 9 R. 306, where the allegation was that a cautioner who had become bound by a separate obligation subsequently to the other cautioners had interposed for relief of two of the original cautioners alleged to have granted their obligation as matter of arrangement merely until the new cautioner should attain majority and undertake for himself. This decision proceeded on the view that the effect of the documents was to make them all co-cautioners, and on that assumption I think that the judgment stands on a clear principle. In the Outer-House I had taken a different view of the documents, and had allowed a proof, which was set aside.

I think that the question of evidence in this case arises much more directly. For the pursuers here did not come in by any separate obligation. They interposed by becoming parties to a new bond by which they along with the principal debtor and two of the parties to the old bond all bound themselves, conjunctly and severally, in like terms for the cash-credit. This bond makes no reference to any previous bond, or to any special agreement that the Hamiltons were to be in a different position from other co-cautioners.

The legal import and effect of the bond in this case was in my opinion to put all the parties, other than the principal debtors, *in pari casu*. Each has a claim of total relief against the principal debtor, and among themselves those who were truly cautioners have presumably the ordinary rights of relief and the ordinary duties of contribution—that is to say, each is liable in a question with his co-sureties only *pro rata*.

Such being the legal position of the cautioners towards each other, I think it incompetent to prove by parole evidence that one of them renounced or discharged his claims of relief in favour of another, and in the present case I think it incompetent to admit parole evidence to shew that the defender agreed that

the security subsequently obtained by the Hamiltons under the *ex facie* absolute disposition should be granted to them for their own behoof alone to the exclusion of their co-cautioners.

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To allow such proof is to allow parole proof in contradiction of the obligations arising under the bond. For nothing in my opinion can be more inconsistent with the obligations incurred by co-cautioners towards each other, or more prejudicial to the defender's right of relief against the principal debtor, than to allow parole proof that the principal debtor granted with the defender's consent the *ex facie* absolute disposition of his property in favour of the pursuers and for their sole benefit.

2. The next question is, if the parole evidence is competent whether it is sufficient? I have examined it oftener than once, and I can only say that in my opinion it is unsatisfactory.

The Hamiltons appear to have been in partnership with the principal debtor in the Springhill Coal Company, and they must have known his position as well as anybody. If they stipulated for a security to themselves alone over the Rochsolloch Iron Works, and Mr Freeth agreed to this, nothing could have been simpler than to get a letter to this effect before signing the bond. In point of fact, the disposition was not granted for six months after the bond, and bears no reference to it. If their statement is correct that it had been stipulated for before the new bond of credit was granted, it would have been natural to expect that Freeth's written consent should have been asked to a conveyance whereby the principal debtor liable to him in relief divested himself of his whole property in the Rochsolloch Iron Works in favour of the Hamiltons. I cannot say that it is clearly proved that there was such a stipulation.

The fact that the pursuers did not examine the agents, or produce any of the correspondence which is said to have passed with relation to the disposition, is to me very strange. For I do not think that any intelligent and respectable agent who was informed that the deed was granted in fulfilment of a stipulation assented to by the other cautioners would have prepared the deed without making it clear that the co-cautioners were consenting parties and acknowledged the stipulation.

To hold the pursuers' allegation proved in the face of a denial both by the principal debtor and by the co-cautioners is in my opinion far from satisfactory.

3. Another question was raised as to the application of the surplus. The pursuers William and John Hamilton do not now maintain that there are less than four cautioners. In answer to a question they declined, through their counsel, to dispute the soundness of the Lord Ordinary's view. But they contend that they are entitled to apply the surplus towards extinction of the liabilities of their firm (the fourth cautioner), and to withhold it entirely from the defender.

My opinion is that there is no more difficulty in holding it proved that the security was stipulated for the benefit of the firm than there is in holding it proved to have been for their own benefit exclusively. If the stipulation is proved at all, I see no reason why it should not be sustained to this effect also.

LORD JUSTICE-CLERK.—I concur with Lord Rutherford Clark. I have no doubt that parole proof is competent on this question. This is a case in which a bargain was already made before the cash-credit bond was granted, and was a condition of the pursuers' granting it. It is a sound principle that where



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several persons become co-cautioners, and a security is afterwards granted by the debtor to one of them, the benefit of that security shall enure to all the co-cautioners, but I can see no principle which should prevent one of several co-cautioners stipulating, with the knowledge and assent of the others, that he should have the benefit of a separate security for his individual protection. I think that such a stipulation, if proved, is effectual. And I think that this is such a case if there ever was one, for I think it is proved that the Hamiltons entered into the cash-credit arrangement solely for the benefit of Freeth, to prevent him from having to pay under the original cash-credit bond. I do not think that the case of *Macpherson* decided anything to the contrary. It is not here proposed to contradict the terms of the cash-credit bond; in *Macpherson's* case parole evidence was disallowed, because it was proposed thereby to alter the conditions of the bond. This is just the exceptional case contemplated by Professor Bell in the passage quoted by the Lord Ordinary. I think that passage contains a sound statement of the law, and that parole evidence is competent to establish the special agreement to which Professor Bell refers. I further agree with Lord Rutherford Clark in thinking that the evidence clearly establishes the existence here of such an agreement.

LORD YOUNG was absent.

THE COURT adhered.

W. B. GLEN, S.S.C.—J. & A. HASTIE, S.S.C.—Agents.

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ROBERT EDWARD STUART HARRINGTON STUART, Pursuer (Reclaiming).—

*Murray—Dundas.*

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WILLIAM DUNLOP HAMILTON, Defender (Respondent).—

*Sir Charles Pearson—Guthrie.*

*Superior and Vassal—Entry—Casualty—Composition—Relief—Implied entry—Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), sec. 4.*—In 1860 John Hamilton, a proprietor infest in certain lands, and entered with the superior, disposed them *a me vel de me* to his brother James D. Hamilton, his heir-presumptive, who took infestment but did not enter with the superior. On the passing of the Conveyancing Act, 1874, he was impliedly entered with the superior.

John Hamilton died in 1877, and James D. Hamilton died in 1886, without having been called upon by the superior to pay a casualty. He left a general disposition and settlement in favour of William Hamilton, who was infest thereon, and thus obtained an implied entry under the Conveyancing Act, 1874.

The superior then raised an action against William Hamilton, concluding for declarator "that in consequence of the death of John Hamilton, who died upon the 27th day of February 1877, and who was vassal last seised in" the lands, "a casualty, being one year's rent of the lands, has become due to" the superior. "and that the said casualty is still unpaid, and that the full rents" after the date of citation belonged to the superior till payment of the casualty.

The defender pleaded that the superior was not entitled to a casualty of composition in respect that the defender was heir-at-law of James D. Hamilton and also of John Hamilton.

*Held* by a majority of the whole Court (the Lord President, Lord Justice-Clerk, Lords Mure, Shand, Rutherford Clark, Wellwood, and Kyllachy) (1) that by James D. Hamilton's statutory entry a new investiture was created, and the prior investiture evacuated; (2) that on the death of John Hamilton a casualty of composition became payable to the superior which could have been exacted from James; and (3) that this casualty not having been paid by James a casualty of composition was payable by the defender.

*Diss.* Lords Young, Adam, Lee, M'Laren, Kinnear, and Trayner, who held No. 185.  
that the defender was only liable in a casualty of relief—

Lords Adam, Lee, M'Laren, and Kinnear holding that in determining the question of casualty the implied entries were to be disregarded, and that John Hamilton, on whose death a casualty became due, was to be regarded as the vassal last seised in the lands, and the defender as his successor, and that, accordingly, the defender being heir-at-law of John Hamilton was liable in a casualty of relief only—Lord Trayner holding (1) that by James D. Hamilton's statutory entry a new investiture was created, and the prior investiture evacuated; (2) that on the death of John Hamilton in 1877 a casualty became due to the superior, and could then have been exacted from James; (3) that non-payment of the casualty by James did not affect the defender's rights, and that the defender, as heir-at-law of James, the last entered vassal, was liable in relief-duty only.

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IN 1804 John Hamilton was proprietor of the lands of Rodgerton, Lanarkshire, under a destination in favour of himself and his heirs general. He was duly entered with the superior. He disposed the lands to James Hamilton by disposition dated 27th January 1804. James Hamilton was never infeft, but he disposed the lands to trustees with a direction to them to convey them to James Dunlop Hamilton, the second son of John Hamilton of Greenbank. The feudal fee, however, continued in the same investiture.

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Lord Kinnear.  
M.

John Hamilton of Rodgerton died in 1838. His eldest son and heir-at-law, John Hamilton of Greenbank, although he had no beneficial interest in the lands, completed his title to Rodgerton, and entered with the superior by precept of *clare constat*. He died in 1855, and his eldest son, John Hamilton, second of Greenbank, obtained a precept of *clare constat* from the superior, upon which he was infeft on 25th June 1855.

In 1860 John Hamilton, second of Greenbank, in implement of the disposition of his grandfather, John Hamilton of Rodgerton, and of the trust-disposition of James Hamilton, conveyed the lands to his immediate younger brother, James Dunlop Hamilton, by a disposition *a me vel de me*. James Dunlop Hamilton took infeftment, but was not entered with the superior till the passing of the Conveyancing Act, 1874, when he was impliedly entered. On 27th February 1877 John Hamilton, second of Greenbank, died without issue.

In 1886 James Dunlop Hamilton died, leaving a general disposition and settlement in favour of his brother and heir-at-law, William Dunlop Hamilton. He had never been called upon to pay a casualty. William Dunlop Hamilton was infeft upon this disposition, conform to a notarial instrument in his favour recorded in the Register of Sasines on 17th August 1886, and in virtue of the Conveyancing Act, 1874, was entered with the superior.

On 12th July 1887 the superior of the lands, Robert Edward Stuart Harrington Stuart of Torrance, raised an action of declarator and payment under the Conveyancing Act, 1874,\* concluding for declarator

\* The Conveyancing Act, 1874 (37 and 38 Vict. c. 94), enacts, sec. 4,—  
“When lands have been feued, whether before or after the commencement of this Act . . . (2) Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands, shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate Register of Sasines duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice . . . (3) Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties, which may be due or exigible in respect of

No. 185. "that in consequence of the death of John Hamilton of Greenbank, Mearns, who died upon the 27th day of February 1877, and who was the vassal last vest and seised in" the lands, "a casualty, being one year's rent of the lands, has become due to" the pursuer as superior, "and that the said casualty is still unpaid, and that the full rents," &c., "of the said lands, after the date of citation hereon, do belong to the pursuer," until the said casualty and expenses should be paid. In the petitory conclusion the pursuer concluded for decree for £250, as the amount of one year's rents of the lands.

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The pursuer, after narrating the above deeds down to the infeftment of John Hamilton, second of Greenbank, upon the precept of *clare constat* in 1855, averred;—(Cond. 4) "Thereafter the said John Hamilton, second of Greenbank, as heritable proprietor feudally vested in the said lands, and in implement of the disposition referred to in article 2 [*i.e.* of John Hamilton of Rodgerton] in 1804, and of the trust-disposition and settlement of James Hamilton referred to in article 3 [*i.e.* of James Hamilton of Rodgerton], conveyed the said lands to the said James Dunlop Hamilton by a disposition, dated 8th, and recorded in said Particular Register of Sasines 9th August 1860. In virtue of this recorded title, and of the provisions of the Conveyancing (Scotland) Act, 1874, the said James Dunlop Hamilton had an implied entry in the said lands, subject to payment of the casualty of composition due by him to the superior as a singular successor of the said last mentioned John Hamilton, when it should become exigible on the death of the latter. The said casualty became exigible on the 27th day of February 1877, being the date of the death of the said John Hamilton, second of Greenbank." (Cond. 5) "The said James Dunlop Hamilton, without having made payment of the said casualty, died upon the 31st day of May 1886, leaving a general disposition and settlement in favour of William Dunlop Hamilton, his brother, the defender, dated 28th May, and which is recorded in the Books of Council and Session 8th June 1886. The defender is infeft in the lands described in the summons, conform to notarial instrument in his favour, recorded in the said division of the General Register of Sasines on 17th August 1886. In virtue of his said title, and of the provisions of the said Conveyancing (Scotland) Act, 1874, he is entered vassal with the pursuer in the said lands, and is liable in payment of the casualty which had become due as aforesaid."

The pursuer pleaded;—(2) The said lands being in non-entry, or a casualty of composition being due and payable therefor, the pursuer is entitled to decree of declarator and for payment as concluded for, in terms of the Act 37 and 38 Victoria, chapter 94.

the lands at or prior to the date of such entry, . . . but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering; (4) No lands shall after the commencement of this Act be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action . . . and the summons in such action may be in or as nearly as may be in the form of schedule B hereto annexed."

The form of summons in schedule B concludes for declarator that "in consequence of the death of C [*or otherwise as the case may be*] who was the vassal last vest and seised in All and Whole the lands of X," a casualty has become due.

The defender stated that at the date of the disposition by John Hamilton, second of Greenbank, to James Dunlop Hamilton in 1860, and down to the death of the former in 1877, James Dunlop Hamilton was John Hamilton's heir-at-law, and that "the casualty payable by him was the casualty of relief exigible from him as John Hamilton's heir. The said James Dunlop Hamilton was always willing to make payment of the said casualty, which was never demanded from him by the pursuer." He further stated that he (defender) was "heir-at-law, both of John Hamilton, second of Greenbank, and of James Dunlop Hamilton, his brothers, and that the casualty exigible from him is the casualty of relief."

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The defender pleaded;—(1) The said James Dunlop Hamilton having been the heir-at-law of the said John Hamilton, second of Greenbank, at the date of the said disposition executed in 1860, and down to the death of the said John Hamilton in 1877, the casualty exigible by the pursuer from him, on the death of the said John Hamilton in 1877, was the casualty of relief. (2) The pursuer is not entitled to claim a casualty of composition from the defender in respect that the latter is the heir-at-law of the said James Dunlop Hamilton, and as such is liable only in the casualty of relief. (3) The pursuer is not entitled to claim a casualty of composition from the defender, in respect that the latter is the heir-at-law of the said James Dunlop Hamilton, and also of the said John Hamilton, and as such is liable only in the casualty of relief.

On 20th December 1887 the Lord Ordinary (Kinnear) sustained the defender's third plea in law, and assolizied him.\*

\* "OPINION.—The question in this case is whether the casualty which is admittedly payable to the pursuer is relief or composition.

"The defender's grandfather, John Hamilton of Rodgerton, was duly entered with the pursuer's predecessor as his immediate superior. On his death in 1838 his eldest son and heir-at-law, John Hamilton of Greenbank, completed his title and entered in his place by infeftment on a precept of *clare constat*. On his death in 1855 his eldest son, John Hamilton, the second of Greenbank, was entered in like manner by infeftment on a precept of *clare constat*. This second John Hamilton of Greenbank died on the 27th of February 1877. The casualty which the pursuer now seeks to enforce is that which became due upon his death; and the ground in fact, as set forth in the summons, is that he was the vassal last vest and seised in the estate. I think this is a correct statement of the true ground of action, because, although there have been two implied entries since that of John Hamilton, no casualty has been paid in respect of either; and, in terms of the statute, they are not pleadable in defence to this action. For the purpose of the present question, therefore, between the superior and the proprietor now infeft, John Hamilton, the second, must be considered as the last entered vassal.

"The defender, who is now entered by virtue of the Conveyancing Act, is the brother and heir-at-law of John Hamilton, the last vassal. But he is not entered in that character, but by virtue of a singular title derived from his grandfather, John Hamilton of Rodgerton. The grandfather had disposed the estate to James Hamilton, who was never infeft, but who disposed to trustees with directions to convey to James Dunlop Hamilton, the second son of John, the first of Greenbank. The trustees completed no feudal title, but John Hamilton, the second of Greenbank, having entered, as already explained, in 1855, he, in implement of his grandfather's disposition and of the trust-disposition, conveyed the estate to his younger brother, James Dunlop Hamilton, by a disposition which was recorded in the Register of Sasines on the 9th of August 1860. On the passing of the Conveyancing Act of 1874, the mid-superiority which was left in the elder brother John, the second, was extinguished, and James Dunlop Hamilton was entered with the superior by force of the statute.

"No casualty was paid or demanded during his life, and on his death in 1886,

No. 185. The pursuer reclaimed. On 31st May 1888 the Second Division, in respect of the importance of the question submitted for determination, appointed minutes of debate to be boxed to the Judges of the whole Court for their opinion.

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The pursuer argued in his minute of debate;—At the date of the passing of the Conveyancing Act, 1874, James Dunlop Hamilton, who had recorded his disposition from his brother John Hamilton, second of Greenbank, but had not entered with the pursuer or his predecessor as superior, was holding base of John. The effect of the Act was to extinguish

he left a disposition and settlement in favour of the defender, who is now infeft, and who is heir-at-law both of John Hamilton, the last vassal duly entered under the old law, and of James Dunlop Hamilton, the last vassal entered by force of the statute.

"In this state of the title the defender maintains on the authority of *Mackintosh v. Mackintosh*, 13 R. 692, that the casualty exigible from him is not composition but relief; and I think his plea is well founded. It is said that the case of *Mackintosh* is inapplicable, because in 1860, when the title, confirmed by the Act of 1874, was completed, James Dunlop Hamilton could not have been entered as heir to John, because John was still in life. But the claim cannot be determined by reference to the state of rights in 1860, because at that time there was no casualty due. The lands were not in non-entry, and the action for casualties under the Act of 1874 is competent only when, but for the Act, the superior would have been in a position to sue an action of declarator of non-entry against his vassal's successor. If such an action had been brought in 1877 against James Dunlop Hamilton, he would have been entitled, upon the principle established in *Mackintosh v. Mackintosh* to say that he was in fact the heir of the last vassal, and therefore liable only for relief, notwithstanding that he had already completed a title as a singular successor. It is said that the decision applies only where the vassal is in a position to enter as heir, although he has chosen to complete his title as a singular successor. But this is not consistent with the judgment. Both in the case of *M'Kenzie* and of the *Marys of Hastings* it would have been impossible for the disponee, who was in fact the heir of the last investiture, to effect an entry in that character. The Lord President points out in explaining the case of *M'Kenzie* that, 'the form of entry was necessarily that applicable to a singular successor or disponee.' Nevertheless, the Court decided that he was entitled to the full benefit of his character as heir, and must be entered on payment of relief-duty only."

"This would not aid the defender if he also were not the heir of the former investiture. But he is in fact the heir-at-law of both his brothers, and the action is brought against him in accordance with the provisions of the statute, as the successor in the lands of the elder brother, who was the vassal last vest and seised in these lands, and whose death gives rise to the claim for a casualty."

"The fallacy of the pursuer's argument appears to me to lie in the assumption that a casualty becomes exigible in respect of every implied entry, and, therefore, that its amount must be determined in the same way as if the vassal had demanded a charter or writ of confirmation under the old law at the date of his infestment. It becomes exigible under the statute in respect of the lands being in non-entry, or more correctly, in respect of their being in the position which under the old law would have entitled the superior to a declarator of non-entry; and it arises against the person who is then the last vassal's successor in the lands, whether he is infeft or not. No implied entry is pleadable in defence, and therefore the intermediate entry of James Dunlop Hamilton creates no obstacle to the pursuer's demand against the defender for a casualty which became due in consequence of the death of the last entered vassal in 1877. But the amount of the casualty must depend upon the relation of the defender to this last vassal. If he is a singular successor only he must pay composition. If he in fact unites the characters of singular successor and heir, he is liable only for relief, whatever be the form of title upon which he is infeft."

John's mid-superiority, and to give James an implied entry with the superior. Matters so stood till 1877, when John died. On that event a casualty became due, and the pursuer as superior might have claimed it, but he did not do so. James died in 1886, and the defender had taken infestment under his disposition, and was now sued for the casualty which might have been demanded of James in 1877. The question was the same as it would have been with James in 1877, and the defender could be in no better position than James would have held then. Now, what was the position of James when by the force of the Act he became entered with the superior in 1874? John (*i.e.*, John Hamilton, second of Greenbank), was still in life, and James was only his heir-presumptive. A disposition to an heir-presumptive was not a propulsion of the fee, and the implied entry created a new investiture cutting out John's issue.<sup>1</sup> The implied entry of 1874 evacuated the mid-superiority in John Hamilton, and on John's death in 1877, James could not have served heir to him, and connected himself with the old investiture, for there was nothing left in John's estate to which he could serve.<sup>2</sup> Thus James could not have resorted to the device of tendering himself for entry as heir on paying relief. If, then, the pursuer had brought his action in 1877 against James, James must have paid composition.

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The Lord Ordinary's view was, that if the defender united, as he did on John's death, the character of singular successor and that of heir, he was only liable in relief, and he assumed that, because an implied entry was not pleadable in defence to the action, the pursuer might not found on it as extinguishing the prior investiture. The Act of 1874, in introducing implied entries, made two equitable restrictions to prevent either party from unfairly pleading them, *viz.*, (1) the implied entry was not to enable the superior on the one hand to demand a casualty sooner than he could have done under the old law, and (2) the implied entry was not to be pleadable by the vassal in defence to the superior's claim for a casualty. But there was nothing in the Act which otherwise limited the effect of the implied entry. James's implied entry entered him as a singular successor to John Hamilton, and he was not then John Hamilton's heir. On John's death, when he became his heir, there was nothing left in John's estate to which he could succeed, the mid-superiority having been extinguished by James's implied entry.

The cases established the pursuer's proposition that an implied entry was (subject to the two restrictions above mentioned) the same to all legal effects as an express entry by charter or writ of confirmation under the old law. That of *Ferrier's Trustees v. Bayley*<sup>3</sup> was exactly in point. There as here the impliedly entered vassal had become the heir of the last vassal who paid a casualty. But there it was held that he could not fall back on the old investiture to the effect of paying only relief. It made no difference between the cases that, as the defender pointed out, the beneficial interest had there passed, not to the heir-at-law of the last vassal, but to another person. The question was to be decided by the investiture.<sup>4</sup> In the same case Lord Ormidale said that the right and title of the mid-superior were entirely gone, and that the defender there "could not tender himself or anyone else" as heir to such mid-superior.

<sup>1</sup> Stair, ii. 11, 18, and iii. 7, 5; Ersk. ii. 5, 16, and iii. 8, 90; *Craigie v. Craigie*, Dec. 4, 1817, F. C.

<sup>2</sup> *Stirling v. Ewart*, 3 Bell's Ap. 240; and see per Lord Curriehill in *Sturrock v. Carruther's Trustees* (not reported on this point), May 21, 1880, 7 R. 799—printed in Session Papers.

<sup>3</sup> *Ferrier's Trustees v. Bayley*, May 26, 1877, 4 R. 738.

<sup>4</sup> *Stirling Crawford v. Dempster*, Feb. 26, 1879, 6 R. 708.

No. 185. In *Rossmore's Trustees*,<sup>1</sup> the First Division came to the same conclusion on a question practically identical. In *Lamont v. Rankin's Trustees*<sup>2</sup> the same question was again decided. The only special feature in that case was that the defenders were testamentary trustees, who pleaded, but unsuccessfully, that, as they held the estate for the heir, the action could not be maintained against them. In that case the Law Lords had before them an opinion of Lord Curriehill in *Sturrock v. Carruthers' Trustees*<sup>3</sup> to the same effect. These cases shewed that the old device of tendering the heir was abolished. In order to claim the privilege of an heir, the vassal must be able to point to an investiture, subsisting at the time of his succession, in respect of which a casualty has been paid, and he must also shew that he is the heir under that investiture of the person who paid it.

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The Lord Ordinary relied on *Mackintosh v. Mackintosh*,<sup>4</sup> as shewing that the amount of a casualty must depend on the vassal's relationship to the person who last paid a casualty. But there there was no barren mid-superiority; the defender was at the time of his succession heir of the subsisting investiture, and could either serve as such or make up a title in form as a singular successor, and in these circumstances the Court held the form of the title to be merely accidental. What was truly laid down in that case was thus put by the Lord President,—"It is clearly established that the form of the title is not at all conclusive, and that an heir entering by a charter of confirmation or resignation may still have the benefit of his title as heir." Here there was a new investiture. The defender could not point to its ever having been enfranchised. He was therefore liable in composition in respect of his entry.

The defender argued in his minute of debate;—The casualty due was not composition but relief. The Lord Ordinary assumed that the question was the same as would have arisen if James Dunlop Hamilton had been sued for composition. The defender was willing so to take the case, but would first consider it on the footing of the summons itself. The summons placed it on the assumption that there had been no intermediate implied entry. It narrated that John Hamilton, second of Greenbank, was the vassal last vest and seised, and made no reference at all to the intermediate implied entry of James Dunlop Hamilton. That was the statutory form, and its true meaning was tested in *Mounsey v. Palmer*.<sup>5</sup>

Under the old law the question between relief and composition depended not on the form of the title, but on whether the person proposing to enter was or was not the heir of the previous vassal. That was the principle of many cases.<sup>6</sup> The 3d subsection of section 4 of the Act of 1874 provided that the implied entry was not "to prejudice or affect the right and title of any superior to any casualties . . . due or exigible in respect of the lands at or prior to the date of such entry." By this provision, intended only to preserve his rights as a superior, the pursuer was seeking

<sup>1</sup> *Rossmore's Trustees v. Brownlie*, Nov. 23, 1877, 5 R. 201; cf. *Mounsey v. Palmer*, Dec. 6, 1884, 12 R. 236, Lord Shand at p. 246, *sub finem*.

<sup>2</sup> Feb. 28, 1879, 6 R. 739, aff. Feb. 27, 1880, 7 R. (H. L.) 10.

<sup>3</sup> This was a judgment of Lord Curriehill in the Outer-House, July 15, 1879, which is not reported, but is printed in the Session Papers in *Sturrock v. Carruthers*, 7 R. 799.

<sup>4</sup> *Mackintosh v. Mackintosh*, March 5, 1886, 13 R. 692.

<sup>5</sup> *Mounsey v. Palmer*, 12 R. 236.

<sup>6</sup> *M'Kenzie v. M'Kenzie*, 1777, M. App. voce Superior and Vassal, No. 2; *Brown v. Magistrates of Musselburgh*, 1804, M. 15,038; *Stirling v. Ewart*, Feb. 14, 1842, 4 D. 684 (Lord Moncreiff, at p. 735), 14 Scot. Jur. 490, aff. 3 Bell's Ap. 128; *Marquess of Hastings v. Oswald*, May 27, 1859, 21 D. 871, 31 Scot. Jur. 482; *Mackintosh v. Mackintosh*, March 5, 1886, 13 R. 692.

to enlarge them. On the other hand, the 4th subsection provided that no implied entry should be a defence to the superior's action. The defender did not seek so to found on an implied entry. But he objected to the pursuer founding on one (James Dunlop Hamilton's) with the view of making him liable in composition. The standing investiture, which alone could be known to the superior, was that of the last vassal. But the last vassal was John, not James, and the defender was John's heir.

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The cases of *Rankin* and *Rossmore's Trustees* were inapplicable. In both the title of the defenders was a singular title in substance as well as in form, and in both they endeavoured unsuccessfully to put forward the heir for an entry. Here there was no such proposal. The defender, himself the heir, demanded to be dealt with by the superior in his true character as heir. Even, therefore, if James Dunlop Hamilton would have had to pay composition had the action been raised against him, the defender was only liable in relief, for, as to him, the one question was as to his relation to John Hamilton, the last entered vassal.

But the next question was whether the implied entry of James Dunlop Hamilton affected the liability of the defender. It was said that that implied entry made the case distinguishable from that of *Mackintosh v. Mackintosh*,<sup>1</sup> and assimilated it to *Ferrier's Trustees v. Bayley*. But the alleged distinction from the case of *Mackintosh* made no difference, as the Lord Ordinary shewed. The principle of that decision did not apply only where the vassal was in a position to enter as heir although he had chosen to complete his title as a singular successor. In *M'Kenzie's* case<sup>2</sup> and in that of the *Marquess of Hastings*<sup>3</sup> the form of entry was necessarily that of a singular successor or donee.<sup>4</sup>

In *Ferrier's Trustees v. Bayley* the beneficial interest had passed not to the heir-at-law but to a stranger to the destination, and the defender there was in fact as well as in form of title a true singular successor. In this case no stranger to the destination had ever had a beneficial interest in the estate. But in truth the question in this case and in that of *Mackintosh* was not really before the Court in *Ferrier's Trustees v. Bayley*, as appeared from the fact that in none of the opinions were the cases of *M'Kenzie* or of the *Marquess of Hastings* mentioned. The sole question there was whether the defender could enter to a mid-superiority, and the Court held that his infestment had destroyed it, and that it was therefore a legal impossibility for him to take it up. The Judges did not consider whether the prior investiture was thereby affected.

If, therefore, the question had arisen under a claim made against James Dunlop Hamilton at any time between 1877 and his death in 1886, he would have been entitled to have escaped with payment of relief-duty. If so, it followed that the defender, the heir-at-law of James Dunlop Hamilton, and also the heir-at-law of John Hamilton, second of Greenbank, was not bound in any higher payment. If the question were taken as at 1877, then the defender was entitled to found upon the fact of his relation to James Dunlop Hamilton as his heir, and of James Dunlop Hamilton's relation as heir to John Hamilton, on the principle *heres heredis est meus heres*. If it were taken as at 1886, then at that date the defender was himself the heir of John Hamilton.

The following opinions were returned by the consulted Judges,—

**LORD PRESIDENT.**—The facts of this case are few and simple. Prior to 1860

<sup>1</sup> *Mackintosh v. Mackintosh*, 13 R. 692.

<sup>2</sup> *M'Kenzie v. M'Kenzie*, 1777, M. voce Superior and Vassal, No. 2.

<sup>3</sup> *Marquess of Hastings v. Oswald*, May 27, 1859, 21 D. 871.

<sup>4</sup> Lord President in *Mackintosh v. Mackintosh*, 13 R. at p. 695.



No. 185. John Hamilton was owner of the *dominium utile* of the lands in question, which he held of the superior or his predecessor as his immediate lawful superior. In 1860 John Hamilton disposed to his brother James, with a double manner of holding, and James took infeftment but never was entered with the superior, and held base of his brother John down to the passing of the Statute of 1874. Between 1860 and 1874 therefore there were three estates in the lands—the pursuer's estate of superiority, John Hamilton's estate of mid-superiority, and James Hamilton's *dominium utile*. But after the passing of the statute there were but two estates—the pursuer's estate of superiority and James Hamilton's estate of *dominium utile*—and between the owners of these two estates there existed the direct relation of superior and vassal, John Hamilton's estate of mid-superiority being extinguished *vi statuti*. In these circumstances the pursuer as superior became entitled to a casualty (composition or relief) for the entry of a new vassal, but was precluded by a clause of the statute from demanding payment until the death of his last entered vassal, John Hamilton, the owner down to 1874 of the mid-superiority. James Hamilton, who had been the entered vassal of the pursuer in the *dominium plenum* since 1874, died in 1886, leaving a settlement of the lands in favour of his brother William Hamilton, the defender, who took infeftment, and thus became and is now the entered vassal of the pursuer.

The casualty which accrued to the superior in 1874 on the implied entry of James Hamilton has never been paid, nor has the defender paid any casualty in respect of his entry, and consequently a casualty is now demanded from him.

The only question is, whether the pursuer as superior is entitled to a composition or to relief-duty only.

As regards the facts, this case is admitted to be on all-fours with *Ferrier's Trustees v. Bayley*, 4 Ret. 738. *Mutatis nominibus*, the facts are identical.

In that case Lord Curriehill found the defender, who corresponds to the present defender, William Hamilton, liable in a composition, and the Second Division by a majority adhered to his judgment. This judgment has been recognised as settling the law in several subsequent cases, and in particular in *Lamont v. Rankin's Trustees*, which was appealed to the House of Lords. The noble and learned Lords who advised the House, in affirming the judgment of this Court, reviewed all the cases on the subject, and determined, after the fullest consideration, that the rule adopted in one and all of them was sound law.

But I understand the Lord Ordinary and the Judges who agree with him to say, that in *Ferrier's Trustees*, as distinguished from the other cases which followed, the heir of the last vassal tendered for entry with the superior was the individual who had been impliedly entered under the statute, or, in other words, that he was at once proprietor of the *dominium utile* and heir of the deceased owner of the extinguished mid-superiority. This is quite true, but the fact was prominently in view of the Court in giving judgment, and the distinction was clearly stated by Lord Curriehill, who thought the case all the more important because if a person in the position of the defender were entitled to offer himself as heir, it would be very difficult to refuse to another vassal impliedly entered the right to offer the last vassal's heir for entry though the last vassal was a stranger to him. In like manner Lord Ormisdale, one of the Judges of the Second Division who affirmed Lord Curriehill's judgment, very pointedly states that "there is no longer any room or opportunity for the defender tendering

himself or anyone else as heir to a mid-superior whose right and title are entirely gone." No. 185.

It seems to be thought that this distinction was not sufficiently pressed on the Court. But I am not prepared to disparage the authority of a careful and well-considered judgment on the ground that the case was imperfectly argued. July 18, 1889.  
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I am therefore of opinion that we are bound to alter the Lord Ordinary's judgment on the authority of *Ferrier's Trustees v. Bayley*.

But assuming the question to be open, I am of opinion that the pursuer is entitled to the composition for which he sues.

When the Act of 1874 came into operation, James Hamilton, who had previously held of his brother John as his immediate superior, was at that date converted into the vassal of the pursuer, and that immediately by the operation of the statute. The postponement of the term of payment of the casualty did not and could not keep alive the estate of mid-superiority in John Hamilton, which was immediately extinguished. James was no doubt heir-presumptive of his brother John, but he could take nothing in that character while John was in life; and on John's death in 1877 John had no estate in the lands in question to which James could succeed. He was heir so far as regards propinquity of blood, and he might have served heir in general to John, but there was no estate which he could take up by special service, and if he had asked the superior to enter him by precept of *clare constat*, he would have been met with the conclusive answer that he was already entered with the superior *vi statuti*, and could not be entered a second time, and in a different character.

The existing investiture prior to 1874 was created by an entry obtained by the defender's grandfather in favour of himself and his heirs general, and the estate thereafter passed through a series of heirs in terms of the destination, which was enfranchised by the superior when he entered the defender's grandfather. John Hamilton, who died in 1877, was the last heir who held under that investiture, for he had been deprived of the estate before his death by the operation of the statute, and nobody could take up the succession as heir to him, or (consequently) as heir of investiture. A new investiture therefore necessarily came into existence with the implied entry of James Hamilton in 1874 requiring to be enfranchised, which of course can only be done on payment of a composition.

The Lord Ordinary's judgment proceeds very much on the supposed application to the present case of the judgment of the First Division in the case of *Mackintosh v. Mackintosh*. But the principle of that judgment is in my opinion entirely inapplicable here. It was settled law before the Statute of 1874 that if the person entering with the superior was the heir of the existing investiture, he was entitled to be entered on payment of relief only, although he had made up his title to the estate in a form properly applicable to a singular successor. The form of his title was held not to deprive him of his character of heir. The same rule was in the case of *Mackintosh* held to be applicable in implied entries under the Statute 1874. But the important fact in that case was that the person impliedly entered was the heir of an existing investiture, and might have served heir in special under the investiture. Mr Æneas Mackintosh, the last entered vassal, made a *mortis causa* disposition of his estate in favour of his nephew Mr Keir, who was one of his two heirs-portioners. Mr Keir naturally made up his title by taking infestment on his uncle's conveyance, because one-half of the estate he could take only by virtue of the conveyance, and not as

No. 185. heir. But as regarded the other half *pro indiviso*, he held the character of heir of the vassal last entered, and heir of the existing investiture. He was, by taking infeftment on the conveyance, impliedly entered with the superior as disponee, but his character as heir entitled him, according to the judgment, to pay relief-duty only as regards one-half *pro indiviso* of the estate which his uncle left him. Nothing had occurred in that case to affect the position of the uncle as last entered vassal and as heir of investiture, and his right as such passed (*quoad* one-half *pro indiviso*) by the operation of the law of succession to the defender as his heir.

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The case of *Mackintosh*, for these reasons, appears to me to stand in clear contrast to the present, because it was attended by none of the difficulties arising from the operation of the Statute 1874.

LORD MURE.—I concur in the opinion of the Lord President.

LORD SHAND.—The question in this case being whether the pursuer is entitled to payment of composition, or is only entitled to relief-duty, it is essential to bear in mind the rule or principle which determines in the case of each entry with a superior whether the superior has right to the larger or only to the smaller payment.

That rule may be stated in this way—Where the entry, which before the Statute of 1874 was given by a deed under the superior's hand, was merely a recognition or renewal of the existing investiture, the vassal was only liable in payment of relief-duty; but where the superior was called upon to enfranchise a new investiture—that is to say, to grant a deed which not merely recognised and admitted the heir of the existing investiture, but admitted a singular successor—then the new vassal, as the condition of the enfranchisement of this new investiture, was liable to pay a composition of a year's rent of the subjects.

The Statute of 1874 did away with the necessity for writs or charters by progress, for by his infeftment an heir or purchaser of any property held under a superior was thereby declared to be duly entered with the superior, to the same effect as if the superior had granted a writ of confirmation. But that statute made no change on the rule of payment I have just stated. It is not maintained by anyone that if the entry of the vassal which results from his taking infeftment is an entry not under the investiture which the superior last sanctioned or renewed, but is a new investiture, the vassal can only be required to pay relief-duty. Composition in that case must be paid as the appropriate condition or price of the confirmation, or it may be of the creation of the new investiture. Even in the series of cases terminating with that of *Lamont v. Rankin's Trustees* in the House of Lords, 7 R. (H. L.) 10, no view to the contrary of what has now been stated was suggested. It was not maintained in these cases that if the vassals were unable to get behind the statutory entry with the superior resulting from infeftment they could resist the claim for composition, for the vassals entered were all singular successors. The struggle was entirely to get rid of the effect of the entry by bringing forward the heir of the vassal under the last investiture recognised by the superior, and so to make the payment to the superior that of relief-duty only. On that question, the decision of which has an important bearing on the argument in this case, it was held that, after an entry taken by infeftment constituting a new investiture, the vassal could no longer adopt the device or course of bringing forward the heir under the former

investiture, either to take any place in the title or to take away the superior's No. 185.  
claim to composition and reduce it to a claim for relief.

The decision, then, of this case seems to me to depend entirely on this con- July 18, 1889.  
sideration :—Is the entry which the defender, the vassal, has obtained by virtue Stuart v.  
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of his infeftment, the enfranchisement or recognition by the superior of a new  
or different investiture from that which the superior last recognised, and in  
respect of which he obtained a payment? If it be, then according to the law,  
which has not been in any way affected by the Statute of 1874, composition is  
due. If, on the other hand, the entry is only that of an heir under the investi-  
ture last recognised by the deed of the superior, then relief-duty only is  
exigible.

The facts are very simple. The position in the title of three persons only  
requires to be considered.

1. John Hamilton (called second of Greenbank) was the last entered vassal  
in respect of whose entry a payment was made to the superior. He was never  
the owner of the property, but he had been put forward by the true owner, and  
had by agreement taken a place in the title in order to save the true owner a  
payment of composition,—as his father has also come forward on a previous  
occasion. This John Hamilton, as his father's heir, in February 1855 obtained  
a precept of *clare constat* from the superior on payment by the true owner of  
relief-duty, and he was infeft in June of that year.

2. John Hamilton in 1860 conveyed the property to his immediate younger  
brother James Dunlop Hamilton, who was infeft on the conveyance in August  
of that year. This deed was granted at the request of the true owners of the  
property, and in implement of certain deeds granted by them, which are nar-  
rated in the conveyance, and mentioned in articles 2 and 3 of the condescend-  
ence. James Dunlop Hamilton was heir-presumptive only, and of course  
not heir-apparent of his brother John Hamilton, the last entered vassal. On  
the passing of the Act of 1874, he became the entered vassal in virtue of his  
infeftment in 1860. John Hamilton survived till 1877, when the superior's  
claim to composition or relief-duty emerged, although payment has not been  
demanded or sought to be enforced till recently.

3. In the meantime James Dunlop Hamilton having died in May 1886, leav-  
ing a general disposition and settlement in favour of his immediate younger  
brother William Dunlop Hamilton, he in his turn took infeftment on that deed  
in August 1886, and so entered with the superior. He is not only the heir-at-  
law of James Dunlop Hamilton, from whom he derived the property, but it so  
happens that, as his brother John in 1877 also died without issue, he is heir-at-  
law also of John, the last entered vassal who paid for an entry.

These being the facts, the question recurs—Is the entry for which a payment  
is now demanded that of a successor under a singular title—has the superior im-  
pliedly recognised and enfranchised a new investiture, or, on the contrary, is the  
succession that of an heir of the vassal last entered who paid a casualty, and has  
the superior under the statute merely recognised or renewed the investiture  
existing when he received the last payment for entry?

The payment became exigible on the death of John Hamilton in 1877, but  
the demand was not made against James Dunlop Hamilton then, or during his  
survivance to 1886, and now his brother, the defender, is in the position of  
vassal infeft. The claim therefore is properly made against him as the pro-  
prietor in possession of the lands, and it is so made in respect of his own entry

No. 185. by the infestment he took. This is I think settled by the case of *Mounsey v. Palmer*, 12 R. 236. It is true that between 1877, when John Hamilton died, and 1886, when James Dunlop Hamilton died, the superior might have claimed a payment from the latter for his entry by infestment, followed by the Statute of 1874, but he omitted to make that claim, and the entry to be now paid for is that of the defender. The state of the facts was entirely similar in the case of *Mounsey*, in which the opinions were unanimous to the effect that though the superior might have made a claim, for a time, against an intermediate vassal who survived the vassal who had last paid a casualty, yet as another vassal had been entered in consequence of the infestment he had taken, the claim must be made against him, and as for his own entry.

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I have come to the conclusion, differing from the Lord Ordinary, that the defender is liable to the pursuer in payment of composition and not of relief only, for I think it is clear that the claim for a payment is made not in respect of an entry under the old investiture which the superior had recognised, obtained by an heir taking or entitled to take an entry under that investiture, but in respect of a new investiture which under the statute the superior must be taken as having recognised and confirmed.

The investiture on which the last casualty was paid was in favour of John Hamilton and his heirs, and if James Dunlop Hamilton, the intermediate vassal, had taken the property not by a *de presenti* conveyance in 1860, but by service to John Hamilton, or under his *mortis causa* deed in 1877 when he died—and the defender in his turn had taken the property as the heir of James Dunlop Hamilton—then there would have been a continuance of the old investiture, and the appropriate payment would have been relief-duty. But what occurred was quite different. James Dunlop Hamilton did not take as his brother's heir, and was not so entered when the Act of 1874 passed. He was then entered, but he was not then his brother's heir. This is clear, for his brother might have had issue after that date. He was an heir-presumptive only, not an heir-apparent, and the entry he obtained by virtue of the conveyance in his favour, granted in the circumstances already explained, was clearly an entry on a new investiture. From 1874 till 1877, during his brother's lifetime, he possessed the property as an entered vassal, not as his brother's heir to whom he had succeeded, because his brother was still alive, nor as his brother's heir to whom the succession under the existing investiture had merely been propelled, for he was not his brother's heir-apparent during that time. It is therefore, I think, not doubtful that if after John Hamilton's death in 1877 the superior had demanded a payment from James Dunlop Hamilton as for his entry, composition would have been due for the change of investiture. It would have been no good answer to the demand to say that John Hamilton having died without issue, it had turned out that James Dunlop Hamilton had on that event become his heir of line. The entry had been obtained in 1874. The investiture then was a new one, and the superior's right to a composition arose from the implied statutory confirmation of that investiture, although he was not entitled to demand payment of that composition sooner than the death of the last entered vassal. By the fact of entry the new investiture was established and confirmed, and the vassal who had been so entered for three years could not on his ancestor's death thereafter successfully seek to undo the entry he had got as a singular successor, and either in fact or in theory enter as an heir under the old investiture, on payment of a casualty only, as if he had taken the property as his brother's heir of line. Such

a proposal or suggestion, if made, could not have been successful, for it would have been open to the same answer on the part of the superior as was made in the series of cases ending with that of *Lamont*, already referred to. In these cases, after the various defenders had been themselves entered under the statute as vassals, they proposed to put forward the heir under the former investiture as willing to enter, and so to revert to the old investiture—or at least do so in theory—and thus reduce the payment of composition to that of relief. It was held that this proposal was inconsistent with the entry which had been already taken in each case. So by clear analogy it follows that James Dunlop Hamilton on the death of his brother could not present himself as heir of his brother under the old investiture, because from 1874 to 1877 he had been in fact entered on a singular title and under a new investiture.

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Then, is the defender in any different position? I think clearly not. He no doubt has taken the estate as the heir of his brother James Dunlop Hamilton, on whose death he succeeded, and if his brother had by a payment of composition, as on his entry, obtained an enfranchisement of the new investiture, then of course as an heir of that investiture the defender would have paid relief only for his own entry. In that case the superior would have received first a payment of composition, and now a payment of relief, in place of the single payment of composition to which I think he is now entitled. But the payment now demanded is the first that is asked since and in respect of the new investiture. The defender cannot plead his character of heir under the old investiture, because the title which his brother James Dunlop Hamilton and he have made up, and of which they have already under their infeftments obtained confirmation, precludes this. Indeed, if the view already stated be sound, neither the late James Dunlop Hamilton, nor anyone taking as his heir, could do otherwise under the new investiture after 1874, when it was confirmed by the statute, and so I am unable to see how the defender can now revert to the old investiture, and claim the benefit of a payment of relief only as an heir under it.

In one way, and in one way only, could the payment be reduced to relief, and that is by obliterating from the title as an element in the decision of this question the intermediate conveyance and infeftment in favour of James Dunlop Hamilton, and the superior's confirmation of these effected by the Statute of 1874. If this could be done, then it might be maintained that, looking only on the one hand to the person who was last entered and who paid for an entry, and on the other to the person who is now last entered, and from whom a payment is demanded, if the latter should happen to be the heir of line of the former, relief only shall be exigible, even although there have been one or more intermediate transmissions, with infeftments following on transactions of purchase and sale. I understand that if other arguments fail this view is contended for by the defender, who also pleads that the decision in the case of *Mackintosh*, 13 R. 692, enables him to maintain successfully that the mere fact of his entry under a title by conveyance will not preclude him from taking the benefit he can claim in his character of heir, and that the payment demanded will depend on his relationship and character of heir of line of the person who last paid a casualty.

Laying out of view for a moment the case of *Mackintosh*, the contention of the defender would, I think, lead to extraordinary and novel results in the law applicable to casualties—results which it would be most difficult to shew that the provisions of the statute have brought about. Take the very case in hand,

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and suppose that the entries of James Dunlop Hamilton and of the defender had taken place, as they did, not by virtue of the statute, but by charters of confirmation of the infeftments, I apprehend it to be too clear for argument that the pursuer must be entitled to a composition, and if only the confirmation had been asked by the defender of both infeftments at the same time he must have paid the composition. The superior's right would have arisen because of the new investiture confirmed. The only way in which that result could be avoided would have been by not so taking an entry at all. The authorities have now, however, firmly settled that if an entry with its benefits be obtained by infeftment taken, it must be accompanied by any disadvantages which attend it, such as the exclusion of the right to bring forward an heir under the former investiture, or (what is the same thing) a person already entered under a new and confirmed investiture seeking to set up his character of heir under the old and sopped investiture so as to reduce the payment of composition to relief.

The argument in favour of the contention that when the question of payment for an entry arises the intermediate entries between that of the person who last paid a casualty and the person against whom the demand is made shall all be disregarded is founded, I understand, on the provisions of the statute, sec. 4, subsec. (3), providing that "such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering," and subsec. (4) that "no implied entry shall be pleadable in defence" against an action of non-entry, and for payment of any casualty exigible at the date of such action. It is argued that the result of these enactments is not only that the superior can make no claim in respect of intermediate entries till the death of the person who last paid a casualty, but that however numerous these entries may be, and even of purchasers on singular title, yet if when the death of the vassal who last paid occurs his heir of line happens to have repurchased the property and become the last person infeft, relief only is due. The contention is said to be supported by the provision that "no implied entry shall be pleadable in defence," and the argument is said to derive some force from the provisions of subsec. (4) of sec. 3 of the statute as to the superior's remedy by action of non-entry, and for payment of a casualty, and the relative form of summons given in Appendix B of the statute.

What, then, is the meaning and effect of the provision that "no implied entry shall be pleadable in defence" against the action for non-entry and a casualty? Simply this—That the entered vassal when sued shall not be able to plead either his own or any intermediate entry as excluding the claim. He cannot say that he and the other intermediate vassals having been already entered no payment can thereafter be demanded. The clause is one to protect the superior, not to affect him injuriously. If it be said that as he so far obtains advantage by it, because the vassal cannot plead the implied entries, it follows that he cannot on the other hand found on the entries, the answer is,—the statute contains a limited enactment or provision, and there is no warrant for giving to it any effect beyond its clear terms. The words are, "No implied entry shall be pleadable in defence." But it is plain that the superior must be entitled to plead, and necessarily does plead, the defender's own entry where he has taken infeftment, for that entry is the very ground of the superior's claim to the payment of the casualty, which he can enforce by having recourse to the rents. Moreover, after all it does not

appear to me that the superior does in any proper sense plead the implied intermediate entry or entries in such a case as this. When he makes his claim the defender answers the demand by saying he is heir of investiture of the last vassal who paid a casualty, but his own titles, which he cannot ignore, shew that the formerly existing investiture has been superseded. The heir under the old investiture cannot as such complete a title to the property. A service in special to the last person who paid a casualty could carry nothing, and could never complete a title, and a superior is entitled to require such a service by anyone claiming the character of an heir of investiture—*Menzies' Lectures* (3d ed.), p. 814, and authorities there cited. Again, if instead of intermediate entries the defender had taken infeftment on an assigned precept of sasine, and the progress disclosed a new investiture and singular title, in that case the superior without any intermediate entry could certainly demand a composition, because the infeftment confirmed carried out a new investiture.

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I attach no importance to any argument founded on the form of the summons appended to the statute, and employed in this case. That form properly proceeds on the view that a casualty becomes payable on the death of the last entered vassal who paid a casualty. No one can suggest that "the death of C" in the schedule means the death of an intermediate vassal, although the expression used is, "who was the vassal last vest and seised." The form is quite suitable for the case—it is probably the common one—in which there are no intermediate entries. It might have been better to have added in brackets after the words, "who was the vassal last vest and seised in all and whole the lands of X," such words as ["where there have been intermediate entries, add, 'and who paid the last casualty'"]. But it is not surprising that the schedule should not have entered into the matter with such detail. It would indeed be a very strong proposition to maintain that because the person "C," who did pay the last casualty, is only described as the vassal last seised in the lands (which will be true in most cases), and is not also described as having paid the last casualty, as he did, that therefore the intermediate entries are not to be looked at even as links in the title, or for the purpose of ascertaining whether the vassal against whom the claim is made takes under the old investiture or under a new investiture and a singular title, on the confirmation of which a composition has never been paid to the superior.

The case of *Mackintosh* is clearly distinguishable from the present, and cannot, I think, affect the decision to be now given. In that case the defender had completed his title by taking infeftment, following on a testamentary settlement by his uncle. He was his uncle's heir-at-law as regarded one-half of the lands, and to that extent it was held he was only bound in payment of relief for his entry. But in that case there was no intermediate entry, or any change of the investiture, which had been already enfranchised when the defender's uncle had paid for his entry. The defender could have entered by special service and infeftment, and it was held in conformity with the former law that the mere form of the title he made up did not render him liable to more than the relief-duty payable by an heir of the existing investiture. The Lord Ordinary seems to indicate that the authority of the case goes beyond what has been now stated, for his Lordship observes,—“It is said that the decision applies only where the vassal is in a position to enter as heir, although he has chosen to complete as a singular successor. But this is not consistent with the judgment. Both in the case of *M'Kenzie* and of the *Marquess of Hastings*, it would have been impos-



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sible for the dispositive, who was in fact the heir of the last investiture, to effect an entry in that character. The Lord President points out, in explaining the case of *M'Kenzie*, that 'the form of entry was necessarily that applicable to a singular successor or dispositive. Nevertheless the Court decided that he was entitled to the full benefit of his character as heir, and must be entered on payment of relief-duty only.' But, as is pointed out in the argument for the pursuer, in both of the cases of *M'Kenzie* and the *Marquess of Hastings*, the defender was an heir of the existing investiture under entail destinations, which had already been enfranchised by the superior, a circumstance which was prominently before the Court in the case of *Mackintosh*. In *M'Kenzie's* case, *M. voce Sup. & Vas. Apx. 2, p. 7*, the interlocutor of the Court finds that the superior "is obliged to enter the defender, who in this case is the heir of the former investiture, in terms of the tailzie," upon relief and not composition, reserving the superior's claim to composition "on the entry of any future heir of tailzie not an heir of the investiture prior to the tailzie"; and in like manner in the case of *Hastings*, 21 D. 872, the interlocutor expressly proceeds on the basis of "the defender being the heir of the last investiture," and adds a reservation in the same terms as in *M'Kenzie's* case. These cases and that of *Mackintosh* therefore are in sharp contrast with the present. They were decided on the ground that the defender in each case was the heir of the last and still subsisting investiture, while in the present case the last investiture has been extinguished and a new investiture created and confirmed, the defender being the person liable for the composition payable in respect of this. The case is indeed in all its circumstances identical with that of the leading case of *Ferrier's Trustees v. Bayley*, in which the defender was held liable in composition. It is true that the defence here maintained was not pleaded in that case, but if it had been well founded it is very difficult to suppose it would have escaped the observation not only of the bar but of the bench, by so many of whom the case has been considered and discussed.

I am on the whole of opinion that the judgment of the Lord Ordinary should be recalled, and that decree should be given against the defender for payment not of relief, but of composition.

LORD ADAM.—The question in this case is whether the defender William Dunlop Hamilton is liable to the pursuer in composition or relief in respect of his entry to the lands of Greenbank.

The material facts are few and simple. The pursuer and his predecessors were and are superiors of these lands.

John Hamilton was infeft in the *dominium utile* of these lands conform to instrument of sasine recorded on 25th of June 1855, proceeding on a precept of *clare constat* from the superior in favour of himself and his heirs.

John Hamilton was therefore duly entered with the superior. He died in 1877.

John Hamilton conveyed the lands to his immediate younger brother James Dunlop Hamilton, conform to disposition in his favour dated 8th and recorded 9th August 1860.

James Dunlop Hamilton died on 31st May 1886, leaving a general disposition and settlement, dated 28th May 1886, in favour of his brother the defender William Dunlop Hamilton. William Dunlop Hamilton is infeft in the lands conform to notarial instrument in his favour recorded in the Register of Sasines on 17th August 1886.

Such being the state of the titles, I do not think there can be any doubt that, prior to the passing of the Act of 1874, the defender William Dunlop Hamilton would have been liable in relief-duty only.

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The superior might, at any time after the death of John Hamilton in 1877, have brought a declarator of non-entry against James Hamilton during his life; but not having done so, his only course now would have been to have brought a declarator of non-entry against the defender, and he being admittedly the heir of the last entered vassal John, would have been liable in relief-duty, although possessing on a singular title, in conformity with the case of *Mackintosh v. Mackintosh*.

The main object of the provisions of the Act of 1874 now in question was undoubtedly to put an end to the creation of barren mid-superiorities, and it did so by declaring that every proprietor infeft in the *dominium utile* of lands should be held as duly entered with the over-superior.

On the passing of the Act of 1874 accordingly, James Dunlop Hamilton became immediately entered with the superior in virtue of the entry implied by the Act, with the result that John ceased thenceforward to be vassal in the lands, James becoming such vassal; and on James's death, the defender William became, in like manner, entered with the superior and vassal in the lands.

But while thus putting an end to barren mid-superiorities, I think the purpose of the Act was to interfere as little as might be, consistently with so doing, with the pecuniary rights and obligations of the superior and vassal, and I think that it has left them very much on the old footing.

Thus the third subsection of the fourth clause enacts that "All rights and remedies competent to the superior under the existing law and practice for recovering, securing, and making effectual such casualties, feu-duties, and arrears, . . . and all the obligations in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative, in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming."

Then after this general enactment as to the rights of the superior there follows the provision for the protection of the vassal—that an implied entry should not entitle a superior to demand a casualty sooner than he could by the law prior to the Act have required the vassal to enter, or to pay such casualty irrespective of his entering.

Then follows subsection 4, under which this action is more particularly brought, and which provides the only mode in which a superior's claims for casualties can be enforced—and therefore gives the measure of these rights, because if a right cannot be enforced it has practically no existence.

This subsection introduces a new form of action in place of a declarator of non-entry—a declarator of non-entry being obviously no longer applicable, because no lands could thereafter be in non-entry. But although the form of the new action of declarator and payment is different, the effect is the same as that of the former declarator of non-entry.

The only person who is entitled to insist in it is a superior "who but for the passing of this Act" would be entitled to sue a declarator of non-entry against the successor of the vassal in the lands—that is, the vassal whose death but for the passing of the Act would have caused the lands to be in non-entry. The only person against whom it can be raised is "such successor," and it is enacted that a decree for payment in such action should have the effect of and

No. 185. operate as a decree of declarator of non-entry, according to the "now existing" law.  
July 18, 1889. Who, then, in this case, is the vassal in the lands, in the sense of this Act,  
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It is not disputed that John Hamilton is the "vassal in the lands" in the sense of the statute, and the action is brought against the defender, as his successor, on that footing.

But John Hamilton was not the vassal in the lands, except on the assumption that an implied entry is to have no effect in this question, because if it is to have effect, then James and not John would have been the "vassal" in the lands.

But if John is to be treated as vassal in the lands for the purposes of this case, then it is as his successor, and his successor only, that the action can be insisted in against the defender. But in calling the defender as successor of John, the Act does not mean merely that at some previous period John was proprietor of the lands, but that the defender is to be treated as John's immediate successor in title. If John is the vassal, and the defender is his successor, it is surely the terms of John's investiture which must be looked to to see in what relation his successor stands to him. If that be done, as the defender is admittedly the heir under John's investiture, he is liable in relief-duty only.

I confess that I cannot follow the reasoning by which it is proposed, in an action brought against the defender, as the successor to John, as "the vassal last vest and seised in the lands," to decern against him for a composition on the ground that he is not the successor of John in the lands because John had ceased to be vassal, and therefore could have no successor, but that he is the successor to James under a new investiture alleged to be created by James's implied entry.

It is quite true that as a matter of title James was John's successor and was duly entered, and that the defender is James's successor and is also duly entered, in virtue of their respective implied entries, but it appears to me that that has nothing to do with the present case, in which, for the purposes of the case, John is assumed by statute, contrary to the fact, to be the last entered vassal, and the action is, in the terms of the statute, brought against the defender as his successor.

It humbly appears to me that there are only two ways of looking at the case—either James's implied entry is to receive effect, or it is not. If it is, then John was not the vassal in the lands—he had thenceforth no connection with them, and could have no successor therein, and there can be no decerniture against the defender as his successor; or else the implied entry is not to receive effect, and in that case John is to be treated as vassal in the lands, and if so, then the investiture under which he held the lands must be looked to to see whether the defender is heir of the investiture or a singular successor. I cannot see that the superior is entitled to found on James's implied entry to the limited effect only of shewing that the defender is not John's successor, which he can only do by shewing at the same time, and for the same reason, that John was not the vassal last vest and seised in the lands. It appears to me that the statutory action proceeds on the footing and assumption that the vassal who last paid a casualty was the last entered vassal in the lands, and it further appears to me that the superior cannot plead or found on implied entries, because that would be to displace the foundation of his action. In short, in an action

directed, and necessarily directed, against the defender as the successor of John, No. 185. I do not see how the pursuer can obtain a decree against him on the ground that he is not John's successor. I think, therefore, that the superior is precluded by the form and tenor of the statutory action from founding on inter-mediate implied entries. But, on the other hand, if the vassal were to be entitled to found on such entries, the effect would be to exclude the action. It was necessary, accordingly, to provide against that contingency; therefore the Act enacts "that no implied entry shall be pleadable in defence against such action," and that is all that was required to exclude any reference to implied entries on either side.

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Further, it appears to me that a consideration of the form of action given in schedule B, and which has been rightly adopted by the pursuer in this case, shews that the construction I have put upon the statute is the right one.

The summons seeks to have it found and declared that in consequence of the death of John Hamilton, who died upon the 27th February 1877, and who was the vassal last vest and seised in all and whole, &c., a casualty, being one year's rent of the lands, has become due to the pursuer as superior of the said lands, and that the said casualty is still unpaid, and that the full rents, mails, and duties of the said lands after the date of citation hereon do belong to the pursuer as superior thereof until the said casualty and expenses after mentioned be otherwise paid to the pursuer. Had the form in the schedule been strictly followed, the summons should have been thus expressed,—“A casualty, being one year's rent of the lands, became due to the pursuer, as superior of the said lands, upon 27th February 1877, being the date of the death of the said John Hamilton,” and so on as in the summons.

It will be observed that the summons proceeds upon the assumption, in conformity with the form in the schedule, that John was the vassal last vest and seised in the lands; but this he certainly was not, if James's implied entry is to be taken into consideration. Then the pursuer is directed to describe or refer to the lands, and if the casualty due is a taxed composition or an heir's relief-duty, to say that a casualty of £        has become due. Now, this surely is meant to refer to the investiture of the vassal last vest and seised before referred to, and not to any investiture under an implied entry, and then it is said that a casualty became due upon the        day of       , being the date of the death of the said vassal. All this appears to me to be framed in conformity with the provisions of subsection 4, and for the purpose of giving effect to them, and of leaving the superior's and vassal's rights and obligations, as regards casualties, just as they were before the statute.

If, then, John's investiture, as the vassal last vest and seised, is to be looked to, the question is whether the defender, as John's successor under that investiture, would “but for this Act” have been liable in relief-duty only. That would depend on whether he was heir under that investiture, notwithstanding that he held the lands under a singular title. That he is heir is not disputed, and therefore I think the case of *Mackintosh v. Mackintosh* directly applies.

I think the case is quite different from *Rankin's Trustees v. Lamont*, and that class of case. In these cases it was proposed by proprietors who were singular successors, but not also heirs under the investiture, to put forward the heir of the last entered vassal for entry with the superior, while here the defender is himself the heir of the last entered vassal; in the sense of the statute he is

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I think, however, that the facts of the case of *Ferrier's Trustees v. Bayley* would have raised this question, but I am equally clear that the question was not raised or decided, probably because it occurred before the recent case of *Mackintosh v. Mackintosh*.

But it is said that a casualty became due in 1874 for the implied entry of James, that a new investiture necessarily came into existence with this implied entry, that this new investiture required to be enfranchised by payment of a composition, that the superior was precluded from demanding payment by a clause in the statute until the death of the last entered vassal, John, in 1877, but that he was now entitled to demand payment of it.

I do not, however, think that a casualty became due for the implied entry of James in 1874. The statute does not say so. But I suppose it is inferred from the fact that, as the law previously stood, if a vassal applied to the superior for a new investiture the superior was not bound to grant it, except upon payment of a casualty, even although the lands were not in non-entry. This, however, was an entirely optional proceeding on the part of the vassal, who chose to pay for a new investiture, and I do not think that it is to be necessarily inferred from it that a casualty is due for an implied entry.

As the law stood previous to the statute, lands became in non-entry, and a casualty became due, only on the death of the last entered vassal. The casualty became due because the lands were in non-entry, and was paid in order to obtain an entry. But no lands are now in non-entry, and if the whole matter had not been specially provided for by statute, I could quite understand a vassal successfully resisting a claim for a casualty, in respect of an implied entry, on the ground that his lands were not in non-entry, because he was duly entered by statute, and that he was not bound to pay the superior for an entry which he had obtained without his intervention.

The statute, as I have remarked, does not say that such a casualty is to become due. Neither does the statute say anything about payment of such a casualty being postponed. What the statute says is that the superior "should not be entitled to demand any casualty sooner than he could by the law prior to this Act." That is a different thing from merely postponing payment of a casualty already due. As the law previously stood, a casualty became due upon the death of the last entered vassal; but when the superior came to demand his casualty, the question then arose, whether the vassal was liable in composition or relief, and that depended on the state of the title at that time, and not at the date of the lands falling into non-entry. If, when the demand was made, the proprietor of the lands was in fact heir under the existing investiture, he was liable in relief only, although he might not have been the heir when the lands fell into non-entry; and so also, if a composition was payable, the amount would be calculated, not according to the rental of the lands at the date of the lands falling into non-entry, but at the date of the action.

I think, accordingly, that when the statute enacted that the superior should not be entitled to demand a casualty sooner than he could by the law prior to the Act, the intention was not to postpone payment merely of a casualty, but to leave the parties on the same footing as before the Act when a demand for a casualty was made.

Suppose the superior had raised after the death of John an action of declar-

tor and payment against James for payment of a casualty, it must have been directed against him as successor to John. But James undoubtedly at that time—John having died without children—would have been the heir under John's investiture, and so liable in relief-duty only. If John had left children James would not have been heir, and would have paid composition, just as he would have done before the Act. I do not think that it was the intention of the statute, that when a vassal conveyed the lands to an heir-presumptive, a new investiture should be created. It remained to be seen when the demand for a casualty was made, whether that was so or not. If it then appeared that the vassal was heir under the old investiture, no new investiture was created.

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As I understand the matter, a new investiture, such as a superior could refuse to enfranchise except on payment of a composition, implies the introduction of stranger substitutes, who as heirs under the investiture would be liable in relief-duty only, and whose introduction therefore into the investiture would possibly prejudice the superior's rights by depriving him of composition.

Such a question arose in the case of the *Marquess of Hastings*, 21 D. 871, and might arise under an implied entry, and might entitle the superior to a composition, although the heir was also the heir under the old investiture; but no such case arises here.

I may say, although the case has not been so treated, that the only claim made on record in this case is for a casualty in respect of the entry of James, but which was not demanded during his life. The defender is clearly not liable for it, and I think that on that ground he ought to be assolizied.

If that casualty had been paid by James, the defender would admittedly have been liable only in relief.

In the pursuer's view of the case, that casualty was not only due, but became payable by James at any time after 1877. I do not see why the defender should now be held liable in composition because of the pursuer's negligence in failing to enforce payment of it.

It appears to be making the casualty payable by a vassal to depend not on the state of the title, but on an extrinsic fact, viz., whether a particular payment was or was not made, of which the vassal may have no means of knowledge. This appears to me to be without precedent, and contrary to principle.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

**LORD M'LAREN.**—It is unnecessary that I should recapitulate the facts on which this interesting question of property law arises. The subjects passed by title to three brothers successively, John, James, and William Hamilton. John is the person by whom a casualty was last paid to the superior. A casualty is admittedly due to the superior by William, and the entry is untaxed. The question is, whether William is to be treated as a person who has entered as the heir of one of his brothers, or whether he is to be treated as a singular successor or purchaser, and therefore liable in payment of a sum equal to a year's rent of the subjects.

1. There appears to be a preliminary question which is raised by the minutes of debate, and is considered in some of the opinions of my colleagues. I mean the question, Who is the "predecessor" or person in consequence of whose death this claim of casualty arises? John conveyed the subjects to James by deed *inter vivos*, and thereafter died survived by James. If the superior had

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I think, however, that the facts of the case of *Ferrier's Trustees v. Bayley* would have raised this question, but I am equally clear that the question was not raised or decided, probably because it occurred before the recent case of *Mackintosh v. Mackintosh*.

But it is said that a casualty became due in 1874 for the implied entry of James, that a new investiture necessarily came into existence with this implied entry, that this new investiture required to be enfranchised by payment of a composition, that the superior was precluded from demanding payment by a clause in the statute until the death of the last entered vassal, John, in 1877, but that he was now entitled to demand payment of it.

I do not, however, think that a casualty became due for the implied entry of James in 1874. The statute does not say so. But I suppose it is inferred from the fact that, as the law previously stood, if a vassal applied to the superior for a new investiture the superior was not bound to grant it, except upon payment of a casualty, even although the lands were not in non-entry. This, however, was an entirely optional proceeding on the part of the vassal, who chose to pay for a new investiture, and I do not think that it is to be necessarily inferred from it that a casualty is due for an implied entry.

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I think, accordingly, that when the statute enacted that the superior should not be entitled to demand a casualty sooner than he could by the law prior to the Act, the intention was not to postpone payment merely of a casualty, but to leave the parties on the same footing as before the Act when a demand for a casualty was made.

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tor and payment against James for payment of a casualty, it must have been directed against him as successor to John. But James undoubtedly at that time—John having died without children—would have been the heir under John's investiture, and so liable in relief-duty only. If John had left children James would not have been heir, and would have paid composition, just as he would have done before the Act. I do not think that it was the intention of the statute, that when a vassal conveyed the lands to an heir-presumptive, a new investiture should be created. It remained to be seen when the demand for a casualty was made, whether that was so or not. If it then appeared that the vassal was heir under the old investiture, no new investiture was created.

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1. There appears to be a preliminary question which is raised by the minutes of debate, and is considered in some of the opinions of my colleagues. I mean the question, Who is the "predecessor" or person in consequence of whose death this claim of casualty arises? John conveyed the subjects to James by deed *inter vivos*, and thereafter died survived by James. If the superior had



**No. 185.** been attending to his rights, he would have obtained a casualty from James as successor to John, John being the "predecessor" in the sense explained. Then  
**July 18, 1889.** on the death of James survived by William, the superior would be in a position  
**Stuart v.** to claim a second casualty, in consequence of the death of William's immediate  
**Hamilton.** predecessor James. That casualty would undoubtedly be the casualty exigible from an heir. In point of fact, the superior did not exact a casualty from James, and I find from the printed papers that Lord Trayner is of opinion that this omission makes no difference in the result. Lord Trayner points out that according to the conception of the statute (37 and 38 Vict. cap. 94), illustrated by the schedule, the claim to a casualty is always founded on the death of the last entered vassal, who in this case is James Hamilton. If this be the correct interpretation of the statute, then the superior's omission to exact a casualty from James would not have the effect of increasing the burden to William, who would of course be entitled to an entry as heir of James, which he is.

The Lord Ordinary, again, has held that the summons is rightly laid in concluding for a casualty as accruing in consequence of the death of John Hamilton, although his Lordship has not sustained the claim to the extent of the duty payable by an heir.

The result of my consideration of this question is that I agree with the Lord Ordinary in holding John to be the predecessor through whose death the lands are to be treated as if in non-entry. It is undoubtedly the general intent of the statutory enactments that the obligations of the vassal to the superior are to be as far as possible unchanged by the operation of the statute. The form of an entry with the superior is abolished, and the feudal relation is changed to a species of freehold tenure, in which every person is held to be entered by the mere act of taking seisin or real possession of the lands. But for the preservation of the superior's rights, the statute has introduced what may be termed a fictitious process of non-entry, in which it is set forth that a casualty has accrued to the superior in consequence of the death of someone, and that until such casualty be paid the rents and profits of the subject are to pertain to the superior. Under the feudal law, the person whose death caused the lands to fall into the state of non-entry was the last entered vassal; that is, the person who had last paid a casualty, and not necessarily the person who last died in the possession of the lands.

It might very well happen in the contingencies of life that an entered vassal would survive more than one of the successive disponees deriving right from him. But so long as the entered vassal survived, his mere existence was sufficient to maintain the feudal relation with the superior, notwithstanding that the vassal had parted with the substance of his interest in the lands. To what do these observations tend? That under the new process, as under the old, there must be one definite way of ascertaining who is the predecessor on whose death a casualty accrues; either he must be always in all cases the person who last paid the entry-duty, or he must be in all cases the person who last died infeft. The second alternative is plainly untenable, because the person who last paid the entry-duty may survive the person who last died infeft, and in such a case the superior's claim does not emerge. I therefore come to the conclusion that the new statutory action for recovery of a casualty follows strictly the analogy of the old action of non-entry, and that in this case the summons correctly libels that a casualty has become due in consequence of the death of John Hamilton of Greenbank.

I now pass to the main question, which in my apprehension is to be solved by the same criterion which I have proposed to apply to the question already considered.

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2. I conceive that for the purpose of enforcing the superior's pecuniary rights, and for no other purpose, the statute has authorised a form of action founded on a fictitious state of non-entry, in which the claim of casualty is to be made effectual in the same manner and to the same effect as if the lands were actually in non-entry. Such, I apprehend, is the true interpretation of these words,—“No implied entry shall be pleadable in defence against such action.” These words are clear and intelligible on the hypothesis that the lands are to be treated as if in non-entry (although not really so), for the purpose of explicating the superior's rights. The alternative construction is, That no implied entry shall be pleadable to the effect of limiting the casualties payable to the superior; but that an implied entry may be pleaded to the effect of extending these claims. This seems to me to be a very forced construction; and it is also open to objection on the ground that it supposes the Legislature to have contemplated a compulsory variation of the contract between superior and vassal. I think therefore that this construction is to be rejected. The hypothesis of the statutory action is that the defender is unentered (because the summons sets forth the death of C, “the vassal last vest and seised in all and whole the lands of X”), and while this hypothesis is contrary to the facts of the case, the defender is not allowed to contradict it. It was not necessary to say that the pursuer should not contradict it, because it is the pursuer's statement, and is indeed the condition of his claim, that the lands are to be treated as in non-entry. That being so, neither party is in a position to found on any implied entry, and the case is to be determined in all respects as if the defender was unentered. I do not conceive that the construction requires any aid from equitable consideration, but it is a construction that does not suffer from any equitable test that may be applied to it, because it gives the superior his due—that is, the sum which he is entitled to receive according to the original charter or feu-contract.

I would here interpose an observation which may possibly tend to remove one of the difficulties which have weighed with some of my colleagues—I mean the difficulty of getting over what is termed the new investiture of James when James Hamilton became entered by force of the statute. My observation on this is, that in strictness there are no longer any investitures, and therefore the distinction peculiar to our feudal law between a new investiture and a mere renewal of the investiture has no longer a place in our legal system. I think that in Scotland all property is now enfranchised or made freehold by the mere act of taking seisin or real possession, and that the statutory entry is not a thing substituted for investiture, but is its virtual abolition, under reservation of course of the superior's pecuniary rights.

In applying the principle I have indicated to the facts of the case, I have only to consider what would be the casualty due by William Hamilton in consequence of the death of John, supposing that the implied entry of the statute were non-existent. As the implied entry is not pleadable in an action of this nature, I think it must be treated as non-existent. In that case the lands are to be held as being in non-entry. Now, as William combines the characters of heir and singular successor, he is entitled to take the lands out of the hypothetical state of non-entry, just as he might have taken them out of actual non-entry, by payment of the relief-duties exigible from heirs. Indeed, the decisions

**No. 185.** go further, because, supposing an entry were to be taken, William would be entitled to be entered as a singular successor on the terms appropriate to heirs.  
**July 18, 1889.** Under no circumstances, and in no state of the title, could a *de facto* heir be  
**Stuart v.** required (according to the feudal law) to compound as a singular successor,  
**Hamilton.** although in certain cases which are not *hujus loci* the superior might object to the introduction of a stranger into the destination unless composition was paid for or in respect of the insertion of his name. My opinion therefore is that although the defender was entered by the statute as a disponee of James Hamilton, who again was entered by the statute as a disponee of John, neither of these implied entries are to be regarded in this question, and so the defender is only liable for the casualty payable by an heir.

III. I conclude by stating in a word how I conceive the Lord Ordinary's interlocutor stands with reference to previous decisions. I have not been able to find any material distinction in the *species facti* between *Ferrier's Trustees v. Bayley* and the present case. But as the present remit to the consulted Judges is made by the Division of the Court in which the case of *Ferrier's Trustees* was heard and determined, I suppose that their Lordships desire our independent opinions on the questions of law argued in the minutes of debate. The Conveyancing (Scotland) Act has opened a new chapter of property law, and after the lapse of fifteen years, during which a great number of points have come up for decision, it was perhaps considered desirable that the present question, which is one of general importance, should be considered by a Court differently constituted, and who would not be absolutely bound by the opinions, however weighty, of a numerically smaller body of Judges.

With regard to the series of cases, including *Rossmore's Trustees*, with which I have a long-standing acquaintance, and *Lamont v. Rankin*, which went to the House of Lords, I conceive that the Lord Ordinary's interlocutor is not in conflict with them. These cases only settled this principle, that where the proposed limitation of the casualty to a duplicand feu-duty depended on the taking of an entry—that is, on doing something which could no longer be done—the defender must fail. In the present case, the defender is entitled, as I think, to the privilege of an heir irrespective of the form of the title in his person.

**LORD KINNEAR.**—I remain of the opinion to which I gave effect in the interlocutor under review, but the special point of the case is more clearly brought out in the opinion of Lord Adam, in which I concur.

I do not think that there can be any serious question as to the state of the feudal title. But in consequence of the Statute of 1874 the superior's right to casualties no longer depends upon the actual state of the title. The general purpose of the enactments which require consideration appears to be to abolish the necessity for the superior's intervention in order to complete the title of heirs and disponees, and at the same time to leave the pecuniary rights and liabilities of superior and vassal as far as possible untouched by the changes introduced into the system of conveyancing. In saying this, I of course accept as perfectly sound and authoritative the opinions which were expressed in the House of Lords in *Lamont v. Rankin*. It was there pointed out that the Legislature had expressed no intention such as had been assumed by the minority of the Judges “to leave payments to a superior exactly as they were, and not to give him in any case a title to a more valuable casualty than he would have had if the Act had not passed.” But the particular case, with reference to which it was held

that no such intention had been expressed, was that of a singular successor, who, but for the Act, might have escaped composition by procuring the entry of the disponent's heir. On the general question Lord Blackburn says—"I agree that it was not the object of the Act to produce any change in the pecuniary relations between superior and vassal; and if I could see any reasonable construction of the language used by the Legislature which would avoid doing so, I should feel inclined to adopt that construction. But I do not think it would be justifiable to interpolate a scheme for this purpose not expressed by the Legislature." His Lordship therefore held that the heir of an extinguished mid-superiority could not be put forward to protect the actual proprietor of the lands. But although the Act contains no such scheme as was required to support the argument in *Lamont v. Rankin*, it does contain provisions for maintaining unchanged the pecuniary relations of the superior and his actual vassal, not by enabling the estate to be taken up by a person who has no right to it, but by fixing the conditions on which a claim for casualty may be made against the true proprietor. It is material therefore to inquire what the rights of the parties would have been if the Act had not passed.

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The facts are simple. John Hamilton the second of Greenbank was the superior's vassal in the lands. But he had conveyed the *dominium utile* to his brother James Dunlop Hamilton, who was infeft in a subaltern fee as the vassal of John. James Dunlop Hamilton's subaltern right might be converted at any time by the superior's confirmation of his infeftment into a holding of and under the superior. But if the Act had not passed it is not probable that that step would ever have been taken. There was no reason for displacing John from the immediate fee during his lifetime; and when he died in 1877 his brother James was his heir-at-law, and in the ordinary course of things he would have completed his title in that character, entered with the superior as his brother John's heir, and thereafter consolidated the *dominium utile* with the mid-superiority. By completing his title in this way he would not have subjected himself to a claim for composition, but would have entered as heir for payment of relief-duty only, and when he died in 1886 the defender would have entered on the same condition as the heir of the investiture, because nothing would have happened to disturb the investiture created by the infeftment of John Hamilton of Rodgerton, the defender's grandfather. John Hamilton the first, John Hamilton the second, James Dunlop Hamilton, and the defender would, each in his turn, have entered as heir of that investiture.

The defender's position would have been just the same if James, as might have happened, had continued to possess on his subaltern infeftment after John's death, and had made up no title to the mid-superiority. The defender in that event, as heir of John, might have taken up the estate left in his *hereditas jacens*, taken infeftment on his special service, and so entered as heir.

It would have made no difference to the defender if James had applied for confirmation. He could not have compelled an entry in that manner without payment of composition during his brother John's life, because as he was only presumptive heir a conveyance to him was not a mere propelling of the succession. But, on the other hand, he could not have been compelled to enter until the death of John, or to enter at any time in any other character than that of heir. If he had completed his title on John's death by confirmation of his own infeftment he would not have been liable for composition, because he was in fact the heir of the last vassal, and might have entered in that character if he

No. 185. had thought fit. But whether he had been required to pay composition or not, and whether his confirmation had been obtained before or after the death of his brother, the defender would have been the heir of an enfranchised investiture, and would, when the succession opened, have been entered as such for relief. In whatever manner the title of James Dunlop Hamilton had been completed, therefore, the defender could never have been made liable for composition under the old law.

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The question therefore is, whether the statute gives the superior a right which the prior law would not have given him?

It cannot be disputed that immediately upon the passing of the Act James Dunlop Hamilton, as proprietor infest, was entered by force of its provisions with the pursuer as his immediate lawful superior; and as a necessary consequence of his entry the mid-superiority which had been left in the person of John Hamilton was extinguished. On John Hamilton's death therefore his heir, if he had left a nearer heir than James, could not have taken up his estate of mid-superiority so as to interpose a vassal between the superior and James or his successor in the *dominium utile*. This is decided in *Lamont v. Rankin*. It was equally impossible for James himself to take up the mid-superiority, because he was already entered in the full fee. This is decided in *Ferrier v. Bayley*. But the inference which it is proposed to draw from this admitted state of the title appears to me to be a mere assumption, altogether unsupported by any provision of the statute. It is assumed that because James Dunlop Hamilton was entered by the passing of the Act to the same effect as if the superior had confirmed his infestment, he therefore became liable, in consequence of his entry, for the same casualty which he would have required to pay under the former law if he had applied for confirmation during his brother John's lifetime. It is said that the right to enforce payment may have been postponed by the provision that the superior shall not demand a casualty sooner than he could by the former law have required a new vassal to enter, but the assumption is that nevertheless the liability attached immediately by the operation of the statute upon the title as it stood in 1874. But the statute creates no such liability as a consequence of the implied entry. It dispenses with the necessity for the superior's intervention in order to complete the title of an heir or a disponee by entry, and the abolition of the superior's right to enter heirs or disponees by his own writ or charter and not otherwise carries with it of necessity the abolition of his right to exact payment of relief-duty or composition as the condition of his granting an entry. His pecuniary rights are saved as far as possible by other provisions. But the Act gives him no right, either in express words or by implication, to exact a casualty in respect of every entry. If such a right had been conferred it would have given a most unreasonable advantage to the superior, because it would have given him right to a year's rent upon every transmission of the property, whether the lands were in non-entry or not. But the entry implied by the registration of a conveyance during the lifetime of an existing vassal does not of itself give right to a casualty, and there may be many such entries for which no casualty can ever be demanded. This appears to me to be the necessary consequence of the provisions for maintaining the pecuniary rights and liabilities of superior and vassal.

The provisions for this purpose are in subsections 3 and 4 of section 4. But subsection 3 has no application to the present case. That subsection provides that the "implied entry shall not prejudice or affect the right or title of any

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superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry"; and it goes on to reserve to the superior all rights and remedies competent to him under the existing law for recovering such feu-duties or casualties subject to the proviso already mentioned. But there was no casualty due or exigible in respect of the lands at or prior to the date of James Dunlop Hamilton's entry, and the superior had no right or remedy for recovering casualties which could have been put in force at that date. This particular enactment therefore has no bearing on the case, and the rights of the parties to this action must be regulated by the fourth subsection, and not by the third. But the fourth subsection gives no right to any casualty except when the lands have come into the position in which but for the passing of the Act the superior would have been entitled to sue a declarator of non-entry. Now, it is certain that the superior would not have been entitled under the prior law to sue a declarator of non-entry so long as John Hamilton continued in life. The right to a casualty therefore did not accrue until John Hamilton's death, and accordingly I take it to be clear that if a change of ownership had taken place before John Hamilton died the only casualty exigible in consequence of his death would then have been payable by the new proprietor as his successor in the lands, and no casualty would ever have been exigible from anybody in respect of James Dunlop Hamilton's entry. There might indeed have been many changes of ownership between the entry of James and the death of John, and every new owner in succession might have been entered by implication of the statute, and yet none of them would have been liable for a casualty except the owner in right of the lands at the date of John's death. The statutory action could have been brought against him alone, and the intermediate proprietors would be in no way affected by the only remedy which the action affords. For the only remedy is to enter into possession, and draw the rents until the casualty is paid.

The importance of this consideration is, that when the right accrued, James Dunlop Hamilton was the heir-at-law of his brother John, and if he had been required, as he might have been, to pay a casualty as John's successor in the lands he would therefore have been liable for relief-duty only, and not for composition. This appears to me to follow from the well-settled rule of the former law that the casualty must be determined by the character of the applicant for entry, and not by the form of his title. There are many decisions to this effect. But that which appears to be most directly in point is the *Marquess of Hastings v. Oswald*, 21 D. 871, because, except for the implied entry, it is indistinguishable from the present. James Oswald held the lands of Auchencruive by an entailed title immediately of and under the Marquess of Hastings. In 1849 he disentailed with the consent of the three next heirs, none of whom was heir-apparent, and thereafter, in performance of the contract for disentail, he executed a new entail in favour of his nephew Alexander Oswald, as institute, and a series of heirs. This was not a mere propelling of the succession, because (as appears from the session papers) the lands were conveyed to Alexander Oswald, with entry as at the date of the conveyance in October 1849, and Alexander, being a nephew of the disponent, might of course have been excluded from the succession under the former investiture by the birth of an heir of the body. When the fee became vacant on the death of James Oswald in 1853 the superior maintained that Alexander Oswald held by a singular title, because his right stood upon a conveyance *inter vivos* executed in performance of a contract by

No. 185. the last vassal. But the Court held that he was entitled to entry by a charter of confirmation for the same payment as if he had entered by service as heir of the old investiture, because although his right to the lands stood upon a conveyance *inter vivos* he was in fact the heir of the vassal last vest and seised in the fee. The case was complicated with another question, because the subsequent destination under the new entail differed from that of the old entail, and it was accordingly found that "a reservation must be admitted into the charter of confirmation by which the new investiture is established reserving to the superior his right to claim a year's rent upon the entry of the first substitute who shall not be the then existing heir under the former investiture, and to the vassal any legal defence against such claim." This part of the judgment has a material bearing on the argument. But the point of importance at present is that the casualty was determined by the new vassal's personal character as heir of the old destination, and not by the title under which alone he could hold the lands. On the same reasoning James Dunlop Hamilton would have been entitled, if the Act of 1874 had not passed, to demand a confirmation of his existing infestment for payment of relief-duty, because although he held the lands upon a singular title he was in fact the heir of the last investiture. The only difference is that there would have been no occasion to make any reservation in the charter, because the confirmation after John's death of his conveyance to James, and of the infestment following upon it, would have made no change whatever in the investiture. It was a mere renewal of the old investiture, because no one could take up the estate in succession to James as his heir who was not also the heir of the old investiture.

The question then is, whether James Hamilton had lost the right to have the benefit of his confirmation for payment of relief by reason of his implied entry under the statute? I think he had not, because the statute subjects the successor of a deceased vassal to no other casualty than would have been exigible under the old law if such successor had been required to enter at the date when the right accrues. It is true that at that date James Hamilton could not have made up a title by special service as heir, because he had been already entered by the confirmation of his predecessor's conveyance; and it is equally true that under the former law the superior could not be compelled to enter his last vassal's successor in the character of heir unless his right were judicially ascertained by a special service. But the point is, that although the successor could not enter as heir by reason of the form of his title he was still entitled to the benefit of his character as heir, and might demand an entry by charter of resignation or charter of confirmation for payment of relief, and it was decided in *Mackintosh v. Mackintosh* that a successor who has been already entered by the implied confirmation of his ancestor's conveyance is still entitled to the same benefit if he be in fact the heir at the time when the right to casualty accrues. This decision appears to me to be directly applicable to the case of James Dunlop Hamilton. I agree that it would not be in point if the right to composition accrued at the date when the Act came into force in consequence of the implied confirmation of his infestment, or, in other words, if that implied entry were the sole ground of the pursuer's claim, but, for the reason already given, I think this is a false assumption. The right does not arise from the implied entry, but from the subsequent death of the last entered vassal. In this respect the case of *Mackintosh v. Mackintosh* resembles the present. The only effect of the implied entry in the one case, as in the other, is to prevent the new vassal from entering by

special service. But that does not prevent him from saying that he is in fact the heir. The principle which I take to be recognised in the case of *Mackintosh* is, that the casualty payable by a successor already entered by force of the statute is to be fixed by the same rule ~~as if he were demanding a charter at the time when the action for casualty is raised.~~ No. 185.  
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But, apart from that decision, I think the same conclusions follow from the conditions which the statute attaches to the superior's right of action. The case in which alone the action can be brought is when the superior would, "but for the Act, be entitled to sue a declarator of non-entry against the successor of the vassal in the lands"; and it is to be brought "against such successor whether he shall be infeft or not." It may be proper to observe that the Act seems to contemplate the possibility of a declarator of non-entry being sustained by reason of special stipulations in the feu-contract, because the prescribed form of summons contains alternatives by which it might be adapted to such cases if they occurred, and which are inapplicable to the normal case of non-entry by death. But the only case which it is necessary to consider for the present purpose is that of a feu-right conceived in the ordinary terms. And there can be no question as to the effect of the provision just cited in its application to such a right. It requires the superior to shew as the condition of his right of action, first, that the vassal last vest and seised in the lands has died, because that is the only event which could have brought the lands into non-entry; and secondly, that his successor, "whether by succession or by conveyance," still remains unentered, because that is the condition upon which under the former law he could have sued a declarator of non-entry. The prescribed form of summons is exactly in accordance with the substantive enactment, because it requires the pursuer to set forth that the casualty has become due "in consequence of the death of the vassal last vest and seised in the lands." Now, that is an assertion which could not be made if the implied entry were to be taken into account, because the vassal last vest and seised would in that case be either the defender in the action or any predecessor who had obtained such entry, and therefore, as a necessary complement of the provision which requires the superior to treat the vassal on whose death the right accrues as the last entered vassal, it is provided that "no implied entry shall be pleadable in defence against the action." The superior therefore is to bring his action on the assumption that no entry has taken place since that of the vassal whose death he alleges as the ground of his right, and the defender is forbidden to traverse that assumption by alleging an implied entry. But if the implied entry is to be disregarded for the purposes of the action, the liability for a casualty must be determined on the assumption that the last entered vassal's successor still requires to obtain an entry, or, in other words, he is to pay for the entry which the statute has given him on the same footing as if he were demanding a charter from the superior in answer to a declarator of non-entry. The question therefore must be whether, if he were not entered at the date of the action, he could have demanded a charter without paying composition as for a new investiture.

If the superior had brought such an action in 1877 it does not appear to me James Dunlop Hamilton's right to demand a charter without composition could have been disputed. The pursuer would have alleged, as he does now, that the casualty had become due in consequence of the death of John Hamilton, who was the last entered vassal. The answer would have been that the defender was heir of line of this last vassal, and had therefore right to obtain a charter con-



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firming the titles on which he already held the lands for payment of relief, and the superior could not have maintained that the implied entry had excluded that right without admitting that he had been already entered, and so contradicting his own ground of action. It has been suggested that he might nevertheless found upon the title of the defender, who could not dispute his own title, and that that title would have disclosed a change of the investiture. That is just saying in other words that John Hamilton was not the last entered vassal, because there can be no change of investiture until a new charter has been obtained from the superior in favour of strangers to the old investiture. But the suggestion is fallacious, because it confuses between the title upon which the vassal may be supposed to have entered, or to have right to enter, and the entry itself. The pursuer's argument indeed appears to me to be vitiated throughout by this inaccurate use of the terms "entry" and "investiture." It is elementary, but it has not perhaps been sufficiently kept in view, that the entry of a vassal who has been infeft upon the precept of a prior vassal, and not directly upon the precept of the superior, means nothing but the superior's recognition of the infeftment. The investiture in like manner is the title and infeftment *plus* the recognition. It would not therefore have occurred to me to doubt that either party might found upon the vassal's title notwithstanding the prohibition against pleading the implied entry. It must be permissible to found upon the title for the purpose of ascertaining the successor in the lands, against whom alone the action lies. But what cannot be pleaded is not the title, but the recognition of the title, which would otherwise have been implied under subsection 2. In other words, the statute says that it shall not be maintained that the registration of a conveyance during the lifetime of an entered vassal has operated as a recognition of the dispositive by the superior or as a change of the investiture. It cannot, of course, have changed the investiture if it is not a recognition of the dispositive, because it is elementary and fundamental that an investiture once recognised cannot be displaced except by a return of the feu to the superior, or by the superior's recognition of a stranger.

If this action had been brought therefore in 1877 James Hamilton's title would have disclosed no change whatever in the investiture. It would have shewn only that James Hamilton, who was the heir of the investiture, had been already entered by a charter by progress, which, if it had not been implied by the statute, he would have been entitled to obtain for relief. The implied writ of confirmation would no doubt have altered the investiture if it had enabled James Hamilton's heirs to enter for relief, although they were not also the heirs of John, and therefore could not have come in as heirs under the original grant. But the implied entry of James Hamilton could not prejudice the superior's right in this way, because it could not be used to enable a stranger to enter as heir, or to enable James Hamilton himself to escape liability for composition if he were not the heir when the right to a casualty accrued.

This is a material difference between the implied entry under the statute and the entry obtained under the former law by actual charter. By the old law the casualty payable for the entry of a new vassal was necessarily fixed at the date of entry, because the entry discharged the claim. By the new law it is fixed when the right accrues, or when the action is brought, because the implied entry does not affect the claim. But by the former law the superior could not exact a year's rent as the price of a new charter, unless he thereby admitted strangers to the feu, from whom he would have no other opportunity of exacting compo-

tion. The second branch of the case of *Hastings v. Oswald* shews that even when a new charter altered the destination the superior would not be entitled to composition on granting the charter if his right to demand it when a stranger substitute presented himself could be effectually reserved. On similar grounds it appears to me that he cannot exact a year's rent, because of its being uncertain at the date of the implied entry whether the title thereby confirmed would operate in favour of an heir or of a stranger at the date when the casualty should become due. The implied entry is not a recognition by the superior of a new vassal and his heirs, who may be strangers to the existing investiture, and therefore he is not entitled to be paid for it as if it involved such recognition. The pursuer's right to casualties remained after James Hamilton's entry exactly as it was before—a right to exact payment of a casualty on John's death, on the footing that his investiture was still the rule of the feu, and the successor's liability must be determined upon that footing, irrespective of the implied entry. If John had left heirs of his body, James would not have been his heir, and must have paid composition at his death. But since he was in fact the heir, he would have been liable only for relief on the same ground on which he could then have obtained a charter of confirmation for payment of relief under the former law.

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If James Hamilton would have been liable only for relief, it follows that the defender's liability is also for relief, because he is the heir both of James and of John, and might therefore have obtained a confirmation of the conveyances and infestments by which he holds the lands without paying a year's rent for it. But the form of the action against him brings out with remarkable clearness the contradiction which appears to me to make the pursuer's case untenable. He did not think proper to make any claim for casualty during James Hamilton's life, and in stating the claim against the present defender he had therefore to consider whether the casualty became due on the death of John or on the death of James. As the action is laid he founds his claim on the death of John as the last vassal. And this view may probably be supported on the ground that although James was entered by force of the statute he paid no casualty, and therefore that there is nothing to prevent the pursuer from alleging that he would under the old law have been entitled to sue a declarator of non-entry in consequence of the death of John. But then the pursuer's case must be that John Hamilton was the last entered vassal, or in other words, that nothing has occurred to disturb the investiture since the date of his entry, and accordingly he alleges as the ground of his action that a casualty has become due in consequence of the death of John Hamilton, "who was the vassal last vest and seised in the lands." This is said to be a technical and immaterial point. I venture to think, on the contrary, that it is of vital importance, because the superior has no action unless he can shew that but for the Act he would be entitled to sue a declarator of non-entry. Now, the only way in which the lands could have fallen into non-entry before the passing of this Act was by the death of the vassal last vest and seised as of fee. The foundation of the pursuer's action, therefore, is the averment that John Hamilton was the vassal last vest and seised in the lands. But that implies an averment that no other vassal has entered since his death, or, to use the language of the old law, to which the pursuer is required by the statute to appeal, that the fee is still vacant in consequence of his death. If these propositions cannot be substantiated the action fails. But then it follows that the investiture established by the original charter to John Hamilton of

**No. 185.** Rodgerton has not been changed for the purpose of this action. The superior's right to casualty, and the corresponding liability of the vassal, must be measured by the same investiture. And when the pursuer avers that John Hamilton was the last entered vassal, the casualty payable must of necessity be determined by the relation of his successor in the lands to his investiture, because that is the last investiture according to the pursuer's own statement. The pursuer cannot be permitted to contradict his own ground of action, and the condition of his action is that he has recognised no new vassal, or in other words, that he has made no change in the investiture since the entry of John Hamilton. He cannot be permitted to say that nobody has been recognised since John Hamilton, and therefore that John Hamilton's heirs are the only persons enfranchised, and at the same time to say that James was recognised during John's lifetime, and therefore that John's heir must pay composition. If the superior's right is to depend on the assumption, which the statute requires to be made, that John Hamilton was the last entered vassal, it appears to me to follow that the vassal's liability must be determined upon the same assumption. I cannot suppose that this admits of argument. The right and the liability must necessarily be reciprocal. These are not two different or separable things, but only two aspects of the same obligation. If the statute provides that the implied entry shall not be considered as a recognition so as to affect the liability of the vassal it follows of necessity that it shall not be considered as a change of the investiture so as to alter the right of the superior.

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But if this reasoning be erroneous, and the old investiture has been extinguished by the entry of James Dunlop Hamilton, the defender is the heir of the new investiture, and in that character is liable only for relief. It is of no consequence whether James paid a casualty or not if he is to be considered as an entered vassal for the purpose of the action. For it is decided that no casualty exigible from James can be demanded from the defender, and I do not understand that there is any difference of opinion upon this point. If the pursuer chose to waive his claim against an entered vassal he must submit to the loss. He cannot throw it upon a succeeding vassal.

The pursuer is in this dilemma. Either the investiture has not been changed since the entry of John, and in that case the defender is liable only for relief, because he is heir of the old investiture, or else it has been changed by the entry of James, and in that case the defender is still liable for relief only, because he is the heir of the new investiture. The pursuer may possibly be entitled to treat the entry of James as an alteration of the investiture. But if he so treats it he must accept the necessary legal consequence of that position. He cannot be permitted to maintain two contradictory propositions at one and the same time, and to say that James was duly entered during the lifetime of John, and therefore that the defender cannot have the benefit of his character as John's heir, and at the same time to say that James was not duly entered, and therefore that the defender takes no benefit from his character as heir of James.

The sounder view appears to me to be that the action lies against the defender as John's successor, and that his liability must be determined by his right to obtain a confirmation of the series of titles on which he holds the lands on the assumption that there has been no entry with the superior since that of John Hamilton. But if he were now in the position of demanding a charter he would be entitled to obtain it without payment, and his liability for the implied charter which the statute has given him must be determined by the same rule.

The effect of the whole series of enactments appears to me to be that the infeftment of a disponee during the lifetime of an entered vassal shall have the same feudal effect as a charter of confirmation under the former law ; that no casualty shall be exigible in respect of this implied entry until the lands fall into the position which under the former law would have been non-entry ; that when this event happens a casualty is to be exigible from the person who is at the time the last vassal's successor in the lands, and from no other person ; and lastly, that his successor shall be liable for the same casualty as he would have been required to pay by the former law if he had been demanding an entry at the date when the casualty is demanded upon the titles on which he then holds the lands. I do not think this view inconsistent with the decisions. What I take to have been decided is, that the actual successor in the lands must pay a casualty according to his own liability, because when he has once been entered by the registration of a conveyance in his favour he cannot put the last vassal's heir into his place. The ground of judgment is thus expressed by the Lord Chancellor in *Lamont v. Rankin*,—"The appellants are by the Act deemed and held to be duly entered, and if so, there is no vacant fief into which the heir could enter." I think it quite in conformity with the law so laid down to hold that the actual successor, who alone holds the fee, must pay the same casualty as he would have paid if instead of being entered by implication he had been required to enter under the former law. Therefore, if the successor is in fact the heir of the last vassal, when the right arises he shall pay relief. If he is a stranger, he must pay composition. If it is proved or admitted that he is in fact the heir, the question whether he can still make up a title in that character does not appear to arise under the statutory action, for the action does not, like the old declarator of non-entry, require the defender to make up a title or forfeit the lands. It merely requires that he shall pay a casualty. The only previous case in which the point now to be determined could have been raised was that of *Ferrier's Trustees v. Bayley*. But in that case it was not raised, and therefore it was not decided. The decision was that an implied entry as disponee excluded a subsequent entry by the same person as heir of an extinguished mid-superiority. But no question was raised as to the amount of casualty payable, if it were decided that the title could not be completed otherwise than by the implied entry. But if *Ferrier's Trustees v. Bayley* is to be taken as a decision in point it is not binding upon the whole Court, and ought not in my opinion to be followed.

LORD TRAYNER.—Applying the provisions of the Act of 1874 to the admitted facts of the present case, I think it clear (1) that James Hamilton was entered with his superior by force of statute in 1874 ; (2) that a new investiture was thus created, whereby the prior investiture was evacuated ; and (3) that in 1877, on the death of John Hamilton, a casualty became due to the superior, and could then have been exacted from James. Granting these propositions, it follows that the defender's claim to be entered as heir to John Hamilton cannot be sustained. After the completion of James's right by implied entry in 1874 there was no right left in John to which the defender could have served. The decision in the case of *Ferrier's Trustees* appears to me conclusive of this part of the case.

It is in accordance with the pursuer's argument to hold, as I do, that the result of the implied entry of James was to operate a change of the investiture, and to create a new investiture excluding the heirs of John Hamilton. But I

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have some difficulty in seeing how the pursuer can maintain that argument, and at the same time maintain the claim as put forward in his summons. The pursuer concludes for decree against the defender for a "casualty, being one year's rent of the lands," which has become due "in consequence of the death of John Hamilton . . . who was the vassal last vest and seised," &c. How could John Hamilton be the vassal last vest and seised when James became the vassal vest and seised in 1874? The pursuer explains this by saying that he had to follow the form of summons provided by the Act. But the schedule appended to the Act does not require him to state what is not the fact; it gives a form no doubt, which is to be followed "as nearly as may be"—but not to be followed, as I have said, irrespective of the conditions of the case. The importance, I suppose, of setting forth John as the last vassal is that the defender cannot bring himself as an heir within the investiture as it stood in John, and if not an heir, then he is necessarily a singular successor liable in composition. If the summons had set forth James as the vassal last vest and seised, the defender being admittedly his heir, it would have followed that he was liable only in relief. But turning from the conclusions of the summons to the averments in the condescendence, I find the facts to be thus stated (conds 4 and 5)—That James, in respect of his implied entry in 1874, became subject to payment of the casualty of composition "as a singular successor of" John, "when it should become payable on the death of the latter"; that the "said casualty" became exigible in 1877, when John died; that James died in 1886 without having made payment of "the said casualty"; that the defender is infeft in the lands in question in respect of a general disposition and settlement in his favour granted by James, and that in virtue of his infeftment he is liable to the pursuer "in payment of the casualty which had become due as aforesaid." That is, in a word, that as James did not pay the casualty exigible from him in 1877, the defender is now bound to pay it—not to pay a casualty in respect of his own entry in 1886, but to pay a casualty due by and exigible from his predecessor in the lands. The decision in *Mounsey v. Palmer* has settled that the defender is not liable for any casualty except that exigible in respect of his own entry, and the pursuer's claim as laid cannot in my opinion be sustained.

But apart from this, and assuming the present claim to be relevantly stated as a claim for the casualty due on the defender's own entry, the question is, what is the extent of the defender's liability—is it for composition or relief? That depends upon the character in which the defender stands to the person last entered, and it is admitted that the defender is the heir-at-law of James. It therefore appears to me that as heir of James, who was the vassal last vest and seised, the defender is liable in relief-duty only. The answer which is made to this, however, is, that the defender is not the heir of an enfranchised investiture recognised by the superior, James not having paid the composition exigible from him in 1877. I think there is a fallacy involved in this answer. (1) There is no recognition by the superior of James's entry required. It is recognised by the statute, and the superior cannot disregard it. (2) It is not payment that enfranchises an investiture, but the act of the superior admitting the vassal to his public holding. The act of the superior is essential; the payment may be called accidental. For a superior may, if he pleases, enfranchise an investiture without exacting any payment. He may, at his own pleasure, refuse to exact any payment; he may in a doubtful case accept relief-duty where he

thinks composition due; he may accept half the amount of the casualty as a compromise rather than go to law about a disputed casualty. No. 185.

In all cases it lies absolutely within the pleasure of the superior to renounce in whole or in part the pecuniary advantage he may be entitled to derive from a change of investiture. But whatever he may elect to do in reference to the payment due to himself the enfranchisement of the investiture is not thereby affected. The enfranchisement is complete when the superior has recognised the new investiture by granting his writ of confirmation, either on or without consideration. Now, that being so, how stands the investiture of 1874? James, by recording his infeftment, became entered with the superior "to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice" (Act of 1874, sec. 4, subsec. 2). It is not open to doubt that if under the old law—that is, as it stood prior to 1874—the superior had granted James a writ of confirmation, the investiture thereby created would have been enfranchised quite irrespective of what, if anything, had been paid for it. No conveyancer having that writ of confirmation in his hand would have asked on what consideration it had been granted. The fact of its being granted was the essential matter; the vassal under it was duly entered by its execution and delivery. But if the implied entry under the statute is to have all the effect of a writ of confirmation, then it must have the effect of enfranchising the investiture, and if that effect followed the investiture created by James's implied entry, then the defender, as heir of that investiture, owes the pursuer relief-duty and nothing more.

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There is this difference between the case of an entry by writ of confirmation granted under the former practice and the implied entry under the Act of 1874. The superior could formerly withhold his writ of confirmation until his casualty was paid; he has no such protection now, because the entry is completed by the vassal taking infeftment, an act which the superior cannot prevent or control. The statute, in view of this difference, provides that no implied entry shall be pleadable in answer to the superior's demand for a casualty—that is, as argued by the pursuer, "it is to be impossible for the vassal to avoid the claim by saying,—'I am already entered by force of the statute, and therefore no casualty on entry can possibly now be due by me.'" But this difference is only one affecting the mode in which the superior can make good or secure his pecuniary claim; it does not affect the legal consequences of the entry itself.

Again, if the payment of the casualty has anything to do with the question, which I think it has not, through whose fault is it that the casualty due on the entry of James has not been paid? That casualty was due in 1877, and then exigible. It was never demanded. Had the superior enforced his right the casualty would have been paid, and the defender would only have been liable on his entry in payment of relief. This will be conceded. Is the neglect of the superior to enforce his right to increase the burden on the defender? Suppose the feu-duty to be one penny Scots, and the yearly rental of the subjects £500, the defender will be liable for £500 (composition), or only one penny Scots (relief-duty), just as the superior enforces or neglects his rights. Surely that is not reasonable. If the superior suffers by his neglect, *sibi imputet*, the defender may justly claim to be dealt with as if the superior had done his duty by his own interests.

In my opinion the judgment of the Lord Ordinary is right. The defender is undoubtedly the heir of James, and succeeds to the lands in question as his

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I am of opinion that in the present case the defender is bound to pay composition and not relief-duty, for this reason, that on the passing of the Conveyancing Act, 1874, his author, James Dunlop Hamilton, was entered with the superior. The effect of that entry was not merely to evacuate the mid-superiority in the person of John Hamilton, second of Greenbank, and thus sweep away the old investiture, but also to make the vassal entered under the new investiture liable in a composition (he being a singular successor), although payment of it could not be demanded until the death of John Hamilton, second of Greenbank. In other words, I think that the amount of the casualty which would have been payable at the date of the implied entry had the vassal been then entered under the old law cannot be affected by any change of circumstances which may have taken place subsequently to infeftment, as, for instance in the present case, by the accident of the vassal from whom a casualty is demanded happening at the time when the demand is made to be heir of the vassal who last paid a casualty.

If it had been intended that the character in which the vassal should be held as entered, and the amount of the casualty to be paid should be determined as at the date of a casualty becoming due, it would have been enacted that on the death of the vassal who last paid a casualty the person then infeft in the lands should be held to be duly entered with the superior. Or it might have been provided that the superior should not on a casualty becoming due be entitled in respect of a prior implied entry to claim any other or higher casualty than he would have been entitled to had such implied entry not been previously taken. This would have suspended the effect of the implied entry as regarded the amount of the casualty as well as the time at which it might be demanded. In the view which I take of the statute, however, an implied entry takes immediate effect except in so far as it is otherwise expressly directed, and as no exception is made in regard to the amount of the casualty to be paid that must be taken to be the amount which would have been payable if demanded at the date of the implied entry.

The defender relies on the provision of the statute (Act, 1874, sec. 4, subsec. 4) that no implied entry shall be pleadable in defence against the superior's action for a casualty, and it is argued with much force that if an implied entry is not to be pleaded against the superior it should not be pleaded in his favour to the effect of enlarging his rights. The answer is, that while this provision is made in the superior's favour the converse is not enacted, and cannot, I think, be implied and read into the statute.

Again, it is said that the superior's rights will be enlarged if the pursuer's contention is sustained. This is true; but *Ferrier's Trustees v. Bayley* and *Rankin's Trustees v. Lamont* establish that this consideration is not of itself sufficient to override the fair construction of the statute. No doubt this is a harder case for the vassal than if he were seeking to put forward an heir who was not also proprietor of the lands, but the defender is not in a more favourable position, because the old investiture having been extinguished in consequence of James Dunlop Hamilton's implied entry he can only claim through the new investiture, which has not been enfranchised.

The facts of the case indeed are identical with those in *Ferrier's Trustees v. Bayley*. It may be that the defence here is rested on more plausible grounds, because it is not sought to revive an extinct mid-superiority. The defender, however, seeks to avail himself of the old investiture by founding on his relationship to the vassal whose mid-superiority was extinguished.

It is true that the form of the title is not conclusive, but the question turns No. 185.  
not upon the form of the title, but upon the character of the vassal at the time July 18, 1889.  
when the title is made up. If he is then heir of the existing investiture he Stuart v.  
will be dealt with as an heir; if his position is that of a stranger to it, he will Hamilton.  
be treated as a singular successor. In the case of *Mackintosh*, 13 R. 692, the  
vassal was at the date of the implied entry heir of the existing investiture, and  
might have demanded an entry as such. Again, in the older case of *M'Kenzie*,  
1777, the vassal, although he made up his title so as to comply with the pro-  
visions of the newly executed deed of entail, was heir of the existing or prior  
investiture, and was for that reason held entitled to be entered on payment of  
relief.

In the present case, however, when John Hamilton (2) died in 1877, James  
Dunlop Hamilton was already fully entered as a singular successor and could  
not have thereafter reverted to the old investiture. The defender is in no better  
position than his author. This case must be taken as if the question had arisen  
in 1877, and if James Dunlop Hamilton would then have been held to be a  
singular successor, the impediment created by his implied entry cannot, if the  
view which I take of the case is correct, be ignored in a question with his dis-  
pensee and heir, the defender.

I am therefore of opinion that the Lord Ordinary's judgment should be  
altered.

**LORD KYLLACHY.**—The question in this case is, whether the defender is liable  
in a causality of relief or of composition? and there are, as I understand the  
case, two views on which it is maintained that he is only liable in relief. The  
first is, that James Hamilton, his immediate predecessor, was duly entered with  
the superior, and that he is James Hamilton's heir, and that that being so, it is  
of no consequence that James Hamilton paid no casualty upon his entry, or  
that his entry was only an implied entry under the statute. The other view,  
which is alternative, is, that the defender is entitled, for the purposes of the  
present (statutory) action, to treat the old investiture in favour of John Hamilton  
of Greenbank and his heirs as still subsisting, and to connect himself as heir  
with the old investiture, and so pay only an heir's casualty in the same manner  
as under the old law.

It is obvious that the questions thus raised depend for their answer on the  
precise effect which is to be given—in fixing the pecuniary rights of the superior  
—to the implied entries under the statute intermediate between the entry of  
the last vassal who paid a casualty, and that of the existing proprietor, who is  
the defender in the statutory action.

The case would be clear enough if those implied entries were to receive effect  
all round. It would also be clear enough if they were to be ignored all round.  
It is admittedly, however, impossible to go that length in either direction. If  
the implied entries were to receive full effect—as if in each case there had been  
a writ of confirmation under the old law,—there would not only be an implied  
enfranchisement of new investitures without payment of casualty, but the fee  
would, or might, be kept always (impliedly) full, so that no casualty could  
ever be demanded. On the other hand, if the implied entries were for the  
purposes of the statutory action to be wholly ignored the result would be to  
conflict not only with the decisions of the Court in the case of *Ferrier's Trustees*,  
4 R. 738, but also with the decision of the Court in the case of *Rosemore's*



No. 185. *Trustees*, 5 R. 201, and with that of the House of Lords in the case of *Lamont v. Rankin*, 7 R. (H. of L.) 10.

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The question therefore really is (1) how far the view first above mentioned can be maintained short of ignoring altogether the proviso that implied entries shall not be pleadable against the superior, and (2) how far the view second above mentioned can be maintained short of ignoring the decisions in the cases of *Rossmore's Trustees* and *Lamont v. Rankin*. I exclude in the meantime the case of *Ferrier's Trustees*, it being at least doubtful how far the present question was in that case argued.

(1) In my opinion it is impossible for the defender without violating the express words of the statute to found on the implied entry of James Hamilton (the last impliedly entered vassal) as foreclosing all reference to former investitures, and enabling the defender to take his stand on the simple fact that he is the heir of James Hamilton. The statute, dealing with the statutory action, provides expressly that "no implied entry shall be pleadable against the superior," and I see no reason why this proviso should not receive effect according to its terms. No doubt it is necessary (because it is necessarily implied) to confine the proviso to implied entries on which no casualty has been paid (just as it is necessary to make a similar implication in the schedule in construing the words which refer to the death of the vassal "last vest and seised"). But (subject to that restriction which cannot help the defender) I see no reason for denying effect to words which seem to be plain, and not only to be plain, but to be essential to the statutory scheme. In particular, I am not able to discover any ground for holding as suggested that the proviso only affects the mode in which the superior can make good or secure his pecuniary claim, and does not affect the legal consequences of the implied entry itself. In my opinion the whole object of the proviso was to exclude the legal consequences of the implied entry in so far as the same might prejudice the pecuniary rights of the superior.

Moreover, it is not, I think, possible for the defender in this view of the case to stop short at treating the implied entry of the last vassal as an enfranchisement of the last vassal's investiture. If the implied entry is good for that purpose, it must also, it is thought, be good to the effect of postponing the superior's right of action in many cases quite indefinitely. No doubt James Hamilton, the last impliedly entered vassal in this case, happens to be dead, but if he had been alive the question would have been just the same. And if the view now under consideration were well founded the superior would have had no action as now on the death of John Hamilton of Greenbank, but would have had to wait until the death of James Hamilton, and if James Hamilton had happened to dispoise *inter vivos* to a donee who took infertment he would have had to wait until the death of that donee. Now, as I already said, I do not think it possible to maintain that such is the meaning of the statute, nor indeed do I understand that the defender would so contend.

(2) It remains, however, to consider how far it is possible to take the other view, viz., to ignore the implied entries for the purposes of the statutory action, and at the same time to give due effect to the decisions to which reference has been made.

Apart from those decisions, I quite follow and appreciate the defender's argument. In particular, I accede to the proposition that the superior's whole rights and remedies are for the purposes of this question to be found in the 4th subsection of section 4, and that there is nothing in the statute which gives

him right to demand a casualty except the provision in subsection 4 to the effect that "when but for the Act the superior would have been entitled to sue a declarator of non-entry, he shall have right to bring the statutory action against the proprietor of the lands for the time." I also accede to the proposition that under the old law no declarator of non-entry could have been brought when the fee was full, and that that being so, the superior requires as the basis of his statutory action to ignore the intermediate implied entries, because standing those implied entries, the fee may be, and indeed generally will be, full. All this I think quite sound, and thinking so, I acknowledge the force of the argument, that as the superior ignores and must ignore the implied entries as filling the fee, he cannot at the same time object to the defender ignoring the implied entries as extinguishing the old investitures.

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But, in the first place, in construing a statute like the present it does not necessarily follow that all its provisions are in precise logical symmetry. The question always is, what does the statute mean, and it may very well be that, logically or illogically, the purpose and meaning of the statute was to entitle the superior to ignore the implied entries so far as they might be pleaded as excluding his action, and yet to found upon them as excluding any attempt on the part of the existing proprietor to connect himself with extinguished investitures. It is certainly the case that while it is expressly provided that "no implied entry shall be pleadable in defence against such action" it is nowhere said that such implied entry shall not be pleadable in support of such action.

In the second place, however, I am unable to regard this question as still open. The case of *Ferrier's Trustees v. Bayley*, is, it is hardly disputed, expressly in point, and I doubt whether it is sufficient to displace the authority of that judgment that the point now taken does not appear to have been specially argued. But however that may be, there is no disputing the authority of the case of *Rosemore's Trustees* or of the case of *Lamont v. Rankin*, which went to the House of Lords. And I am quite unable to distinguish this case from those cases. It is true that the defender here is himself the heir of the old investiture, and is here tendering himself, and that in the cases in question the defenders sought to tender heirs who happened to be third parties. But having carefully read the judgments in those previous cases, I am unable to discover that they or any of them proceeded on this distinction. It was nowhere, so far as I can see, suggested that notwithstanding subsequent implied entries in favour of strangers, the statute left open the old investitures for the benefit of the heir of the old investiture if he happened to be the true owner of the estate, foreclosing merely the right to put forward—in answer to the superior's action—anybody but the true (beneficial) owner of the estate. That could hardly, I think, have been held consistently with the subsequent decision of the Court in the case of the *Duke of Hamilton v. Guild*, 10 R. 1117, which expressly affirmed the right of the defender in the statutory action if uninfert to exclude the superior's claim for composition by putting forward a third party, not the owner of the lands at all, and making up a title in the person of that third party as the heir of the subsisting investiture. Neither do I think it is possible to hold that the principle of the judgments in question was merely this—that the old investiture was still open, but that entry being abolished nobody could be put forward to connect with the old investiture who was not in a position to obtain infertment and thus become a successor in the lands. That would rest the judgments in question on a mere technicality, and one which could have been easily overcome,

No. 185. *viz.*, that the heirs there put forward had not had dispositions executed and recorded in their favour, or that the defenders did not propose to execute and procure the recording of such dispositions. It appears to me that if this had been all that was meant it would have been somewhere expressed, and moreover that the unimportance of the judgments—which in this view would have been clear—would have been speedily recognised. The true principle of the judgments was, however, in my opinion different, and was the same in all the cases (*Ferrier's Trustees* included), and was simply this—that however the superior's action may be laid, and whatever he may require to assume *fictioe statuti* as the basis of his action—implied entries under the statute in favour of strangers have the effect of ~~extinguishing all previous investitures, and of forwarding all recourse to those extinguished investitures for the purpose of enabling any person to connect himself therewith as heir.~~

I am therefore of opinion that the pursuer is here entitled to prevail, and I have only to add that I do not consider that the case of *Mackintosh* touches the present question. In the case of *Mackintosh* there was no change of investiture operated. Giving the fullest effect to the only implied entry which there occurred, the old investiture remained intact. The old investiture was in favour of *Æneas Mackintosh* and his heirs-at-law, and the disposition which he executed, and which was impliedly confirmed, was in favour of his heir-at-law. And that appears to have been the basis of the judgment. It is true that the case in question, and the previous cases on which it followed, may be held to affirm the proposition that under the old law a person might claim entry on relief who had so made up his title that he was no longer in a position to serve. But the important fact which distinguishes all those cases from the present is that at the date when the heir in those cases made up his title by confirmation he was in a position to serve. By making up his title by confirmation he merely exercised an option affecting the form of his title, and in the exercise or non-exercise of which the superior had no interest.

At advising in Second Division,—

LORD JUSTICE-CLERK.—After much deliberation and consideration the consulted Judges have given their opinions in this case, and these opinions disclose the great difficulties raised by it. For their Lordships are divided as nearly equally as an uneven number admits of, being five of them in favour of reversing the judgment of the Lord Ordinary, and four of them for adhering to it. The responsibility of this Division is thus rather increased than lessened by our having sought the assistance of our brethren, for instead of their deliberations having disposed of the difficulty which led to their being consulted, the case comes back to us hanging in the balance as before, and we have to take our choice between very learned and closely reasoned opinions which are in direct conflict with each other.

After studying these opinions and the whole case, my judgment, arrived at in the end without any substantial doubt, is in accordance with that of the majority of the consulted Judges. That being my opinion, I might have contented myself with expressing it, knowing that I could add nothing of weight to their reasons. But in a case of so great importance, which in its ultimate decision must rule so many and so important interests, it may be considered desirable that the views of individual Judges should be expressed on the points which affect its decision.

In doing so, however, it will be unnecessary to recapitulate the facts which are already so clearly stated in more than one opinion, and about which there is no controversy.

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The first question is,—Did every proprietor holding as a singular successor become at the passing of the Act of 1874 the direct vassal of the superior? This I hold to be conclusively settled by the decisions already pronounced. It is clearly expressed in the Lord President's judgment in the case of *Rosemore's Trustees*. The refusal to allow the defender in that case to put forward the heir of the previously entered vassal, so as to limit his payment to the superior to relief, is justified by the Lord President in these words,—“I come to the conclusion, certainly not without much consideration, but also in the end, I am bound to say, without any difficulty, that the effect of a person taking infeftment subsequent to the passing of the Act of 1874” (which is the same thing as his being infeft at the date of the Act), “is to enter him as a singular successor with the superior, and of course to subject him to all the conditions of such an entry as it stood before the statute, and, among other things, to the payment of a composition.” This view of the law is fully upheld in the other cases which are referred to in the opinions of the consulted Judges, including a decision by the House of Lords. The question is not in my opinion an open one. But if it be assumed that the laying of a case before the whole Court re-opens questions which have already been made subject of decision, then my opinion is, that apart altogether from previous decision, the view contended for by the pursuer of the effect of the statute is sound, and ought to be sustained.

The opening part of subsection 2 of section 4 of the Act of 1874 makes the change in the law in very clear terms. By it a proprietor infeft at or after the passing of the Act is to be deemed and held, as at the date of registration of his infeftment, duly entered, as if the superior had granted a writ of confirmation. No enactment could be more clear and distinct, and if the clause had stopped there no possible doubt could have existed as to its effect. But there is modification by proviso, and the modifications require careful consideration in order to see whether they so affect the direct enactment as to give it a different meaning from that which its words import. Here it is noteworthy that the modifications are specific and sharply defined. There is no suggestion of modification to be implied. The direct modifications which have a bearing on the present question are these,—(1) That although the proprietor is held to be entered by registration of his infeftment he is not necessarily to be liable at once to pay a casualty, but only becomes liable at the time at which, under the conditions subsisting before the statute, the superior could have demanded it; (2) that his implied entry shall not also imply, as a writ of confirmation would have done, that all previous casualties were discharged, and shall not be pleadable in defence against the superior's action for a casualty; and (3) that although no lands are to be deemed to be in non-entry, and no action of declarator of non-entry can be raised, yet that the superior may raise an action of declarator and for payment of any casualty exigible at the date of the action, decree in which is to have the same results as a decree of declarator of non-entry until the casualty is paid.

These are practically all the statutory modifications of the enacting words in subsection 2 of section 4. There is nothing said in that or other subsections to modify to any other effect the declaration that registration of infeftment implies entry. In particular, it is not said that the entry by force of statute does not extinguish mid-superiority. It is not said that when a casualty is exigible it is

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not to be that which, but for the postponing proviso, would have been exigible at once. It is not said that the postponement of the time for the enforcement of the ordinary pecuniary conditions of confirmation is to expose the superior, in whose favour these conditions exist, to having their value modified by the subsequent course of events. It is not said that the character of the casualty which is the sequence of the entry forced on the superior by the statute without present payment of casualty, is to depend upon the chapter of accidents occurring after the entry. Had such anomalous results been intended, the intention could have been easily expressed. As was pointed out in the House of Lords in *Rankin's* case, "a few simple words" would have sufficed to express such intention of the Legislature, had the intention really existed. Even admitting that implication might be enough, it would require to be necessary implication, and it can scarcely be contended that there exists any necessity for such implication.

Keeping in view these three things—first, what the statute enacts; second, what modification it applies to the enactment; and third, what modifications it does not apply—let us now consider the grounds of the judgment of the Lord Ordinary. These are mainly two in number—First, that as the payment of a casualty in respect of James's entry under the statute is postponed by statutory proviso till the death of the vassal last vest and seised in the lands, therefore, as James ceased to be a mere presumptive heir at that date, and became the heir *de facto*, he is entitled to limit his payment to that applicable to an heir, and the superior cannot demand a composition. Second, that whether this be so or not, the casualty is now one of relief only, William being the heir, and succeeding as heir—that is, as heir of John's investiture.

Now, taking this last contention first, it appears to me to be fallacious to speak of William as being the heir of the investiture of John, as some of my brethren do. In *Ferrier's* case it was distinctly held that no person could now tender himself as heir to one who had disposed away the property prior to the Act of 1874. By that Act the right and title of such a one were absolutely taken away whenever registration of the disponent's infestment was completed. Nothing remained in him as the basis on which alone such a tendering of his heir as would have been competent before the statute could rest. If the question be asked, who after the passing of the Act was the vassal of the superior, liable to him in the feu-duties affecting the lands, and the performance of all the obligations of feu, the answer plainly is "not John, but James." James's entry by virtue of the statute is declared to be "to the same effect as if the superior had granted a writ of confirmation." So certainly is this the effect of the statutory enactment that it is only by special proviso that the superior's claim against the former vassal and his heirs is reserved to him "until notice of the change of ownership shall have been given to" him, and this again is declared to be without prejudice to the previous proprietor or his heirs, &c., recovering all feu-duties he "may have had to pay in consequence of any failure or omission to give such notice." I am therefore unable to understand how it can be held that William has any defence to this action on the ground that he is the heir of John. John's right ceased to exist by force of statute in 1874. James could not therefore succeed to John when John died in 1877, for John was divested, and that being so, neither can William claim the character of heir of John's investiture. The Lord Ordinary, and those of my brethren who are in favour of upholding his judgment, found strongly on the case of *Mackintosh* in support of the opposite view. But I must confess that I am unable to understand why they should rely upon

*Mackintosh's* case at all. If John's investiture ceased to exist in 1874, then *Mackintosh's* case cannot apply. If it did not cease to exist, and William can take advantage of it, then there is no need to appeal to *Mackintosh's* case in support of his right to satisfy the superior's claim for a casualty by a casualty of relief only. It is trite law that if the person succeeding as heir is to be entered, the superior must enter him for relief. And if James had not been entered till 1877, at John's death, the case we are dealing with would have been a different one altogether. I therefore do not see even the purpose for which *Mackintosh's* case is founded on. In the view I take of that case it has no application to the present. There the vassal from whom a casualty was demanded was, as regarded one-half of the estate, which he took only on the death of the previous vassal, the heir of investiture entitled to enter by special service. It was held that having that right he was not debarred from pleading it against the demand for the greater casualty for the whole property, merely because having the right to the whole by the testament of the last proprietor he had taken infestment as a singular successor thereunder, he being at the same time his heir in relation to a half. That comes to nothing more than this, that if a vassal entered by virtue of the statute has the character of heir of the already enfranchised investiture, he can maintain that the investiture is continued in his person, and can therefore claim to limit his payment of casualty accordingly, notwithstanding that the form in which he has made up his title is that appropriate to a singular successor. That which was in his predecessor, and which could pass to him by right as heir, he was entitled to found upon in any question as to what casualty was due to the superior on his entry under the statute. His relation at the time of the statutory entry being that of heir to a *pro indiviso* half of the estate, he was held entitled to plead that relation in the question of composition or relief. Here there is no such case. James was in 1874 only heir-presumptive to John, and therefore not in a position to take anything as heir. He, when he obtained his entry in that year, did so solely on the right obtained from John by disposition, and therefore fell to be dealt with as a stranger in the question of payment of casualty when that should become exigible. That this brings about a claim for a greater casualty than might have been the case had the Act not been passed is no reason for not giving effect to the statute. As Lord Cairns pointed out in the case of *Lamont*, such a consideration will not justify the interpolation of words into the statute upon an assumption that the Legislature intended what the legislative enactment does not express.

But then it is said—and this is the other ground on which the Lord Ordinary's judgment is supported—that as James, though only the heir-presumptive of John at the time when he was entered by force of statute in 1874, was in point of fact his heir when he died, James was entitled as at 1877 to satisfy the superior's claim for a casualty by payment as for relief only. This view is based on the principle that the casualty must be determined "by the character of the applicant for entry, and not by the form of his title," as Lord Kinnear points out. But the answer seems to me to be this, that James was not in 1877 an "applicant for entry." He was entered at the passing of the Act in 1874 "to the same effect as if the superior had granted a writ of confirmation." It seems to me impossible to maintain that if there had been no words in the statute postponing exaction of casualties a demand in 1874 for a casualty could have been resisted by James, and if payment of casualty could not have

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been resisted, there could have been no pretence for limiting it to relief. It was the confirmation in the case of a singular successor, which was impliedly effected in James's case by the passing of the Act of 1874. It is quite true that prior to 1874 a singular successor could by the device of tendering the heir for entry limit the casualty to relief. But it has been expressly decided that the singular successor cannot now tender the heir. What is the difference in this case? It is only that the heir as to whom it is suggested that he might have been tendered in 1877 is the same person as the singular successor, it happening to be the fact that at the time of John's death James was his heir. But if Lord Cairns's doctrine in *Lamont's* case must be accepted, that "the appellants" [i.e., the singular successors] "are by the Act deemed and held to be truly entered, and if so, there is no vacant fief into which the heir could enter," then the distinction between the two cases is a distinction without a difference. Lord Cairns's words may be applied to this case thus—James is by the Act deemed and held to be truly entered, and if so, there is no vacant fief to which he—though on the death of John he proved to be the heir—can enter. The death of John added nothing to James's right or title. There was in 1877 nothing left in John for James to take up as John's heir. The death of John had only one practical effect. It put an end to the statutory postponement of the payment due to the superior for the enfranchisement of that entry which was already completed as if by writ of confirmation in 1874. I am confirmed in this view by the knowledge that it was held by so high an authority in the feudal law as the late Lord Curriehill, who in his opinion in the unreported case of *Sturrock v. Carruthers' Trustees* in 1879, after stating the rule that the heir cannot now be put forward so as to evade payment of a composition, says—"This rule must take effect where the person whose entry is implied happens, after his infestment as a singular successor of the original vassal, to become also the heir of that vassal."

Some stress is laid by my brethren who are in favour of adhering to the Lord Ordinary's interlocutor upon the form of the action, which proceeds, following the form in the schedule, to describe the heir on whose death a casualty became exigible, namely, John, as "the vassal last vest and seised in the lands." The view taken is that this description of John implies—to use Lord Kinnear's words—"an averment that no other vassal has entered since his death, or, to use the language of the old law, to which the pursuer is required by the statute to appeal, that the fee is still vacant in consequence of his death." This reasoning seems to me to ignore the fact that the statute creates an anomaly by its implied entry and postponed exigibility of the casualty, which, but for the proviso, would have been at once exigible. This anomaly necessarily causes difficulty in the formal procedure for obtaining a decree on the occurrence of the event which removes the bar to exaction. It requires to be enacted that "no implied entry shall be pleadable against" the superior's action when the event has occurred. And accordingly the form of action passes by all such implied entries, and the vassal, to the occurrence of whose death the right to enforce payment of a casualty is postponed, is for the purposes of that action (which passes by implied entries) dealt with as the vassal who was last vest and seised, in contradistinction to the vassal who is impliedly entered, and from whom the superior demands a casualty by his action. That this is the sound view of the meaning of the form in schedule B appears in my judgment very clearly when consideration is given to the expressions used in the Act itself to describe the old and

new vassals in the case of implied entries under the statute, where it is dealing with the rights of the superior, both as reserved and as taken away, in the case of such implied entries. In subsection 2 of section 4 two persons are contrasted, the vassal who is impliedly entered, and the vassal who was entered before him. The words which the statute uses to describe the latter are "the proprietor last entered." Thus it is enacted that notwithstanding the "implied entry the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable" for feu-duties, &c., "until notice of change of ownership is given to the superior." And again the right is conferred upon "the proprietor last entered in the lands to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered may have had to pay in consequence of any failure or omission to give such notice," and all remedies competent to the superior are to be held to be assigned "to the proprietor last entered in the lands, and his foresaids" for recovery of such sums from the entered proprietor. The same expression "proprietor last entered in the lands" is again used in reference to the preservation of evidence of the notice of change of ownership, which is to save him from being still liable to pay feu-duties after the implied entry. And accordingly in schedule A the instructions for drawing up the notice direct that after the words "which formerly belonged to," the name "of the last entered vassal" is to be inserted.

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Now, nothing can be more clear than this, that the statute in the passages I have quoted adopts the words "proprietor last entered in the lands" to describe the proprietor who was entered but has been divested by implied entry of another, and the words "the entered proprietor of the lands" to describe the proprietor who is entered by the statutory implied entry. The two expressions are used in contrast to designate the two proprietors, the old and divested proprietor, and the new and impliedly entered proprietor. Such being the distinctive expressions used in the statute itself, and they being in no way ambiguous when they occur in the statute as to their application, it appears to me that all difficulty which might be supposed to exist regarding the wording of the statutory form of summons in schedule B is removed. In that summons the word "last" is used in the same sense in which it is used in the statute itself. The words "the death of C, who was the vassal last vest and seised," do not, in my opinion, mean who was such vassal when he died, but mean who was the vassal last entered, in contrast to the vassal who, previous to C's death, had entry effected for him by statutory implication, and is thus the entered proprietor of the lands. The words in the enacting clauses cannot be read in any other sense, and the words in the schedule can be read in the same sense, and if they can be so read, then they must be so read—it not being allowable to assume repugnancy—and if so read, all the difficulties suggested disappear.

I have only further to add that I do not think the result is affected by the fact that William has succeeded to James. It is said that as James was entered by implication, and William succeeds James as his heir, that therefore William is liable as for relief only. But this contention is directly in the teeth of the statutory proviso that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c., which may be due or exigible in respect of the lands at or prior to the date of such entry." Now, William's entry is an implied entry, and at the time at which it took place a casualty was due and exigible for the enfranchisement of James's entry. William therefore cannot plead his implied entry to debar the superior from making good out of

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On 6th March following the pursuer lodged a minute, in which she craved the Court to allow her to amend her petition, "in order that she may sue the action at her instance as 'executrix-dative *qua* widow of the late George Turnbull, tinsmith, Jedburgh, and as an individual,' or otherwise to sist process until a supplementary action is brought at the pursuer's instance as executrix-dative of her said husband, in order that the actions may be conjoined."

On 21st March the Sheriff-substitute refused to grant the crave of the minute.

Proof was thereafter led in the cause, and on 13th June 1889 the Sheriff-substitute assoilzied the defender.

The pursuer appealed to the Court of Session, and argued that the Sheriff had erred in refusing the crave of the minute of 3d December. The 24th section of the Sheriff Court Act of 1876 appointed the Sheriff to allow any amendment on the record "for the purposes of determining the real question in controversy." The "real question" was the question raised in the petition, and the provision covered the amending of a title, such as the present, where a person suing as an individual sought to be allowed to sue as an executor. In the case of *Smith*,<sup>1</sup> Lord Dundrennan alone expressed an opinion to the effect that this was incompetent. The case of *Morison*<sup>2</sup> was not in point. Besides, the clause founded on in the Act of 1876 gave the Court entirely new powers.

The respondent was not called upon.

LORD PRESIDENT.—The only ground on which it is contended that we should allow this proposed amendment is founded upon the 24th section of the Sheriff Court Act of 1876. The power of amendment which is introduced by that Act, and in the Court of Session Act of 1868, places a very valuable discretion in the hands of the Court, and if the power is kept within reasonable bounds, it is for many reasons most expedient. But the discretion must be carefully watched and safe-guarded, because it may be carried too far. I think the present proposal carries that discretionary power of amendment beyond the length which is contemplated by the statute. The power is thus worded,—“The Sheriff may at any time amend any error or defect in the record in any action upon such terms as to expenses and otherwise as to the Sheriff may seem proper, and all such amendments as may be necessary for the purposes of determining in the action the real question in controversy between the parties shall be so made.”

In the first place, I do not think the fault which it is proposed to remedy here is an error or defect in the record; it is rather a want of title appearing upon the face of the record. And in the next place, the amendment cannot be said to be proposed for the purposes of determining the real question in controversy between the parties. The real question upon the issue joined in the Sheriff Court was whether the defender was indebted to the pursuer as an individual, which it is now admitted he was not. I am therefore of opinion that the 24th section of the Act of 1876 does not apply.

We therefore fall back upon the question whether it is competent to bring an action to alter the law on this subject; and I am of opinion that the Sheriff Court Act does not do so. I therefore hold that it is not competent for the pursuer either to have herself sisted as a new pursuer, as she asks in the minute, nor to have the summons amended to the effect of allowing her character of executrix to be inserted in it. I cannot do more with the case at present, as the pursuer avers that the debt is due to her as an individual. . . .”

<sup>1</sup> *Smith v. Stoddart*, July 5, 1850, 12 D. 1185.

<sup>2</sup> *Morison v. Gowans*, Nov. 1, 1873, 1 R. 116.

LORD RUTHERFURD CLARK.—I concur in the opinion of the Lord President. No. 185.

LORD LEE.—I think the interlocutor ought to be affirmed. I entirely concur in the opinion of Lord Kinnear. I also agree in the opinion of Lord Adam as to the specialty of the case of William Hamilton. July 18, 1889. *Sheriff v. Hamilton.*

THE COURT pronounced this interlocutor:—"The Lords having resumed consideration of the cause, with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Judges of the whole Court, recall the Lord Ordinary's interlocutor of 20th December 1887: Find that the casualty due by the defender to the pursuer is a composition of one year's rent of the lands described in the summons: Find the pursuer entitled to expenses; allow an account thereof to be lodged, and remit," &c.: "Remit the cause to the Lord Ordinary . . . to proceed further in the cause as may seem just."

DUNDAS & WILSON, C.S.—CAMPBELL & SMITH, S.S.C.—Agents.

MRS AGNES WOOD OR TURNBULL, Pursuer (Appellant).—*John Wilson.* No. 186.  
JAMES VEITCH, Defender (Respondent).—*A. S. D. Thomson.*

*Title to sue—Process—Sheriff Court action—Amendment—Sheriff Court Act, 1876 (39 and 40 Vict. c. 70), sec. 24.—Held that an action raised in the Sheriff Court by a widow for payment of a debt alleged to be due to herself could not, on her being subsequently decerned executrix to her husband, be amended so as to admit of her suing also in that capacity, the power of amendment given by sec. 24 of the Sheriff Court Act not being applicable to such a case.* July 18, 1889. *Turnbull v. Veitch.*

MRS AGNES WOOD OR TURNBULL brought an action in the Sheriff Court at Jedburgh against James Veitch for payment of board for the defender's child. After the action was raised the pursuer was decerned executrix-dative to her husband. 1st Division. Sheriff of Roxburghshire. M.

The defender stated that if there was a debt, it was due to the pursuer's husband, who had died a short time before the action was brought, and pleaded (2) No title to sue.

On 3d December 1888 the pursuer lodged a minute, in which she designed herself as executrix-dative *qua* relict of her deceased husband, and craved to be allowed to sist herself as a pursuer for all right and interest competent to her late husband.

On 24th January 1889 the Sheriff-substitute (Speirs) repelled the defender's plea *hoc statu*, and allowed a proof.

The defender appealed to the Sheriff (Jameson), who, on 26th February following, pronounced this interlocutor:—"Recalls the Sheriff-substitute's interlocutor of 24th January 1889; refuses the crave of the minute, No. 8 of process, and refuses also the pursuer's motion (made at the debate), alternatively to the said minute, to be allowed to amend the petition by adding after the pursuer's designation, the words 'as executrix of the deceased George Turnbull, and as an individual': Remits the cause to the Sheriff-substitute for further procedure, &c."\*

\* "NOTE.—It is settled that a new pursuer cannot be sisted in an action without the consent of the defender—*Morison v. Gowans*, 1 R. 116. Further, it was settled by the case of *Smith v. Stoddart*, 12 D. 1185, which closely resembles the present, that a summons raised by a widow in her individual capacity could not competently be amended to the effect of libelling that she sued also as executrix of her husband. In *Hislop v. MacRitchie*, 8 R. (H. L.) 95, Lord Watson observed that the Court of Session Act, 1868, section 29, which is practically the same as the Sheriff Court Act, 1876, section 24, did

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On 6th March following the pursuer lodged a minute, in which she craved the Court to allow her to amend her petition, "in order that she may sue the action at her instance as 'executrix-dative *qua* widow of the late George Turnbull, tinsmith, Jedburgh, and as an individual,' or otherwise to sist process until a supplementary action is brought at the pursuer's instance as executrix-dative of her said husband, in order that the actions may be conjoined."

On 21st March the Sheriff-substitute refused to grant the crave of the minute.

Proof was thereafter led in the cause, and on 13th June 1889 the Sheriff-substitute assoilzied the defender.

The pursuer appealed to the Court of Session, and argued that the Sheriff had erred in refusing the crave of the minute of 3d December. The 24th section of the Sheriff Court Act of 1876 appointed the Sheriff to allow any amendment on the record "for the purposes of determining the real question in controversy." The "real question" was the question raised in the petition, and the provision covered the amending of a title, such as the present, where a person suing as an individual sought to be allowed to sue as an executor. In the case of *Smith*,<sup>1</sup> Lord Dundrennan alone expressed an opinion to the effect that this was incompetent. The case of *Morison*<sup>2</sup> was not in point. Besides, the clause founded on in the Act of 1876 gave the Court entirely new powers.

The respondent was not called upon.

LORD PRESIDENT.—The only ground on which it is contended that we should allow this proposed amendment is founded upon the 24th section of the Sheriff Court Act of 1876. The power of amendment which is introduced by that Act, and in the Court of Session Act of 1868, places a very valuable discretion in the hands of the Court, and if the power is kept within reasonable bounds, it is for many reasons most expedient. But the discretion must be carefully watched and safe-guarded, because it may be carried too far. I think the present proposal carries that discretionary power of amendment beyond the length which is contemplated by the statute. The power is thus worded,—“The Sheriff may at any time amend any error or defect in the record in any action upon such terms as to expenses and otherwise as to the Sheriff may seem proper, and all such amendments as may be necessary for the purposes of determining in the action the real question in controversy between the parties shall be so made.”

In the first place, I do not think the fault which it is proposed to remedy here is an error or defect in the record; it is rather a want of title appearing upon the face of the record. And in the next place, the amendment cannot be said to be proposed for the purposes of determining the real question in controversy between the parties. The real question upon the issue joined in the Sheriff Court was whether the defender was indebted to the pursuer as an individual, which it is now admitted he was not. I am therefore of opinion that the 24th section of the Act of 1876 does not apply.

We therefore fall back upon the question whether it is competent to bring an not alter the law on this subject; and I am of opinion that the Sheriff Court Act does not do so. I therefore hold that it is not competent for the pursuer either to have herself sisted as a new pursuer, as she asks in the minute, nor to have the summons amended to the effect of allowing her character of executrix to be inserted in it. I cannot do more with the case at present, as the pursuer avers that the debt is due to her as an individual. . . .”

<sup>1</sup> *Smith v. Stoddart*, July 5, 1850, 12 D. 1185.

<sup>2</sup> *Morison v. Gowans*, Nov. 1, 1873, 1 R. 116.

action in one capacity, and to insist upon it in another; and upon this matter No. 186.  
I think the Sheriff has come to a right conclusion.

LORD MURE concurred.

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LORD SHAND.—I concur with your Lordship. I think that the power of amendment which is allowed by statute both in this Court and in the Sheriff Court should receive a very liberal construction. In practice it has received such a construction, and accordingly it has in many cases saved the necessity of bringing a new action. But the present proposal would carry the power of amendment too far. The pursuer had not the character of executrix to her deceased husband when the action was brought. The action as brought was stamped with the character of a personal action, *i.e.*, an action at the instance of the pursuer herself as an individual. It could not in any sense be held to be at her instance as executrix. The proposal is that some time after the action was brought, having been appointed executrix to her deceased husband, she should, under the 24th section of the Sheriff Court Act of 1876, be entitled to prosecute her action in this new character. I think the Sheriff is plainly right in holding that this is inadmissible. It is enough for the decision of the case that the title of executrix was obtained after the action at the instance of the pursuer, as an individual, was in Court.

LORD ADAM.—I think this is an attempt to introduce a new pursuer, for which there is no warrant in the 24th section of the Sheriff Court Act.

THE COURT refused the appeal.

THOMAS M'NAUGHT, S.S.C.—ADAM SHIELL, S.S.C.—Agents.

DOMINION BANK, Pursuers (Respondents).—*Gloag—C. S. Dickson.*  
BANK OF SCOTLAND, Defenders (Reclaimers).—*Sir Charles Pearson—*  
*Murray.*

No. 187.

July 19, 1889.  
Dominion  
Bank v. Bank  
of Scotland.

*Bill—Payment and discharge—Cancellation without authority—Liability of agent employed to collect bill.*—The agent of the Bank of S. offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the condition on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill cancelled. They then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the estates of the acceptors became bankrupt before diligence could be used against them.

The holders thereupon raised an action against the Bank of S., concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors. *Held (diss. Lord Mure)* that the evidence shewed that if the bill had not been cancelled without authority through the error of the agent of the bank, the holders might have recovered payment by summary diligence before the acceptors became bankrupt, and that the bank was liable.

*Observations on the onus of proof.*

(SEE *Dominion Bank v. Anderson & Company*, Feb. 10, 1888, 15 R. 408.)

On 28th September 1886, a bill for £2939, 9s. 6d. was drawn by the M'Arthur Brothers Company, Limited, of Toronto, upon William Anderson & Company, Grangemouth, in payment of the price of a cargo of timber bought by the latter. Messrs Anderson accepted the bill at 180

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**No. 187.** days from 5th November following, making it payable at the Bank of Scotland, London, on 7th May 1887.  
**July 19, 1889.** The drawers of the bill endorsed it to the Dominion Bank of Toronto who transmitted it for collection to the National Bank of Scotland, Limited, in London.  
**Dominion Bank v. Bank of Scotland.**

The National Bank presented the bill for payment on 7th May 1887 at the Bank of Scotland in London, but payment was refused in consequence of a dispute between Messrs Anderson and the M'Arthur Brothers in reference to the state of the cargo of timber on its arrival. The bill was then protested for non-payment.

The dispute having been settled, Mr Mackenzie, the agent for the Bank of Scotland, at Grangemouth, on 21st May 1887, wrote to the National Bank of Scotland in London:—"With reference to my letter of 16th inst., if the bill p. £2939, 9s. 6d. be sent on here for collection, it will in all likelihood be paid, but not the expenses, as the fault was not on Messrs W. Anderson & Company's side—at least so they say."

On 28th May following the Messrs Anderson wrote to Mr Mackenzie:—"Confirming our former instructions to you, it just now occurs to us that immediate payment might be made provided that the National Bank, London, gave a guarantee to hand over the bill to you on its return, and hold us scatheless in event of its miscarriage in any way whatever, also freeing us of all expenses and interest. On hearing you have received such guarantee, we will instruct you to pay."

That letter was on the day of receipt forwarded to the National Bank, London.

On 7th June the National Bank, London, wrote to Mr Mackenzie:—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson, £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge.

"We presented the bill to-day at your London office, but they state that they are still without instructions regarding it."

On 9th June Messrs Anderson wrote to Mr Mackenzie:—"We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now."

That letter was enclosed by Mr Mackenzie to the National Bank in the following letter, also dated 9th June:—"With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions.

"P.S.—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you."

On 13th June Mr Mackenzie took payment from the acceptors of the amount of the bill, with 12s. 6d. of charges, and delivered up to them the bill, which was cancelled by perforation of the word 'paid.' Subsequently, on the same day Mr Mackenzie sent a draft for the amount of the bill and charges to the National Bank in London, enclosed in this letter:—"I beg to enclose draft for £2940, 2s., being amount of W. Anderson & Company's acceptance referred to in your letter of 7th inst., with 12s. 6d. of protest charges.

"Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned the draft is accepted by you in settlement of the transaction without any reservation."

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Messrs Anderson's letter, which was enclosed, was as follows:—"Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c."

On 18th June the National Bank, having got instructions from the Dominion Bank, wrote to Mr Mackenzie:—"As our friends have not authorised us to take payment of the acceptance on the conditions tendered, we return your draft £2940, 2s., and shall thank you to send us the bill, with protest attached." Mr Mackenzie then received back the bill from Messrs Anderson, and repaid the sum which had been paid to him. When he received the bill, it was found that the Messrs Anderson had deleted their names thereon as acceptors.

The Dominion Bank thereupon raised an action against the Messrs Anderson on 12th July 1887, for the amount of the bill and charges, with interest, and decree was granted, with expenses, against the defenders on 10th February 1888 (see 15 R. 408).

Thereafter the Messrs Anderson were charged to pay under the decree, but failed to do so, and their estates were sequestrated on 15th March 1888.

On 11th June 1888 the Dominion Bank raised the present action against the Bank of Scotland, concluding for payment of the amount of the bill, with interest, and for the expenses of the action and diligence against the Messrs Anderson.

The pursuers averred, after reciting the facts above stated;—"In these circumstances, and in consequence of the defenders, or their agent at Grangemouth, for whom they are responsible, having wrongfully and without the authority of the pursuers, delivered up the foresaid bill to the acceptors, and cancelled it in the manner before mentioned, and in consequence of the delay thereby caused, and proceedings which were rendered necessary by the defenders' fault and negligence, the pursuers have sustained loss and damage to the extent of the sum in the said bill, and interest due thereon, and expenses, all as sued for in the first conclusion, or otherwise to the extent of the sum sued for in the alternative conclusion."

The defenders answered;—"Denied, and explained that any loss which the pursuers may have sustained was caused by their own actings or that of their agents, the National Bank, London."

The pursuers pleaded;—(1) The pursuers having, by the defenders' breach of duty and wrongful conduct, sustained loss, all as condescended on, the pursuers are entitled to decree in terms of one or other of the alternative conclusions of the summons. (2) The pursuers having, by the defenders' fault, suffered loss and damage to the amount concluded for, they are entitled to decree therefor.

The defenders pleaded, *inter alia*;—(2) There having been no fault on the part of the defenders, they ought to be assoilzied. (3) The loss, if any, to which the pursuers have been subjected, having been due to the actings of their own agents in London, the defenders should be assoilzied.

In a proof evidence was led, *inter alia*, on the question whether if it had been possible for the Dominion Bank to charge Messrs Anderson on the cancelled bill in July 1887, the latter were then solvent, and could have paid the amount.\*

\* On this point Mr Horsbrugh, trustee in the Messrs Anderson's sequestration, deponed,—"I have declared a dividend of 1s. per £ on the estate, and paid



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On 28th November 1888 the Lord Ordinary (Fraser) decerned against the defenders for the amount of the bill, with interest from 7th May 1887, and for the amount of the expenses of the former action, under deduction

it. The amount paid on the Dominion Bank's claim is £161, 0s. 3d. It was paid to the National Bank of Scotland on 20th September 1888. I expect the estate will yield a further dividend of about 6d. per £. To the best of my judgment, that will be all the estate will yield. I have had all the papers and business books of the bankrupts put before me. From June 1887 to the date of their sequestration they were carrying on their business in the way they had been doing it for some time. They appear to have met their current bills as they became due. Between the dates I have mentioned they met bills to the amount of £10,195, exclusive of the one in question. They were met and paid at their due dates. The bankrupts were also paying freights and other liabilities during the same period. They paid freights to the amount of £1406, besides other debts. I find Mr Anderson did a considerable amount of business in discounting bills for other people, but excluding these, I am of opinion that in order to meet his own bills, and make payments in connection with his own business, he must have paid between 13th June 1887 and the date of sequestration over £18,000.

"Cross.—I endeavoured to ascertain where he got the money, and I find he discounted bills of other people with different banks to the amount of about £12,000, that he collected book debts to the amount of £5000 or £6000, and he got in other sums making up just about £18,000. The difficulty I had was to distinguish what were his bills and what were other people's. At 25th June 1887 he was due the Bank of Scotland £344, and the Clydesdale Bank £3613—together £3958, and there was due to him by the Union Bank £5, 19s. 7d., so that his total indebtedness to his three bankers was £3952. The book debts were ordinary trade debts due to him by parties to whom he actually sold timber. Those parties were mostly in Scotland, I understand. The draft in question was applied as follows:—Lodged on deposit-receipt, in name of Mr Anderson's son, £2846, 11s. 5d., sent to Mr Anderson's law-agents £95—together £2941, the sum which he got back. The deposit-receipt stood in the son's name until 4th July. It was then uplifted and applied thus. In payment in cash to Dow & Company to enable them to retire some bills on 4th July, £862; in retiring bills of his own firm, £298, 12s. 7d.; and paid into current account of his firm with the Clydesdale Bank £1685. The £862 paid to Dow & Company was to enable them to retire bills on which they were ostensibly the primary debtors; there were cross bills. The deposit-receipts were with the Bank of Scotland, I think, but I can hardly state distinctly.

"Re-examined.—Dow & Company and Anderson & Company were, I think, accommodating each other with their names. I think the bills could be traced to their ultimate liability."

Mr Spens, writer, Glasgow, agent for the pursuers in the action at the instance of the Dominion Bank against Messrs Anderson, deponed,—“I had charge of the former litigation in regard to this bill. The bill was placed in our hands first, I think, on 6th July 1887. I went to Messrs Carruthers & Gemmell, Anderson & Company's agents, and proposed that they should pay the amount of the principal, and that all questions as to interest and charges should be reserved. They said they would see their client on the subject, and no answer coming, I wrote them, stating that I had instructed proceedings to be taken. This was on 11th July. When I was first consulted, I asked the bill to be sent so that I might do summary diligence, but when I found it was cancelled, and that I could not do summary diligence, I instructed an ordinary action. Cross.—My impression is that we put warrants of arrestment in the summons in the action against Anderson; I am satisfied that we arrested in the hands of the Bank of Scotland. At that time Anderson & Company, I believe, were engaged in considerable trade. (Q.) Did you try to find any other money? [Objected to; objection repelled.] (A.) I did—I mean I made inquiries with reference to whether I could get money due to Anderson, and I was informed I could not. I did not get anything by arrestment in the hands of the Bank of Scotland.”

of the dividend received by the pursuers in this action in the sequestration of the Messrs Anderson.\*

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\* "OPINION.—This is an action of damages brought by the Dominion Bank, Toronto, against the Bank of Scotland, by reason of the latter having failed to collect the contents of a bill which was intrusted to them for that purpose. The bill was drawn by the M'Arthur Brothers, Limited, of Toronto, upon and accepted by William Anderson & Company, merchants, Grangemouth, for £2939, 9s. 6d., and dated 28th September 1886. It was made payable at the Bank of Scotland, London, at 180 days' sight from 5th November 1886, and therefore was due on 7th May 1887. It was indorsed by the drawers to the Dominion Bank, Toronto, and they are now the holders of it for value. The Dominion Bank sent the bill to the National Bank of Scotland, London, for collection, and the latter bank presented it for payment at the Bank of Scotland in London, when payment was refused, and protest taken. The agent for the defenders at Grangemouth did the banking business for the drawees, William Anderson & Company, and, hearing of the presentment of the bill for payment at the defenders' London branch, wrote on the 16th of May 1887 a letter to the National Bank of Scotland, London, in the following terms:—'An acceptance of Messrs William Anderson & Company, of this town, p. £2939, 9s. 6d., was presented at our London office, and payment refused on account of there being a dispute between the merchants who drew the bill and themselves. If the matter be now adjusted you might send forward the document for collection.' That is to say, the defenders, through their agent, intimated to the pursuers that they would collect the money. In the meantime, however, and before this letter was received in London, the pursuers had returned the bill to Toronto, in order to preserve recourse against the indorsers, and intimated this; but it was added that 'if you remit us the amount and charges we shall have pleasure in recalling the bill by cablegram.' The history of what followed will be found in the opinion of the Lord President in the case of *The Dominion Bank v. Anderson & Company* (10th February 1888, 15 Rettie, 414), and it is unnecessary to do more in the way of narrative than to refer to that opinion. It was held in that case that by reason of the mistake (or the acting without authority) of Mr Mackenzie, the agent for the defenders at Grangemouth, the signature to the bill was cancelled and the bill marked paid. The result of this was, that although the pursuers obtained re-delivery of the bill (which had been sent on to the defenders' branch at Grangemouth), summary diligence could not be done upon it because *ex facie* it was cancelled. An ordinary action was rendered necessary at the instance of the pursuers against Anderson & Company, in which the latter firm pleaded that they could not be sued upon the bill because of the cancellation, while at the same time they had got possession of the timber for which the bill had been granted without paying for it. Shortly after decree was obtained in this action, Anderson & Company became bankrupt.

"Now, it is proved that, if due diligence had been shewn by Mackenzie, the defenders' agent, the bill would have been retired by Anderson & Company. Mr Horsbrugh, the trustee in their sequestration, which took place on 15th March 1888, proves that between 13th June 1887, when the bill was cancelled, and the date of sequestration in March 1888, Anderson & Company were carrying on business to a large amount, and paid away to merchants with whom they dealt over £18,000. The money which had been sent to London in payment of the bill, and which was returned to Grangemouth, was lodged in bank on deposit-receipt in name of Anderson's son to the amount of £2846, 11s. 5d., where it remained until the 4th of July, when it was uplifted, and applied by Anderson & Company to other purposes.

"A proof was led in the present action, and Mr Mackenzie was again examined as a witness. He repeated his former evidence with one unimportant variation, and gave his construction of the letters which passed between him and the National Bank in London, in the same way in which he gave it in the former action, and in regard to which the Court held him to be quite wrong. He justified now, as he justified before, the delivering up of the bill for cancellation;

**No. 187.** The defenders reclaimed, and argued;—The meaning of the letter of 7th June 1887 was—give up the bill if you get the money for it—and payment was taken on that letter alone. It was not proved that any damage had been incurred by the pursuers by the cancellation of the bill; all that they lost thereby was the right to do summary diligence thereon.

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but there was nothing new, either in his evidence, or in the evidence of other two witnesses, to alter the opinion given effect to by the judgment of the Court,—that he acted without authority. The variation from his former evidence consisted in this, that whereas he formerly said, ‘If I had known that the bank did not agree to the conditions expressed in the letter of 9th, I would certainly not have given up the bill.’ But now he says in answer to the question, ‘If you had known that the bank did not agree to the conditions expressed in your and Mr Anderson’s letters of 9th June, would you have given up the bill, in exchange for the payment that you got,’ he answers, ‘On the 13th, certainly.’ And he states that he was misreported on the former occasion, and now says that he would have delivered up the bill to Anderson & Company to be cancelled on the 13th of June, although he had known that the bank did not agree to the conditions expressed in Anderson & Company’s letter of the 9th. This is a strange statement to make, coming from an agent whose duty it was to collect a sum of money, and who took payment upon conditions that he knew his principals had not agreed to.

“According to the evidence of Mr Horsbrugh, the sequestrated estate of Anderson & Company will not yield more than 1s. 6d. in the £—1s. per £ of this dividend has been paid, and the remaining 6d., it is anticipated, may be soon obtained. Thus the Dominion Bank have obtained very little benefit from the decree against Anderson & Company, and they now make their claim against the Bank of Scotland on account of the laches of that bank’s agent. No defence is here stated to the effect that Mr Mackenzie, in what he did, did not represent the defenders. But the defence, as stated by their counsel, consisted of three parts—first, that there was no contract of agency proved. This is clearly negatived by the letters which have been produced, the analysis of which has been given by the Lord President, and the conclusion come to is thus stated in his opinion:—‘From that time (7th June) I apprehend that Mackenzie was acting for both parties. He did not give up the position of acting for the acceptors, but he undertook the additional duty of collecting for the National Bank, and in that character he goes on to correspond with the National Bank.’

“In the next place, it is said that although there might be a breach of duty, the damages should be nominal, because the pursuers may have their recourse against the indorsers who are proved by a witness adduced for the defenders (Malcolm Carswell, a timber broker in Glasgow) to be persons in solvent circumstances. This is no good answer for the defenders’ breach of duty. Whether a good claim could now be made against the indorsers will depend upon the view taken by a Canadian Court as to whether recourse against them has not been lost, and the pursuers stated that they were quite willing to assign over to the defenders any claim that they may have against the drawers and indorsers.

“It is next said that in any view the damages claimable must be limited to the interest upon the bill from the time at which it fell due, a defence founded upon this, that the pursuers, having got hold of the money when it was sent up to them in London, ought to have kept it, and not returned it to Grangemouth. This defence, however, overlooks the fact that the money was sent up under a strict condition that no expenses or other charges for telegrams or commission should be exacted from Anderson & Company. If the money had been kept, it must have been kept under that condition, which was the subject of controversy between the parties, and which condition the pursuers had rejected. The result of the whole matter is that the defenders must be found liable in the loss which the pursuers have sustained. It is proved that if Mackenzie had done his duty payment would have been obtained in the month of June. The amount of this damage consists of the principal sum in the bill and interest thereon, and of the expenses incurred to the pursuers in the former action. . . .”

It had not been shewn that they could not recover from the indorsers, No. 187. and until that had been shewn by taking action against them, the pursuers had not exhausted their remedy, as they were bound to do before proceeding against the Bank of Scotland.<sup>1</sup> In point of fact, the indorsers were perfectly solvent. But if there was liability on the defenders, it was only to the extent of the loss actually shewn to be due to their actings, and they were therefore not liable in the whole amount of the bill with interest and expenses. The pursuers must prove the actual extent of the loss.<sup>2</sup> At all events, the liability must be limited to interest and expenses, as the National Bank should not have parted with the draft which they received in payment of the bill.

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The respondents argued;—The conditions under which payment was made rendered it impossible for the National Bank to retain the draft. Mr Mackenzie was agent for the defenders, and they were responsible for his actings.<sup>3</sup> He had no authority to cancel the bill, and if he had not done so, the pursuers could at once have used summary diligence on it, and recovered the amount from the acceptors. The pursuers were not bound to proceed at once against the acceptors,<sup>4</sup> but were entitled to proceed against the person through whose fault the loss was incurred. The case was analogous to those in which claims were made against messengers-at-arms<sup>5</sup> and law-agents<sup>6</sup> for loss incurred through their fault. In the latter class of cases where the action was for loss through investments made by agents, the Court had found the agents liable, but assigned to them the security. The evidence shewed plainly that the acceptors would have been able to pay had the pursuers been able to do summary diligence in July 1887.

At advising,—

LORD PRESIDENT.—The history of the bill which is the subject of the present action is pretty well known to us from the inquiry in the previous case of *The Dominion Bank v. Anderson & Company*, who were the acceptors of the bill, and it is not necessary to detain the Court over these circumstances for the decision of the present case.

There is no doubt that Mr Mackenzie, the agent for the defenders at Grange-mouth, became the agent of the Dominion Bank in collecting this bill, and it is not alleged that he was acting beyond his powers as the agent of the defenders, the Bank of Scotland. On the contrary, they accept the responsibility for what he did.

The bill had been protested for non-payment, and the reason of the non-pay-

<sup>1</sup> *Muir v. Crawford*, May 4, 1875, 2 R. (H. L.) 148; *Van Wart v. Woolley*, 3 Barn. and Cress. 439; *Chitty on Bills*, 299; *Bell's Prin.* 342; *Bell's Comm.* 7th ed. i. p. 431, note.

<sup>2</sup> *Potter v. Muirhead*, Jan. 21, 1847, 9 D. 519; *Campbell v. Clason*, Dec. 20, 1838, 1 D. 270; *Urquhart v. Grigor*, June 12, 1857, 19 D. 853.

<sup>3</sup> *Bell's Prin.* 337.

<sup>4</sup> *Bills of Exchange Act*, 1882 (45 and 46 Vict. c. 61), sec. 64.

<sup>5</sup> *King v. Stevenson*, Dec. 3, 1807, Hume, 344; *Murray v. Durno*, Dec. 6, 1797, *ibid.* 323; *Dougan v. Smith*, July 3, 1817, *ibid.* 356; *Chatto & Co. v. Marshall*, Jan. 17, 1811, Fac. Coll.; *Campbell v. Clason*, Dec. 20, 1838, 1 D. 270; *M'Millan v. Gray*, March 2, 1820, Fac. Coll.; *Davidson v. Mackenzie*, Dec. 20, 1856, 19 D. 226, 29 Scot. Jur. 113.

<sup>6</sup> *Sim v. Clark*, Dec. 2, 1831, 10 S. 85; *Ronaldson v. Drummond & Reid*, June 7, 1881, 8 R. 767; *M'Lean v. Soady's Trustees*, July 19, 1888, 15 R. 966; *Black v. Curror & Cowper*, June 27, 1885, 12 R. 990; *Guild v. Glasgow Educational Endowments Board*, July 16, 1887, 14 R. 944.

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ment seems to have been some dispute as to the quality of the cargo for which it had been granted. After the failure to pay, the bill was sent out to Canada in order to secure recourse against the drawers, and in these circumstances Mr Mackenzie came forward and offered to collect the bill for the National Bank, who are the agents in this country of the Dominion Bank of Canada. The bill was accordingly brought back to this country, and sent to Mackenzie at Grangemouth, who wrote to the National Bank of London a letter on 9th June, in which he says,—“With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge *re* the bill, on condition that they were held free of further responsibility.” And the enclosed letter was in these terms,—“We have yours stating the National Bank, London, will take payment of this bill, but we would like to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto.”

The question therefore between the parties at that stage was whether Anderson & Company were liable for interest and expenses in consequence of non-payment of the bill on presentation, or were to be relieved of that charge. Everything else seems to have been arranged.

Now, the National Bank were acting merely as agents for the pursuers, and they communicated with them as to the conditions contained in the letter of Anderson & Company, and replied that they were not authorised to take payment upon these conditions. Mackenzie in the meantime, without waiting for an answer to his letter of the 9th June, and with no authority for so doing, took payment for the bill under deduction of the charges for interest and expenses, except the 12s. 6d. for protest charges, and having so taken payment he marked the bill as paid, and delivered it over to the acceptors. The question then arose whether the National Bank would take payment of the amount of the bill under deduction of interest and expenses, and they adhered to the instructions which they had received from the pursuers, and declined to do so.

Now, this was very awkward, and involved a serious responsibility on Mackenzie's part in acting as he did. He had sent on 13th June to the National Bank a draft of the amount paid by Anderson & Company, but accompanied by a letter to this effect,—“Of course you distinctly understand . . . that . . . the draft is accepted by you in settlement of the transaction without any reservation.” The National Bank, acting on the instruction of the pursuers, were forced to return the draft, saying that they could not take it on that condition, and in so doing they acted quite rightly. The money accordingly was sent back and handed over to the acceptors, but the bill was cancelled, and a great difficulty arose in obtaining payment of it, and indeed it might have been impossible to do so if it had not been for the provision of the Bills of Exchange Act, 1882, sec. 63, subsec. (3), which enacts that “a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.” The position of the pursuers and their agents accordingly was that while they could not charge on the bill, they were enabled to raise an action to recover the amount of the bill, founding on the above section of the Bills of Exchange Act, and proving that it was cancelled without authority. The pursuers were successful

in their action against Anderson & Company after a protracted litigation. Evi- No. 187.  
 dence was led, and the case was brought here on a reclaiming note, and the final  
 judgment was pronounced on 10th February 1888. Unfortunately before that July 19, 1889.  
 decree could be put in force against the acceptors they had become bankrupt—Dominion  
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The present action is brought against the Bank of Scotland to recover the loss sustained by the pursuers by reason of the cancellation of the bill. The Lord Ordinary has found the Bank of Scotland liable on the ground, as I understand his Lordship, that owing to the cancellation of the bill, which was unauthorised and improper, the pursuers, the holders, were unable to charge upon it, and that if they had been able to give a charge at the date of the action against Anderson & Company there is no doubt that they would have recovered payment, the bill being liable to no objection on the face of it till it was cancelled. If any dispute had arisen as to the sum due under it, and the acceptors had brought a suspension of the charge, there is just as little doubt that the bill of suspension would not have been passed without consignation, and so the pursuers would have been safe, because at that time it is not disputed that the acceptors' business was perfectly sound and able to meet its liabilities. That seems to me a good ground of decision, and I agree with his Lordship. The damage sustained by the Dominion Bank resulted from the wrongful act of Mackenzie, the agent for the Bank of Scotland, and therefore the Bank of Scotland is liable, and I hold that the question of their liability is not affected by the fact that other parties may be liable against whom the pursuers may have recourse, namely, the drawers, M'Arthur Brothers. We do not know much about the question whether recourse has been preserved against them, or whether they may or may not be good for the money. In the meantime the loss has been incurred directly from the fault of the defenders or their agent, and I do not think it is a good answer to the pursuers' claim that possibly they may recover from someone else. The rule of law rather is that when by the fault of a party a document of debt has been rendered inoperative or ineffectual the party in fault is liable to make good the loss thereby incurred, and cannot say to the loser that he may recover from someone else. On the other hand, I am disposed to say that the Bank of Scotland may have an equitable right to an assignation to enable them to proceed against the drawers.

**LORD MURE.**—When the first question raised with reference to this bill came before the Court in the action against the acceptors, I concurred with your Lordship in holding that the arrangement come to between the agent for the present defenders at Grangemouth and the acceptors relative to the payment of the bill, and under which it was given up to the acceptors and cancelled by them, had resulted in a cancellation which was made by mistake, and without the authority of the holder of the bill, in the sense of the 63d section of the Act 45 and 46 Vict. c. 61, and that the bill was therefore one on which the acceptors were still liable to be proceeded against. In that action decree was pronounced against the acceptors, who were charged on the decree. They, however, failed to pay the bill, and having thereafter been sequestrated a dividend of 1s. in the pound has been declared on the estate; and it seems to be expected that an additional dividend of 6d. in the pound at most may be paid.

In these circumstances the present action has been brought against the de-

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fenders for payment of the bill, on the ground that the pursuers had failed to obtain payment of it through the fault of the defenders' agent at Grangemouth. The fault is said to have consisted in this: That the agent accepted payment of the bill on conditions which the pursuers had not authorised, and were not bound to accede to, and then gave up the bill to the acceptors, who cancelled their signature, and thereby prevented the pursuers from doing summary diligence on the bill. The action is therefore not only substantially but expressly one of damages for loss said to have been caused by the defenders; and it is distinctly alleged in the record (cond. 12) that in consequence of the delay which resulted from the pursuers being obliged to have recourse to an ordinary action instead of summary diligence, and from proceedings "which were thus rendered necessary by the defenders' fault and negligence, the pursuers have sustained loss and damage to the extent of the sum in the bill, and interest thereon," as sued for in the summons.

The Lord Ordinary has given effect to this contention, and decreed against the defenders for payment of the bill and interest, and for a further sum as the balance of an account of expenses brought out after crediting the defenders with the dividend received from the acceptors' estate.

I am of opinion with the Lord Ordinary that if it could be proved that the loss and damage here claimed were occasioned through the delay which occurred in taking proceedings upon the bill, and, in particular, in consequence of the pursuers having been prevented from doing summary diligence, owing to the bill having been cancelled with the knowledge and permission of the defenders' agent at Grangemouth, the damage would be of a description for which the defenders would be liable in law. But after repeated consideration of the evidence, I have been unable, the *onus* being, as I conceive, upon the pursuers to prove their case as laid in the record, to come to the conclusion, in the circumstances of this case, that if the pursuers had been able to do summary diligence at the time they resolved to proceed against the acceptors in July 1887 they would have succeeded in recovering the amount of the bill.

In dealing with this matter, the time at which the pursuers gave instructions that proceedings should be taken is of importance. As I read the evidence, that was not till the beginning of July 1887, as shewn by the letter from the National Bank, London, of the 5th of July of that year, and by the evidence of Mr Spens, one of the firm to whom that letter was addressed, who says,—“The bill was placed in our hands on the 6th of July 1887. When I was first consulted, I asked the bill to be sent that I might do summary diligence, but when I found it was cancelled I instructed an ordinary action.” The main question therefore to be considered upon the evidence under the present action is, whether the pursuers have proved that they failed to obtain payment of the bill in consequence of the delay occasioned by their having recourse to an ordinary action against the acceptors, instead of proceeding by summary diligence; and this I apprehend they must do by some clear and distinct direct evidence, and not by mere presumptions or inferences to be deduced from the circumstances of the case, even if these presumptions were in their favour.

Having regard, however, to the fact that the acceptors' estate did not admit of more than a dividend of 1s. 6d. in the £ in March 1888, the presumptions are, I think, much against the probability of the acceptors being able, under a six days' charge, to meet a demand for about £3000, if they had been charged

for payment at the time Mr Spens received instructions to proceed, and the evidence, as I read it, tends to strengthen these presumptions. Mr Spens is questioned on the subject of arrestments on the dependence, and he says,—“My impression is that we put warrants of arrestment in the summons in the action against Anderson. I am satisfied that we arrested in the hands of the Bank of Scotland. At that time Anderson & Company, I believe, were engaged in considerable trade. Did you try to find any other money?—I did; I mean I made inquiries with reference to whether I could get money due to Anderson, and I was informed I could not. I did not get anything by arrestment in the hands of the Bank of Scotland.”

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Mr Horsburgh, the trustee on the sequestrated estate is also examined, and he says that at the 25th of June 1887 the bankrupts were due to their three bankers about £3950; and with reference to the money which had been remitted to London to pay the bill, but returned, he says—“The draft in question was applied as follows—Lodged on deposit-receipt in name of Mr Anderson's son, £2846, 11s. 5d.; sent to Mr Anderson's law-agents, £95—together, £2941, the sum which he got back. The deposit-receipt stood in the son's name until 4th July. It was then uplifted, and applied thus—In payment in cash to Dow & Company to enable them to retire some bills on 4th July, £862; in retiring bills of his own firm, £298, 12s. 7d.; and paid into current account of his firm with the Clydesdale Bank, £1685. The £862 paid to Dow & Company was to enable them to retire bills on which they were ostensibly the primary debtors. There were cross-bills. The deposit-receipts were with the Bank of Scotland, I think, but I can hardly state distinctly. Dow & Company and Anderson & Company were, I think, accommodating each other with their names.”

There being therefore, according to this evidence, no money to be heard of that could be secured by arrestment when Mr Spens was instructed to proceed against the acceptors, and a large sum due to the banks with whom the acceptors dealt, it is difficult to see where the money was to come from which would have been required to meet a charge on summary diligence for so large a sum on or after the 6th of July 1887. There is plainly no direct evidence either that there was or that there would have been any such sum available to pay the bill.

All therefore that the pursuers would have got by using summary diligence would have been a warrant to poind the acceptors' goods and effects. But there is no evidence as to what those goods and effects were, or as to what might be their value. And it must be borne in mind that it is no longer competent to imprison for non-payment of a civil debt; so that summary diligence as a means of enforcing payment of a civil debt has lost what was formerly its chief compulsitor. It is now substantially nothing more than a warrant to poind and arrest. But it is proved that there was no money to arrest, and it is not proved that there was anything to poind. Had there been funds which could have been attached by arrestment or effects which admitted of being poinded in July 1887, these facts might, as I conceive, have been proved by Anderson and his son. But neither of these parties were examined by the pursuers, who have thus failed to clear up a matter which, in the view I take of it, was of great importance in the case, and should have been cleared up to entitle the pursuers to recover under the present action.



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Does the fact, then, spoken to by Mr Horsbrugh, of the bankrupts' firm having from time to time made payments to the amount of £18,000 in connection with their business between the month of June 1887 and the date of their bankruptcy, being at the rate of about £2000 a-month, lead necessarily to the inference that if summary diligence, as it is now restricted, had been used the bill would have been paid? I have not been able to see my way to that conclusion. It is plain, I think, from Mr Horsbrugh's evidence that a good deal of the business of the firm was carried on by means of cross and accommodation bills, and there is no evidence to shew that they were at any time possessed of any realised capital. The money which had been returned from London, and deposited in the bank, had all been drawn out by the 4th of July, and applied in payment of other debts, and it does not appear from Mr Horsbrugh's statement that the firm ever had any money at their credit in the bank after that date. And that being so, my strong impression upon the evidence as it stands is, that if the pursuers had been in a position to proceed by summary diligence on the 6th of July 1887, instead of by ordinary action, and had done so on a bill of so large an amount, the same result would in all probability have followed as that which followed the charge given in 1888, viz., the sequestration of the acceptors' firm, and the offer of a small dividend to the creditors. For the acceptors do not appear to have been parties who had any large amount of funds at their command. The bill in question was due on the 7th of May, but had been dishonoured and protested for non-payment, and sent out to Canada by the pursuers' agent in this country for instructions, from whence it was not returned till towards the middle of June, and it was not till then that the acceptors appear to have been able to get together money enough to meet the bill, and to make the conditional offer of payment which was refused.

In these circumstances I am unable to arrive at the conclusion that the pursuers have proved that the loss sustained was caused by the cancellation of the bill, and their consequent inability to proceed by summary diligence. On the evidence as it stands the loss arose from the inability of the acceptors to pay their ordinary debts; and the pursuers have not in my opinion proved, as they undertook to do, that the acceptors would have been able to pay the bill had they been charged to do so on or after the 6th of July 1887, or that the amount of the bill would then have been recovered under a warrant to poind and arrest, which is all they would have got under summary diligence, as that remedy is now restricted under the operation of the Act abolishing imprisonment for debt.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and the defenders assoilzied from the conclusions of the action.

LORD SHAND.—This case is one of very considerable hardship to the defenders, because it is contended that they are liable for a bill for nearly £3000, with which originally they had no connection except as collectors, and from which they could have obtained scarcely any profit. At the same time, I agree with your Lordships that responsibility for the amount of the bill attaches to the Bank of Scotland; for I cannot agree with Lord Mure that it is not proved that the pursuers have sustained loss owing to the cancellation of the bill.

The Dominion Bank being the holders of the bill, and having sent it to

London to the National Bank for collection, it was presented at the place of payment and dishonoured. The National Bank then returned it to Canada that the pursuers might take recourse against the drawers. When the bill was on its way out, Mackenzie, an agent of the defenders' bank at Grangemouth, intimated that if it were still in this country the bill would be paid. The National Bank on getting this intimation telegraphed for the bill, and having received it on 7th June 1887 they sent definite instructions to the Bank of Scotland with reference to the collection of the contents of the bill in these terms:—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson, £2939, 9s. 6d. Should the acceptors decline to pay protest charges, please return protest to us. Acceptors will of course pay the remitting charge." That was an authority to the Bank of Scotland to give up the bill only on obtaining payment of the sum mentioned, 12s. 6d. of protest charges, and the remitting charge. On the 25th of June the National Bank got the bill back again, but not in the same state in which it was sent. In the meantime the acceptors' names had been deleted, and it had been perforated as "paid" with the Bank of Scotland's usual mark.

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Now, what had occurred was this: The acceptors being in funds to meet the bill, paid the amount to the Bank of Scotland. They remitted it to London by draft, and if the remittance had not been clogged with a condition there would have been an end of the transaction, as the National Bank would have got all it stipulated for. But Mr Mackenzie in sending the draft did so subject to a condition expressed as follows:—"Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned, the draft is accepted by you in settlement of the transaction without any reservation." The letter enclosed was in these terms:—"Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses," &c. An indefinite amount of interest had run on the bill, and the National Bank had no authority to give up the Dominion Bank's claim for interest and expenses. They were quite willing to take the draft, but not to undertake to abandon their claim for interest and expenses. Accordingly they returned the draft rejecting the conditions and requiring the bill to be sent. When the bill arrived it had been cancelled, because the Bank of Scotland had given up the bill under the arrangement that the acceptors should be free of all further claims.

I think it is clear, that as the bill was cancelled in the way I have explained, there is liability on the part of the bank for the consequences. As to the amount of the liability I confess I have no doubt that it was the legal right of the Dominion Bank to get the bill back as it was sent, and as it was sent back mutilated I think they were entitled to return it, and refuse to take it as a document of debt which, in its altered and mutilated state, was liable to most serious objection. The pursuers might have taken that course. They appeared anxious, however, to avoid inflicting loss upon the Bank of Scotland, who were making scarcely any profit by the transaction, and who had interfered with the view of helping their correspondents, the National Bank. The vital fact is that had the bill not been cancelled proceedings might have been taken to enforce payment by summary diligence founded on the bill, and the charge would have expired by 4th July 1887, and it appears to me the holders would

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As regards the liability of the defenders, is it not proved that damage was sustained? In the first place, my opinion is that the *onus* would lie on the Bank of Scotland of proving that no damage was sustained owing to their action. I think the Dominion Bank would have been entitled to say,—“Take and keep the bill, and pay us the amount of it.” But, however the question as to *onus* might be, there has been a proof in the case. I think that but for the cancellation summary diligence could have been done on the bill early in July 1887. The position of the acceptors at that time was that they were carrying on business as usual. They had remitted a draft for the amount to London, and had the sum lying in bank, and finding that the matter was not arranged, they uplifted the amount in July. The evidence all points clearly to this, that if a charge had been made on the bill in July the money would have been either consigned or secured. Time went on, and in March 1888 the acceptors were sequestered. What is the evidence as to the intervening period? We find from the evidence of Mr Horsburgh, the trustee in the sequestration, that “they were carrying on their business in the way they had been doing it for some time. They appear to have met their current bills when they became due. Between the dates I have mentioned they met bills to the amount of £10,195, exclusive of the one in question. They were met and paid at their due dates. The bankrupts were also paying freights and other liabilities during the same period. They paid freights to the amount of £1406, besides other debts.” The acceptors had a going business, and surely it is to be presumed in that state of matters that the charge would have produced money. And although it appears also that the pursuers made inquiry about getting funds to arrest, and found that the Andersons had an overdraft at the bank, I think there is no reason to infer that they would not have got payment.

On the whole case, I think the *onus* was on the Bank of Scotland to shew that in July 1887 the Andersons had no funds to meet the bill, and that the proof has shewn that there were funds, and further, I think that the Bank of Scotland should have called Anderson as a witness in order to discharge the *onus* upon them. And so I agree in holding that the defenders are liable. I concur also in the view that the pursuers are not bound to go on and adopt further procedure against the drawers, who seem to have an unanswerable objection to a demand for payment of the bill if presented in its present state.

**LORD ADAM.**—I am disposed to think that the Dominion Bank would have been within its right to have refused to take the cancelled bill and to have claimed the full amount from the Bank of Scotland, leaving the Bank of Scotland to recover the amount of the bill. I rather think that would have been the proper course, and all questions would have been avoided as to what might have been recovered. There was, however, nothing wrong in the course which was followed, namely, to raise an action against the acceptors in their own names. I am clearly of opinion that it was impossible to charge the acceptors on the cancelled bill. Then if that be so, what followed? The litigation went on for a year, at the end of which time the acceptors became bankrupt. These facts, I think, shew, unless they are redargued, that the loss which the bank suffered by the cancellation of the bill, and their inability to charge upon it, was just the difference between the amount due on the bill and the dividend they have received from the acceptors' estate. There is, I think, no presumption after so long that the Dominion Bank would have been no more successful in securing payment at the date the bill was cancelled than a year after. No doubt it is quite relevant for the Bank of Scotland to aver and offer to prove that the Andersons were insolvent at that date, and that no loss resulted from the inability to charge on the bill. The *onus* is, I think, on the Bank of Scotland to prove that, and I am accordingly of opinion that if it is matter of doubt whether the Andersons were able to pay at the date of the cancellation, any evil which has resulted must fall on the Bank of Scotland.

If, then, I concurred with Lord Mure as to the doubtful nature of the evidence, I should still have held the Bank of Scotland liable. On the contrary, however, I agree with the Lord President and Lord Shand on the evidence in the case, that if the holders had been in a position to charge on the bill they would have recovered the amount due on the bill. And I also agree that if the loss has arisen from the cancellation of the bill, it is no answer to say that it is possible that some other persons might have been able to pay. The Bank of Scotland is on the other hand, I think, entitled to get an assignation to the bill, and to recover if it can.

THE COURT adhered.

MACKENZIE, INNES, & LOGAN, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

**WILLIAM C. MACLEAN AND OTHERS (Maclean's Trustees), First Parties.—** No. 188.

*Gloag—Low.*

**GEORGE MACLEAN, Second Party.—***Gloag—Low.*

**ELIZABETH AND HUGH MACLEAN, Third Parties.—***Sir Charles Pearson.*

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*Succession—Heritage—Plate and pictures—Substitution in moveables.*—A truster directed his trustees to pay over the free yearly income of his estate, heritable and moveable, to his son. In the event of the latter dying without lawful issue, the trustees were directed to dispose and convey the truster's heritage, with his plate and pictures, to J., his nephew, and the lawful heirs of his body, whom failing, to G., a younger nephew, and the lawful heirs of his body. The truster's son survived him, and died without issue, and J. survived the latter about six months, and died unmarried and intestate.

*Held* that the plate and pictures fell to be conveyed along with the heritage to G., as substitute heir of provision.

*Succession—Residue—Direction to apportion* “within twelve months after death, or as soon thereafter as circumstances will permit”—*Period of pay-*

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*ment—Vesting.*—A truster directed his trustees to pay over the free yearly income of his estate, both heritable and moveable, to his son; and in the event of his son dying without issue, within twelve months after that event, "or so soon thereafter as circumstances will permit," to convey his heritage, and his plate and pictures, to a nephew. As regarded the residue, he directed his trustees, "in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, . . . to apportion and divide the said residue among" my brother's "children equally, share and share alike, whom I hereby appoint to be my residuary legatees, . . . and it is hereby declared that the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The truster's personal estate amounted to £48,000, which was all capable of early realisation, except the stock, crop, and implements of two farms of the value of £5000. The truster's son died without issue. J., one of the nephews, survived him about six months, and died unmarried and intestate. At the date of his death the trustees had not apportioned and divided the residue.

*Held* that a share of the residue had vested in J.

1ST DIVISION.  
C.

HUGH MACLEAN of Westfield and Hythehill, Elgin, died on 8th April 1885, leaving a trust-disposition and settlement, in which he directed his trustees, after payment of debts and making provision for certain alimentary annuities, to pay over the free yearly income of the estate, both heritable and moveable, to his son, John Alexander Maclean, during all the days of his life.

In the eighth purpose of the deed Mr Maclean directed,—“After the death of the said John Alexander Maclean, my son, and within a period of twelve months after that event shall occur, if he shall leave lawful issue, I hereby direct my said trustees to dispone and convey my said lands and estates of Westfield, Inchshaggarty, and Inchbrock, particularly above described, and my dwelling-house at Hythehill, with offices and garden, and my plate and pictures, to the eldest son of the said John Alexander Maclean, and the lawful heirs of his body, whom failing, to the second son of the said John Alexander Maclean, and the lawful heirs of his body. . . . And in regard to the residue of my estate, if it should happen that the said John Alexander Maclean should leave more than one lawful child of his body, I hereby direct and appoint my trustees, after the lapse of twelve months from the death of the said John Alexander Maclean, to divide and apportion the said residue of my estate among the said children equally and share alike, the heir succeeding to the estates of Westfield, Inchshaggarty, and Inchbrock, being entitled to receive an equal share of the residue of my estate along with the other children.” In the ninth purpose he directed,—“In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit, after making due provision for all the annuities, legacies, and bequests herein contained or referred to, and for the complete fulfilment of this my deed of settlement, to dispone and convey my said lands and estate of Westfield, Inchshaggarty, and Inchbrock, specially above described, and my dwelling-house of Hythehill, offices, and garden, with my plate and pictures, to James Maclean, my nephew, son of the said James Maclean, my brother, and the lawful heirs of his body; whom failing, to George Maclean, my nephew, a younger son of the said James Maclean, my brother, and the lawful heirs of his body; whom also failing, to my nearest lawful heirs

whomsoever; and with regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean equally and share and share alike, whom I hereby appoint to be my residuary legatees, declaring hereby that the member of the family succeeding to my said heritable estate of Westfield and others specially above described shall also be entitled to a share of the residue along with the others. And it is hereby provided that if any of the children of the said James Maclean should die before the period of division, leaving lawful descendants, such descendants shall be paid the share of the residue that would have fallen to their deceased parent if then in life; and it is hereby declared that the share of succession effeiring to said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned."

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John Alexander Maclean died without issue on 12th January 1888. James Maclean, the heir of provision, who was then in Ceylon, returned to this country in the beginning of April. The trust-estate, at that date, consisted of the farm of Westfield, in the occupation of a tenant holding under lease, granted by the trustees, for nineteen years from Whitsunday 1886, at a rent of £330, and the farms of Surradale and Orchardfield in the natural occupation of the trustees. The personal estate, which was of the value of £48,000, consisted of £20,950 of heritable securities (convertible into cash on three months' premonition prior to a term of Whitsunday or Martinmas)—£5000 in the stock, crop, and implements on the farms of Surradale and Orchardfield, and the remainder of stock and shares.

The only asset of importance in point of amount which was not capable of early realisation was the stock, crop, and implements of the farms of Surradale and Orchardfield. At the request of James, the trustees had let the farms on a lease for nineteen years from Whitsunday 1888.

James died intestate on 24th June 1888, and unmarried.

At the time of his death the trustees had not made the conveyance in his favour of the heritable estate, with the plate and pictures, specified in the ninth purpose of the trust, nor had they apportioned and divided the residue of the estate.

Questions having arisen as to the distribution of the estate, this special case was presented to the Court by (1) the trustees of Mr Hugh Maclean; (2) George Maclean, James' younger brother, the next heir of provision; (3) Hugh and Elizabeth Maclean, James' elder brother and sister. The case set forth the facts above narrated.

The first parties maintained;—(1) That by the terms of the settlement they were not bound to proceed to convey the estates until twelve months from John's death had elapsed; (2) that in ordinary course it was not practicable to do so sooner, having regard to the magnitude of the estate and the nature of the investments, to the facts that until the crop of 1888 of the farms of Surradale and Orchardfield had been reaped, and the proceeds got in, and the rents of Westfield falling under John's executry had been collected, the residue in the sense of the settlement had not been ascertained, and they could not proceed to apportion and divide.

The second party maintained;—That the residue could only vest on actual payment, and that consequently no share therein vested in James. He also contended that he had the exclusive right to the plate and pictures, as being part of the subjects falling to be conveyed to him with the heritage as heir of provision under the settlement.

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The third parties maintained;—That the provisions in the testator's settlement in favour of the deceased James Maclean vested in him on the testator's death, subject to defeasance in the event of John Alexander Maclean being survived by lawful descendants, or otherwise that the said provisions vested in James Maclean at the death of John Alexander Maclean. They further contended that the plate and pictures fell into residue, or at all events, fell to be dealt with in the same manner as the residue. The third parties further maintained that in ordinary course the estate of Westfield and others, and the dwelling-house of Hythehill, might and should have been conveyed to James before his death, and that the residue of the estate should have been apportioned and divided among the residuary legatees, and that the fact of this not having been done could not prejudicially affect their interests in the succession.

The questions of law were;—“(1) Did a share of the residue vest in the person of the deceased James Maclean? (2) Do the plate and pictures form part of or fall to be dealt with in the same manner as the residue, or do they fall to be conveyed to the second party along with the heritage?”

Argued for the second party;—(1) As regarded the residue.—The testator had expressly provided that the shares of residue should not vest till the time of payment. As to the latter, the provision was that the trustees were, in the event of his son dying without leaving lawful issue, to divide the residue “within twelve months after that event, or so soon thereafter as circumstances will permit.” The testator meant by this to give his trustees twelve months from John's death in which to realise, and as much time thereafter as circumstances rendered necessary. That was the only reasonable construction, and one which derived aid from the provision which he made in the 8th clause as to the residue in the event of John's dying and leaving issue. In these circumstances, he had directed the trustees to make the division “after the lapse of twelve months from the death” of John. He clearly anticipated that the trustees would require twelve months at least in which to realise. That being the sound construction of the clause, no vesting had taken place in James, who only survived John six months, unless it could successfully be maintained that the trustees had unduly delayed to realise.<sup>1</sup> The case of *Ferrier*<sup>2</sup> did not conflict with the cases of *Howat's Trustees* and *Thorburn*. (2) As regarded the plate and pictures.—It was quite true that the presumption of law in a destination of moveables was against substitution, and in favour of conditional institution, but the plate and pictures were combined with the heritage in the same destination. It was quite settled that a testator had the power to create a substitution in dealing with his personal estate; and it was always a question of intention whether he had done so. The destination would receive effect in the same manner both as regards his moveable and his heritable estate, unless the first beneficiary defeated that destination, in the case of heritage by making a new destination, or in the case of moveables by willing them away, or by consuming them. Here it was not a case of money, but plate and pictures, which were as defined in character as any heritage. There was no difficulty then in giving effect to the testator's intention, which was to create a substitution in the case of the plate and pictures as well as of the heritage.<sup>3</sup>

<sup>1</sup> *Howat's Trustees v. Howat, &c.*, Dec. 7, 1869, 8 Macph. 337, 42 Scot. Jur. 116; *Sutherland's Trustees v. Clarkson*, Oct. 29, 1874, 2 R. 46; *Thorburn v. Thorburn*, Feb. 16, 1836, 14 S. 485, 8 Scot. Jur. 239.

<sup>2</sup> *Ferrier v. Ferriers*, May 18, 1872, 10 Macph. 711, 44 Scot. Jur. 390.

<sup>3</sup> *Ramsay v. Ramsay*, Nov. 23, 1838, 1 D. 83.

Argued for the third parties;—(1) As regarded the residue.—Vesting took place at John Maclean's death. The testator meant the trustees to realise so soon after John's death as circumstances would permit,—that was, as soon as possible. In that view James Maclean had a vested interest in the residue, because he survived John six months.<sup>1</sup> In *Bryson's Trustees v. Clark, &c.*,<sup>2</sup> the beneficiary had died before it was competent for the trustees to convey. In all the cases cited by the other parties vesting was excluded in the event of the beneficiary "dying before receiving payment." The *dictum* of Lord Corehouse in the case of *Thorburn*<sup>3</sup> was directly applicable here. In any view the trustees could have realised before James' death, and they ought to have done so. (2) As regarded the plate and pictures.—The beneficiaries' interest in them must be the same as if the trustees had done their duty, and conveyed them without undue delay. The presumption of law in a destination of moveables must be given effect to. It was in-favour of a conditional institution. The presumption was not displaced here.<sup>4</sup>

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At advising,—

LORD PRESIDENT.—By the settlement of Hugh Maclean of Westfield the object of the testator is expressed to be that his eldest son John Alexander should be restricted to an alimentary liferent of the estate, but that after his death the estate generally should go to his children. It turned out, however, that John Alexander had no children, and therefore the question we have to determine really arises upon the death without issue of John Alexander Maclean. Now, the part of the settlement which refers to that contingency is to be found under the ninth head, which is introduced by these words—"In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit, after making due provision for all the annuities, legacies, and bequests herein contained or referred to, and for the complete fulfilment of this my deed of settlement, to dispoise and convey my said lands and estate of Westfield, Inchshaggarty, and Inchbrock, specially above described, and my dwelling-house of Hythehill, offices and garden, with my plate and pictures, to James Maclean, my nephew, son of the said James Maclean, my brother, and the lawful heirs of his body; whom failing, to George Maclean, my nephew, a younger son of the said James Maclean, my brother, and the lawful heirs of his body." Now, as to the construction of that part of the clause I think there is very little room for question. I cannot doubt that George Maclean is called, either as a conditional institute or as substitute, as the case may be. If James Maclean predeceased John Alexander, of course he could not take, and George Maclean would take as conditional institute. But James Maclean survived the death of John Alexander by six months, or nearly so, and

<sup>1</sup> *Ferrier v. Ferriers*, May 18, 1872, 10 Macph. 711, 44 Scot Jur. 390.

<sup>2</sup> *Bryson's Trustees v. Clark, &c.*, Nov. 26, 1880, 8 R. 142.

<sup>3</sup> *Per Lord Corehouse*, 14 S. 487.

<sup>4</sup> *M'Dowall v. McGill*, June 19, 1847, 9 D. 1284, 19 Scot. Jur. 555; *Baillie v. Grant*, May 21, 1859, 21 D. 838, 31 Scot. Jur. 465; *Walker's Executor v. Walker*, June 19, 1878, 5 R. 965; *Campbell v. Campbell*, June 12, 1740, M. 14,855; *Brown v. Coventry*, June 2, 1792, Ball's Octavo Cases, 310; M. 14,863.



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accordingly the right to the heritage vested in him, and upon his death intestate, and without having done anything in the way of evacuating the substitution, the substitution took effect in favour of George Maclean. With regard to the pictures and plate, they are within precisely the same destination as the heritable estate itself, and the direction is to dispose and convey the estate of Westfield "with my plate and pictures." There is no doubt about the intention of the testator to combine the two in order to prevent their separation, and a substitution in moveables is quite an effectual and regular mode of settling property of this description, provided always that that substitution is not defeated. I hold therefore that George Maclean, as substitute heir of provision, is entitled to the estate of Westfield and the pictures and plate as one indivisible subject.

But then there occurs another question, arising partly out of the construction of what I have already read, but partly also out of the construction of what follows,—“With regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean, equally, and share and share alike, whom I hereby appoint to be my residuary legatees.” Now, the question put upon the construction of that part of the clause is, whether the share of this residue vested in James Maclean, the nephew of the testator. James Maclean survived the death of John Alexander Maclean. John Alexander's death was in January, and James Maclean's death was in June, so that he survived five months, at all events, and the question is whether during that time the share of the residue vested in James Maclean. The direction to “pay, or divide, or apportion,” (the words are all used), is that it shall be done within twelve months of that event—that is, the death of John Alexander, “or so soon thereafter as circumstances will permit.” But then there must be taken in connection with that also the further declaration which follows this clause, in which it is “declared that the share of the succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned.” There is no period of payment, no precise period of payment, mentioned in the deed, the direction being to divide “within twelve months of the death of John Alexander, or so soon thereafter as circumstances will permit.” Now, the word “thereafter,” admits of two constructions, it may mean either after John Alexander's death, or after the expiry of twelve months from John Alexander's death. My opinion is that it has the former meaning, not only from the expression in this clause itself, but from the contents of the deed. The expression regarding the twelve months is that the division is to take place within twelve months. Now, that being so, it may take place at any time within twelve months; it may take place within one month as well as at the expiry of twelve months, because it is not on the expiry of twelve months that it is to take place, but at any time within twelve months; and it seems to me therefore that when the testator gives permission and implied direction to divide within twelve months at any time when it shall be practicable, he could hardly at the same moment, and in the same breath, have said, “or at any time after twelve months.” The same expression occurs in regard to the disposition of the heritable estate. There it is an appointment within twelve months after the death of John Alexander Maclean, or so soon thereafter as

circumstances will permit. There I think the meaning is the same. There is another part of the deed in which a different expression is used, and which, I think, was intended to have a different meaning. It is in regard to the residue of the estate in the event of John Alexander Maclean leaving more than one lawful child of his body. In that case the testator directs his trustees "after the lapse of twelve months from the death of John Alexander Maclean" to divide and apportion the residue. There his meaning is obviously different. Again, with regard to the conveyance of the heritable estate in the event of John Alexander Maclean predeceasing him, he directs that the heritable estate shall be conveyed to the eldest son of John Alexander Maclean "within the period of twelve months after that event." So that these expressions stand in contrast with the one which is used with regard to the division of the residue among the children of John Alexander Maclean, if he has any; and upon the whole deed I come to the conclusion that it is in the power of these trustees, and indeed it is almost a direction, that they should divide the estate as soon as possible,—as soon as circumstances will permit after the death of John Alexander Maclean.

Now, that being so, the nature of the testator's estate comes to be very important. If it had been of such a mixed character that it really could not be ingathered and divided except after a long period of administration, I can quite understand that that would influence the construction of this clause. I think it would suggest probably that the "thereafter" meant to give a large discretion to the trustees as to the time within which they could realise, and that they might either realise and divide within the twelve months or after the twelve months, as they found convenient and practicable. But if we find, as I think we do, that the estate of the testator is very easily realisable, and is just of that description which can be realised quite well within an ordinary period, say within six months of the testator's death, which is the period very frequently allowed to trustees, or even within a shorter period, then that carries one's mind in favour of the construction which I have put upon the word "thereafter," so as to give the direction this meaning,—“Realise and divide as soon as possible. You shall do it at anyrate within twelve months, there can be no difficulty about that, but do it as soon as you can after the death of John Alexander without issue.” Now, what is the nature of the estate as we have it disclosed in the statement made of the personal estate as at the death of John Alexander? There is about £20,000 worth of heritable bonds. Now, these are very easily realisable. In the first place, the trustees had plenty of time before the term of Whitsunday after the death of John Alexander to call up those bonds, or if that was inconvenient and undesirable from the nature of the arrangement made at the granting of the security, they could at all events get their market value by transfer or assignation. Nothing can be more easily realised than that. Then the bulk of the estate otherwise consists of stocks and shares, which are in the market every day, and which can be sold at any time whenever convenient to the trustees; and really the only asset of the estate that is of the smallest importance in point of amount that could not be at once realised is the farm stock, crop, and implements of two farms. The amount of these is a little over £5000, and the amount of the entire estate is £48,000. Is the division of this estate to be tied up and nothing done because it is impossible at once to realise the farm stock, crop, and implements? I do not think that that is a fair way of dealing with a direction of this kind. It seems to me that the true meaning of

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the testator, and of the words he has used, is that when the bulk of the estate is fit to be divided, when it has been realised and is in such a shape that that can be done, then it is to be divided. The declaration that the shares of the residue are to become vested interests at and only upon the period of payment above mentioned does not involve any difficulty, because there is no fixed time of payment, as I have said, and it cannot mean—at least I think it does not mean—that nothing is to vest until it is actually paid if it be in a condition fit for distribution. If the estate is in the hands of the trustees, fit for division, and capable of division, then I think it is the duty of the trustees to divide; and if that duty is imposed upon them, their mere delay in the performance of that duty will make no difference on the rights of parties, because they were under an obligation to divide as soon as they could, and therefore the period of payment being fixed as the date of vesting merely means that when the period has arrived at which the trustees are in a condition to divide then the right shall vest. I am therefore for answering the first question in the affirmative.

With regard to the second question I have already expressed my opinion that the plate and pictures fall to be dealt with in the same manner as the heritable estate, and are inseparable from it.

LORD MURK.—I am of the same opinion. I think that this first question put to us should be answered in the affirmative, namely, that the residue vested in James Maclean—that is, his share of it—and I do so upon the same construction of the clause in the settlement that your Lordship has referred to. I think that in the whole of the ninth purpose the event in view is the death of John Alexander, and I think the words in the residue clause “within twelve months after that event, or so soon thereafter as circumstances will permit,” may be read “within twelve months after the death of John Alexander, or so soon after his death as circumstances will permit.” In that view of it, and seeing that the residue admitted of being realised before the death of James Maclean, I think the share may be fairly held to have vested in him by the operation of that clause. On the second question, I agree with your Lordship that the plate and pictures form part of and fall to be dealt with as part of the residue.

LORD SHAND.—I am of the same opinion also, that the first question should be answered in the affirmative. That question relates to the residue, and, as your Lordship has pointed out, there is a very special clause which declares that “the shares of succession effeiring to the residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned.” The question we have to determine is, what is that period of payment? The word “period” is not a very accurate term to use with reference to the payment. I read it as referring only to the term or time of payment above mentioned,—referring to one point of time. Now that depends upon the earlier clause of the deed, on which your Lordship has commented. The particular clause requiring to be construed is this:—“In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit.” It is clear that the word “event” there refers to the event of the son dying, and the only question of

difficulty is, whether the word "thereafter" refers to the word "event" or to the words "twelve months" which immediately precede it. I am disposed to think with your Lordships that the word "thereafter" refers to "event" and not to the "twelve months," so that the clause would read in this way,—*In the event of my son dying without lawful descendants of his body, within twelve months after that event, or as soon after that event as circumstances will permit.*" If the clause be so read it rather appears to me that it would result that the deed might be construed as making the death of John Alexander, his son, the period of vesting, because after all that would simply come to be a direction to this effect,—*"I leave the residue of my estate to be divided amongst those persons as soon as circumstances will permit."* And if that be so, I take it that in a case where there was no other direction the vesting would be held to take place at the death. But I am clear that in any view that may be taken of the deed, looking to the nature of the estate, vesting did occur, because even if you read the clause in the other way suggested, namely, *"within twelve months after that event, or as soon after the expiry of twelve months as circumstances will permit,"* the purpose expressed is that twelve months is given if required to realise the estate, but nothing more. But no direction, such as your Lordship pointed out, occurred in the other part of the deed to divide after the lapse of twelve months; it is all within twelve months. Accordingly, I hold with your Lordship that if the estate is of such a nature that (with the exception of a comparatively small amount of the whole that is divisible) it is clear that it might be divided a short time after the testator's death, it shall be held to have been so divided, or, at all events, that that is the time or term of payment at which it should be divided. Well, John Alexander Maclean died in January, but the estate could all have been realised admittedly, with the exception of the crop and stock, at the succeeding term of Whitsunday 1888. The bonds could all have been called up, because there was time for three months' premonition, and the other parts of the estate were clearly realisable, and therefore at Whitsunday 1888 this estate was in a condition to be divided and was divisible, and James Maclean surviving until June following, I am of opinion that the share of the residue vested in him.

I entirely concur in your Lordships' view upon the second question, which is the only other one we have to answer.

LORD ADAM.—I arrive at the same result, although perhaps not quite by the same road as your Lordships. I do not put the same construction upon the first clause relating to residue; my view of its construction is rather this, that the direction is to pay the residue in the event of the son dying without lawful descendants within twelve months after that event. So far as that goes, I read that as a direction to pay, not at twelve months, but as soon as circumstances will permit within twelve months. I think that is the meaning of that clause—at any time within twelve months, or as soon as circumstances will permit within twelve months. If that be the meaning of that clause, if you go on to read the next clause, *"so soon thereafter as circumstances will permit,"* putting the meaning on the word "thereafter" which your Lordship proposed, namely, as referring to the event of the death, and as meaning as soon after the death as circumstances will permit, that is just, in my mind, repeating again what has already been directed by the first branch of the clause, which I do not think is

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accordingly the right to the heritage vested in him, and upon his death intestate, and without having done anything in the way of evacuating the substitution, the substitution took effect in favour of George Maclean. With regard to the pictures and plate, they are within precisely the same destination as the heritable estate itself, and the direction is to dispose and convey the estate of Westfield "with my plate and pictures." There is no doubt about the intention of the testator to combine the two in order to prevent their separation, and a substitution in moveables is quite an effectual and regular mode of settling property of this description, provided always that that substitution is not defeated. I hold therefore that George Maclean, as substitute heir of provision, is entitled to the estate of Westfield and the pictures and plate as one indivisible subject.

But then there occurs another question, arising partly out of the construction of what I have already read, but partly also out of the construction of what follows,—“With regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean, equally, and share and share alike, whom I hereby appoint to be my residuary legatees.” Now, the question put upon the construction of that part of the clause is, whether the share of this residue vested in James Maclean, the nephew of the testator. James Maclean survived the death of John Alexander Maclean. John Alexander's death was in January, and James Maclean's death was in June, so that he survived five months, at all events, and the question is whether during that time the share of the residue vested in James Maclean. The direction to “pay, or divide, or apportion,” (the words are all used), is that it shall be done within twelve months of that event—that is, the death of John Alexander, “or so soon thereafter as circumstances will permit.” But then there must be taken in connection with that also the further declaration which follows this clause, in which it is “declared that the share of the succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned.” There is no period of payment, no precise period of payment, mentioned in the deed, the direction being to divide “within twelve months of the death of John Alexander, or so soon thereafter as circumstances will permit.” Now, the word “thereafter,” admits of two constructions, it may mean either after John Alexander's death, or after the expiry of twelve months from John Alexander's death. My opinion is that it has the former meaning, not only from the expression in this clause itself, but from the contents of the deed. The expression regarding the twelve months is that the division is to take place within twelve months. Now, that being so, it may take place at any time within twelve months; it may take place within one month as well as at the expiry of twelve months, because it is not on the expiry of twelve months that it is to take place, but at any time within twelve months; and it seems to me therefore that when the testator gives permission and implied direction to divide within twelve months at any time when it shall be practicable, he could hardly at the same moment, and in the same breath, have said, “or at any time after twelve months.” The same expression occurs in regard to the disposition of the heritable estate. There it is an appointment within twelve months after the death of John Alexander Maclean, or so soon thereafter as

circumstances will permit. There I think the meaning is the same. There is another part of the deed in which a different expression is used, and which, I think, was intended to have a different meaning. It is in regard to the residue of the estate in the event of John Alexander Maclean leaving more than one lawful child of his body. In that case the testator directs his trustees "after the lapse of twelve months from the death of John Alexander Maclean" to divide and apportion the residue. There his meaning is obviously different. Again, with regard to the conveyance of the heritable estate in the event of John Alexander Maclean predeceasing him, he directs that the heritable estate shall be conveyed to the eldest son of John Alexander Maclean "within the period of twelve months after that event." So that these expressions stand in contrast with the one which is used with regard to the division of the residue among the children of John Alexander Maclean, if he has any; and upon the whole deed I come to the conclusion that it is in the power of these trustees, and indeed it is almost a direction, that they should divide the estate as soon as possible,—as soon as circumstances will permit after the death of John Alexander Maclean.

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Now, that being so, the nature of the testator's estate comes to be very important. If it had been of such a mixed character that it really could not be ingathered and divided except after a long period of administration, I can quite understand that that would influence the construction of this clause. I think it would suggest probably that the "thereafter" meant to give a large discretion to the trustees as to the time within which they could realise, and that they might either realise and divide within the twelve months or after the twelve months, as they found convenient and practicable. But if we find, as I think we do, that the estate of the testator is very easily realisable, and is just of that description which can be realised quite well within an ordinary period, say within six months of the testator's death, which is the period very frequently allowed to trustees, or even within a shorter period, then that carries one's mind in favour of the construction which I have put upon the word "thereafter," so as to give the direction this meaning,—“Realise and divide as soon as possible. You shall do it at anyrate within twelve months, there can be no difficulty about that, but do it as soon as you can after the death of John Alexander without issue.” Now, what is the nature of the estate as we have it disclosed in the statement made of the personal estate as at the death of John Alexander? There is about £20,000 worth of heritable bonds. Now, these are very easily realisable. In the first place, the trustees had plenty of time before the term of Whitsunday after the death of John Alexander to call up those bonds, or if that was inconvenient and undesirable from the nature of the arrangement made at the granting of the security, they could at all events get their market value by transfer or assignation. Nothing can be more easily realised than that. Then the bulk of the estate otherwise consists of stocks and shares, which are in the market every day, and which can be sold at any time whenever convenient to the trustees; and really the only asset of the estate that is of the smallest importance in point of amount that could not be at once realised is the farm stock, crop, and implements of two farms. The amount of these is a little over £5000, and the amount of the entire estate is £48,000. Is the division of this estate to be tied up and nothing done because it is impossible at once to realise the farm stock, crop, and implements? I do not think that that is a fair way of dealing with a direction of this kind. It seems to me that the true meaning of

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the testator, and of the words he has used, is that when the bulk of the estate is fit to be divided, when it has been realised and is in such a shape that that can be done, then it is to be divided. The declaration that the shares of the residue are to become vested interests at and only upon the period of payment above mentioned does not involve any difficulty, because there is no fixed time of payment, as I have said, and it cannot mean—at least I think it does not mean—that nothing is to vest until it is actually paid if it be in a condition fit for distribution. If the estate is in the hands of the trustees, fit for division, and capable of division, then I think it is the duty of the trustees to divide; and if that duty is imposed upon them, their mere delay in the performance of that duty will make no difference on the rights of parties, because they were under an obligation to divide as soon as they could, and therefore the period of payment being fixed as the date of vesting merely means that when the period has arrived at which the trustees are in a condition to divide then the right shall vest. I am therefore for answering the first question in the affirmative.

With regard to the second question I have already expressed my opinion that the plate and pictures fall to be dealt with in the same manner as the heritable estate, and are inseparable from it.

LORD MURE.—I am of the same opinion. I think that this first question put to us should be answered in the affirmative, namely, that the residue vested in James Maclean—that is, his share of it—and I do so upon the same construction of the clause in the settlement that your Lordship has referred to. I think that in the whole of the ninth purpose the event in view is the death of John Alexander, and I think the words in the residue clause “within twelve months after that event, or so soon thereafter as circumstances will permit,” may be read “within twelve months after the death of John Alexander, or so soon after his death as circumstances will permit.” In that view of it, and seeing that the residue admitted of being realised before the death of James Maclean, I think the share may be fairly held to have vested in him by the operation of that clause. On the second question, I agree with your Lordship that the plate and pictures form part of and fall to be dealt with as part of the residue.

LORD SHAND.—I am of the same opinion also, that the first question should be answered in the affirmative. That question relates to the residue, and, as your Lordship has pointed out, there is a very special clause which declares that “the shares of succession effeiring to the residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned.” The question we have to determine is, what is that period of payment? The word “period” is not a very accurate term to use with reference to the payment. I read it as referring only to the term or time of payment above mentioned,—referring to one point of time. Now that depends upon the earlier clause of the deed, on which your Lordship has commented. The particular clause requiring to be construed is this:—“In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit.” It is clear that the word “event” there refers to the event of the son dying, and the only question of

difficulty is, whether the word "thereafter" refers to the word "event" or to the words "twelve months" which immediately precede it. I am disposed to think with your Lordships that the word "thereafter" refers to "event" and not to the "twelve months," so that the clause would read in this way,—“In the event of my son dying without lawful descendants of his body, within twelve months after that event, or as soon after that event as circumstances will permit.” If the clause be so read it rather appears to me that it would result that the deed might be construed as making the death of John Alexander, his son, the period of vesting, because after all that would simply come to be a direction to this effect,—“I leave the residue of my estate to be divided amongst those persons as soon as circumstances will permit.” And if that be so, I take it that in a case where there was no other direction the vesting would be held to take place at the death. But I am clear that in any view that may be taken of the deed, looking to the nature of the estate, vesting did occur, because even if you read the clause in the other way suggested, namely, “within twelve months after that event, or as soon after the expiry of twelve months as circumstances will permit,” the purpose expressed is that twelve months is given if required to realise the estate, but nothing more. But no direction, such as your Lordship pointed out, occurred in the other part of the deed to divide after the lapse of twelve months; it is all within twelve months. Accordingly, I hold with your Lordship that if the estate is of such a nature that (with the exception of a comparatively small amount of the whole that is divisible) it is clear that it might be divided a short time after the testator's death, it shall be held to have been so divided, or, at all events, that that is the time or term of payment at which it should be divided. Well, John Alexander Maclean died in January, but the estate could all have been realised admittedly, with the exception of the crop and stock, at the succeeding term of Whitsunday 1888. The bonds could all have been called up, because there was time for three months' premonition, and the other parts of the estate were clearly realisable, and therefore at Whitsunday 1888 this estate was in a condition to be divided and was divisible, and James Maclean surviving until June following, I am of opinion that the share of the residue vested in him.

I entirely concur in your Lordships' view upon the second question, which is the only other one we have to answer.

LORD ADAM.—I arrive at the same result, although perhaps not quite by the same road as your Lordships. I do not put the same construction upon the first clause relating to residue; my view of its construction is rather this, that the direction is to pay the residue in the event of the son dying without lawful descendants within twelve months after that event. So far as that goes, I read that as a direction to pay, not at twelve months, but as soon as circumstances will permit within twelve months. I think that is the meaning of that clause—at any time within twelve months, or as soon as circumstances will permit within twelve months. If that be the meaning of that clause, if you go on to read the next clause, “so soon thereafter as circumstances will permit,” putting the meaning on the word “thereafter” which your Lordship proposed, namely, as referring to the event of the death, and as meaning as soon after the death as circumstances will permit, that is just, in my mind, repeating again what has already been directed by the first branch of the clause, which I do not think is

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**No. 188.** a natural reading, and therefore it occurs to my mind that the antecedent of "thereafter" is "twelve months," and I would read the clause so—as a direction to pay within twelve months after the death of the son, or so soon after the twelve months as circumstances will permit. But although that is my reading of the clause, it appears to me practically to come to the same thing, because to my mind it is a direction by the truster to pay and divide as soon as circumstances will permit. That is practically, on either construction of the clause, what it comes to, and I do not think the different views of the possible construction of the clause are at all material as to the result. Then we come to the other clause, "declaring that the share of the succession effeiring to said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." I think that refers back to the period of actual payment, and not to any other time as sometimes occurs in these cases, but although I think it refers to the period of actual payment it is in this case not the time when payment is actually made, but when payment ought to have been made subject to the direction of the truster, because that is what is meant in such a clause by the period of payment. Now, in this case, looking at the estate which we have to deal with here, it is quite obvious that the great bulk of it might have been realised and ready for payment within a short time after the death of John Alexander Maclean. Nearly eight-ninths of it might have been realised and ready for division long before Whitsunday 1888, and if that be so, I agree with your Lordship that the vesting of the estate, or payment of that portion of the estate which can be realised, is not to be delayed because a fraction of it is not ingathered or capable of being ingathered. I am therefore of opinion that the whole of the estate vested certainly before the Whitsunday term and before the death of James Maclean.

As regards the plate and pictures, I concur with your Lordship.

THE COURT pronounced this interlocutor:—"Find and declare that a share of the residue vested in the person of the deceased James Maclean, the testator's nephew: Find and declare that the plate and pictures fall to be conveyed to the second party along with the heritage," &c.

TODD, MURRAY, & JAMIESON, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

**No. 189.** HUGH BRUCE DEWAR AND ANOTHER (Durie's Trustees), Pursuers (Reclaimers).—*Sir Charles Pearson—Salvesen.*  
**July 19, 1889.\*** EARL OF ELGIN AND KINCARDINE, Defender (Respondent).—*Gloag—Jameson.*  
 Durie's Trustees v. Earl of Elgin.

*Superior and Vassal—Contract to grant feu-charter with precept of sasine—Obligation to relieve from minister's stipend and public burdens—Charters by progress.*—In 1764 C. and D. entered into a contract and agreement to the effect that "the said C. has sold and disposed, and binds and obliges him, his heirs and successors, to grant a feu-right to the said D, his heirs and successors," of sixty acres of land, "to be held in feu-farm and heritage of the said C., his heirs and successors, for yearly payment of £3 sterling, at the term of Martinmas yearly, . . . and to assign the rents from and after Martinmas 1765, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, in all time coming, except the said feu-duty, and

to make the said public a real burden upon his other lands, and also the said C. binds him and his foressaids to enclose the said sixty acres betwixt and Martinmas 1766, . . . for the which causes and on the other part the said D., on the said C. performing his part of the premises—that is, granting the said feu-contract in the terms above narrated, binds and obliges him, his heirs and successors, to content and pay to the said C., his heirs, executors, and successors whatsoever, the sum of £600 sterling at Martinmas 1765, . . . and to pay £3 of feu at Martinmas, beginning the first year's payment at Martinmas 1765." The deed contained a precept of sasine, on which D. took infeftment in May 1776.

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In 1888 a singular successor of D., who was duly entered with the superior under a charter of confirmation, which did not set forth an obligation by the superior to relieve the vassal of public burdens, raised an action against the superior, who was a singular successor of C., concluding for declarator that the defender as superior was bound to relieve the pursuer of public burdens.

The pursuer founded on the deed of 1764 as shewing that the obligation to relieve of public burdens was a condition of the feu.

It did not appear that a feu-contract ever was granted, or that the £600 was ever paid.

*Held* that while it would have been competent for the vassal to refer to a feu-contract constituting his right to shew that the obligation to relieve of public burdens was a condition of the feu, the contract of 1764 was not a feu-contract, but merely a personal obligation to grant a feu-contract, and that the obligation to relieve of public burdens was merely a personal obligation, which could not be enforced against a singular successor in the superiority.

THIS action was raised by Hugh Bruce Dewar and others, the marriage-contract trustees of Dr Andrew Dewar Durie and his wife, Mrs Eliza Durie, against the Earl of Elgin and Kincardine, to have it found and declared "that the defender, as superior of the sixty acres Scots measure of the Room of Drumtuthill, lying in the parish of Dunfermline and county of Fife, being the lands described in a contract of agreement and disposition dated 5th June 1764, and registered in the Books of Council and Session, 3d October 1792, entered into between George Chalmers, merchant in Edinburgh, and William Drysdale, tenant in Drumtuthill, of the *dominium utile* of which lands the pursuers, as trustees aforesaid, are proprietors, is bound to free and relieve the said lands of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, excepting the feu-duty payable by the said lands, and also to make repetition to the pursuers of all payments they have made or may yet make in respect of such minister's stipend, schoolmaster's salary, cess, and public burdens since the term of Martinmas 1882, being the date at which the defender became superior of the said lands."

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C.

At the date of the action, the pursuers were in possession of the sixty acres on the following titles:—

Trust-disposition and settlement, by Dr Charles Durie of Craighluscar, in favour of Henry Black and others, as trustees, dated 13th January 1838, and codicil thereto, dated 12th February 1845.

Instruments of sasine thereon in favour of the said Henry Black and others, Dr Durie's trustees, dated 21st May, and recorded in the Particular Register of Sasines for the shire of Fife, 20th June 1845.

Charter of confirmation, dated 26th June 1856, by John Buchan Hepburn, then superior of the lands, a singular successor of George Chalmers above mentioned, in favour of the said Henry Black and others, Dr Durie's trustees, confirming to them the sixty acres and the said infeftment, with the following tenendas and reddendo:—"To be holden the said lands and others immediately of me and my foressaids, superiors thereof, in feu-farm, fee, and heritage for ever; paying therefor yearly the sum of £3 sterling at the term of Martinmas, and doubling the said

**No. 189.** feu-duty the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled." This charter contained no reference to the contract of 1764, or to any obligation by the superior to relieve the vassal of public burdens.

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Disposition, dated March 1860, and recorded in the General Register of Sasines, 5th April 1860, by Dr Durie's trustees, in favour of Robert Durie of Craigluscar.

Writ of confirmation, dated 30th April 1868, confirming the last-mentioned disposition, in so far as consistent with the charter of confirmation of 1856.

Disposition by Mrs Durie of Craigluscar, with consent of her husband, in favour of the pursuers, dated 8th, and recorded 12th April 1869.

Writ of confirmation, dated 9th June 1869 (written upon the last-mentioned disposition), by John Buchan Hepburn, confirming the same "only so far as consistent with the charter of confirmation granted by me, as superior foresaid, in favour of Henry Black," &c., dated 26th June 1856.

The pursuer founded on the following deeds:—

The contract, dated 5th June 1764, between George Chalmers and William Drysdale, which bore that the parties thereto had agreed as follows:—"That is to say, the said Mr George Chalmers has sold and disposed, and binds and obliges him, his heirs and successors, to grant a feu-right to the said William Drysdale, his heirs and successors, of sixty acres Scots measure of the Room of Drumtuthel [Here followed a description of the lands], to be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, . . . and to assign the rents from and after the term of Martinmas 1765 for crop and year 1766, and to free and relieve the said ground of all minister's stipend, school-master's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said public a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said sixty acres, betwixt and Martinmas 1766, on the east, south, and west sides, with a sufficient stone dyke six quarters high, which dykes are afterwards to be upheld on their mutual expenses: For the which causes, and on the other part, the said William Drysdale, on the said Mr Chalmers performing his part of the premises,—that is, granting the said feu-contract in the terms above narrated,—binds and obliges him, his heirs and successors, to content and pay to the said Mr George Chalmers, his heirs, executors, and successors whatsoever, the sum of £600 sterling, and that at and against the term of Martinmas 1765, with a fifth part more of penalty in case of failure, and annual rent after the said term of payment during the not payment, and to pay yearly the sum of £3 sterling of feu at Martinmas, beginning the first year's payment at Martinmas 1766 for the crop 1766, and so forth yearly in all time coming, and to double the said feu each year at the entry of every heir and singular successor, and to grind his victuals at Meldrum's Mill, conform to the thirlage of the said lands: Attour to the effect the said William Drysdale and his foresaids may be infeft in the said sixty acres, the said Mr George Chalmers desires and requires

and ilk one of you conjunctly and severally his baillies in that part, that, incontinent this his precept seen, ye pass to the ground of the said sixty acres, and there give and deliver heritable state and sasine," &c.

Instrument of sasine following thereon in favour of William Drysdale, recorded in the Register of Sasines for the shire of Fife on 17th May 1766, which bore,—“Compeared personally William Drysdale, tenant in

Drumtuthill, and past with Robert Drysdale, residenter in Drumtuthill, No. 189. baillie in that part underwritten, specially constitute by the precept of sasine after insert, to the ground of the lands and others after mentioned, and there the said William Drysdale having and holding in his hands a contract of sale of the date underwritten, entered into betwixt Mr George Chalmers, merchant in Edinburgh, and the said William Drysdale, on the one and other parts, whereby, for the causes therein specified, the said Mr George Chalmers sold, disposed, and bound and obliged him, his heirs and successors, to grant a feu-right to the said William Drysdale, his heirs and successors, of sixty acres Scots measure of the Room of Drumtuthill. [Here followed the description of the lands.] To be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, . . . and to free and relieve the said of all minister's stipend, schoolmaster's salary, cess, and all other publick burdens in all time coming, except the said feu, and to make the said publick a real burden upon his other lands, which contract of sale, containing as said is, the said William Drysdale presented to the said Robert Drysdale, baillie in that part foresaid, desiring him to proceed to his office of baillary thereby committed to him, which desire the said Robert Drysdale, baillie in that part foresaid, found reasonable, and received the said contract of sale into his hands," &c. "After open reading and publishing of which contract of sale and precept of sasine before insert therein contained, the said Robert Drysdale, baillie in that part foresaid, gave and delivered heritable state and sasine," &c.

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Disposition, dated 15th April 1769, by William Drysdale, in favour of Charles Durie of Craighluscar, of the sixty acres. Disposition, dated 8th April 1779, and registered 3d October 1792, by William Drysdale, in corroboration of the above disposition in favour of Charles Durie. This latter deed contained the following clause:—"Which lands, with the teinds and others foresaid, were sold and disposed to me by the said George Chalmers by the contract of sale before mentioned, and which contains an obligation upon the said George Chalmers to free and relieve the said lands, teinds, and others foresaid, of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 sterling therein mentioned, and to make the said public burdens a real burden upon his other lands."

Upon this disposition Charles Durie was infeft, conform to instrument of sasine recorded in the Register of Sasines for the shire of Fife 22d May 1779.

Disposition, dated 4th October 1792 by Charles Durie to Robert Scotland of forty out of the sixty acres, and upon this disposition the latter was infeft, conform to instrument of sasine recorded 1st December 1792.

Disposition and assignation, dated 2d September 1794 by Scotland of the forty acres to Robert Russell, who was infeft therein, conform to instrument of sasine recorded 18th December 1807.

Charter of confirmation, dated 14th May 1814, by Thomas Hog of Newliston, who had acquired from George Chalmers the superiority of the lands of Drumtuthill, ratifying and confirming in favour of Robert Russell, his heirs and assignees, the following deeds:—(1) The disposition by Drysdale in favour of Charles Durie, dated 15th April 1769; (2) the disposition dated 8th April 1779 by Drysdale in favour of the same person, "whereby, in corroboration of the former disposition and the several obligations therein contained, and without prejudice thereto or derogation thereof, the said William Drysdale sold, alienated, and disposed from him and his foressaids, to and in favour of the said Charles Durie," the sixty acres, &c., "which lands, with the teinds and others

No. 189. foresaid, were sold and disposed to the said William Drysdale by the said George Chalmers by contract of sale entered into between them, dated the 5th day of June 1764, and which contains an obligation upon the said George Chalmers to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 stg. therein mentioned, and to make the said public burdens a real burden upon the other lands, together with the obligation to infest *a me vel de me*, procuratory of resignation, precept of sasine, and other clauses contained in the said disposition."

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The deed then narrated the instrument of sasine on the last-mentioned disposition and the deeds above mentioned, forming Robert Russell's title to the forty acres.

The defender, as regarded the contract of 1764, averred;—"It is explained that the sum of £600 which William Drysdale undertook in said contract to pay was never paid, and that no feu-right or charter was ever granted by George Chalmers therein mentioned to William Drysdale. The said deed does not contain any *de presenti* dispositive words, and was truly a provisional deed only, it being in the contemplation of the parties thereto, that a formal charter or other appropriate feudal deed, or as it is called in said contract a 'feu-right' should afterwards be granted. The only substantive obligation undertaken by George Chalmers in the said deed was to grant a feu-right or charter to Drysdale, and *quoad ultra* the deed merely sets forth the clauses and obligations which the charter, when granted, should contain. . . . The intention of parties, as expressed in the 'contract and agreement,' was that the stipend and public burdens effeiring to the feu should be made a burden on other lands belonging to Chalmers, and it was not intended that an obligation of relief should transmit as an obligation against the successors in the superiority." (Ans. 7) "Explained that the charter of confirmation by John Buchan Hepburn, dated 26th June 1856, was the first charter granted which embraced the whole sixty acres of Drumtuthill, and that it contains no reference to the contract of 1764, or to the obligation of relief therein now founded on by the pursuers."

The defender further averred that although the present question was raised for the first time so far back as 1856, there was no reference in the deeds of 1860, 1868, and 1869, to the contract of 1764, or to the obligation to relieve.

The pursuers averred;—"Denied that the question of the right of the vassals to enforce against the superior the obligation of relief was raised in 1856 for the first time; and it is believed and averred that it was then for the first time that the superior denied that that right was in the vassals. It is believed and averred that during the period between the granting of the original feu-right in 1764 and the date of the foresaid charter of confirmation in 1814, the superiors as regularly relieved the vassals of the public burdens in question as the vassals paid the annual feu-duty of £3 to the superiors, and that the same course was followed until the question was raised in 1856." They further averred that they were singular successors in the lands in question, and acquired them on the faith of the records, which disclosed the obligation of relief from further burdens as an inherent condition of the feu.

The pursuers pleaded, *inter alia*;—(1) On a sound construction of the clause of relief contained in the contract agreement and disposition of 5th June 1764, the pursuers are entitled to decree of declarator in terms of the declaratory conclusions of the summons. (3) The obligation of relief in question is an inherent condition of the original feu-right of 1764, and has never been abrogated. (4) The pursuers are onerous dis-

pones, and singular successors in the feu, and were and are entitled to No. 189.  
 rely upon the records, which disclose the existence of the obligation of  
 relief in question. (5) The feu-right of 1764 is the writ which confers July 19, 1889.  
 on the defender the right to the feu-duty, payable under the same; and Durie's Trus-  
 he cannot enforce payment thereof, and yet refuse to perform his counter- tees v. Earl of  
 part of the contract, including this obligation of relief of burdens. Elgin.

The defender pleaded, *inter alia*;—(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) On a sound construction of the titles of parties, especially as explained by the actings of parties and their authors, and by prescriptive practice and possession, the pursuers have no right to the relief claimed. (4) The contract of 1764 merely set forth an agreement as to the clauses and obligations which the feu-charter when granted should contain, and the contract itself contained no obligation of relief, but in any view the obligation of relief from public burdens was, and was intended to be, personal, and not transmissible against singular successors in the superiority of the feu; and *separatim*, the said obligation, assuming it to have been granted, not having been validly transmitted against the defender, or in favour of the pursuers, the defender is entitled to absolvitor. (5) The obligation of relief alleged by the pursuers never having been validly constituted a real burden on the superiority of the lands in question, the defender is entitled to absolvitor, with expenses. (7) Assuming the agreement of 1764 to have contained a valid obligation of relief, it has been extinguished by the negative prescription.

On 31st December 1888 the Lord Ordinary (Kinnear) assoilzied the defender from the conclusions of the summons, and decerned.\*

\* "OPINION.—The question is, whether the pursuers, as proprietors of the *dominium utile* of certain lands in the county of Fife, are entitled to be relieved by the defender, as their immediate superior, of 'all minister's stipend, schoolmaster's salary, cess, and other public burdens,' now and in all time coming. The latest renewals of the investiture prior to the Act of 1874 were effected by a charter of confirmation in 1856, and by writs of confirmation in 1868 and 1869; and these instruments express no obligation of the kind now sought to be enforced. But the pursuers maintain that no mere omission in charters by progress can alter the terms of the investiture, and that the question must therefore be determined by the conditions of the original grant. As a general proposition, this is perfectly correct. But the peculiarity of the present case is, that the instrument upon which the pursuers found is not a grant of the lands, but a mere personal contract to make such a grant on the performance of a certain condition. And the defender maintains that, as a singular successor, he is in no way bound by the obligations contained in the personal contracts of a remote author.

"The contract in question was entered into in 1764 between George Chalmers, then proprietor of the *plenum dominium*, and William Drysdale. It contains no *de presenti* conveyance. But it sets forth that Chalmers 'has sold and disposed, and binds and obliges himself, his heirs and successors, to grant a feu-right to the said William Drysdale' of sixty acres of the Room of Drumtuthill, which are specifically described 'to be held in feu-farm and heritage of the said George Chalmers, his heirs and successors, for yearly payment of £3 sterling; . . . and to assign the rents from and after the term of Martinmas 1765 for crop and year 1766, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said public a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said sixty acres betwixt and Martinmas 1766, on the east, south, and west sides, with a sufficient stone dyke six quarters high, which dykes are afterwards to be upheld on their mutual expenses: For the which causes and on the other part the said William Drysdale,

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The pursuers reclaimed, and argued ;—Although the latest renewals of the investiture prior to the Conveyancing Act, 1874, contained no men-

on the said Mr Chalmers performing his part of the premises,—that is, granting the said feu-contract in the terms above narrated,—binds and obliges him' to pay to Chalmers the sum of £600 at and against the term of Martinmas 1765. That this is not a feu-contract, but an obligation to execute and deliver such a contract, in return for a payment of money to be made at a future term, is perfectly clear. But although it is not a conveyance, it contained a precept of sasine ; and the pursuers found upon an instrument of sasine following upon the precept, dated and recorded in May 1766, by which they maintain that William Drysdale was duly infeft in the lands, upon the conditions expressed in the contract of sale. If this sasine had stood alone, it could not, in my judgment, have been upheld as a valid infeftment. There is authority for holding that at an earlier period a precept alone *secundum chartam conficiendam* might have been sustained as a valid title, if followed by possession, even if no charter had afterwards been made out. But even if this had been still a recognised method of infeftment in 1766, the sasine would be invalid, because the stipulations of the contract in which the precept is contained exclude the possibility of its being used as a warrant for present infeftment. A contract to grant a charter in consideration of a payment of money at a certain future date could not be of itself a warrant for infeftment, notwithstanding that it contained a precept. It gives no absolute right to obtain infeftment. To acquire such a right it was necessary for the feuar to satisfy the condition of the contract by paying £600 at Martinmas 1765 ; and when he had made payment, it was farther necessary, in order to establish the right and complete the title, that he should either obtain a charter or feu-contract, or adjudge in implement.

"The defective character of this first sasine, however, is of no importance to the validity of the pursuers' title, because it has been followed by a series of unchallenged infeftments, confirmed by successive superiors, and by uninterrupted possession. By a charter of confirmation in 1814, Thomas Hog of Newliston, who had acquired the *dominium directum* from Chalmers, confirmed four successive dispositions of forty of the original sixty acres, and the instruments of sasine following thereupon. The remaining twenty acres, after a series of transmissions, came into the same hands as the forty. In May 1845 the trustees of Dr Charles Durie were infeft in the whole subject ; and by charter of confirmation on the 26th of June 1856, John Buchan Hepburn, who had then acquired right to the *dominium directum*, confirmed to these trustees All and Whole the said sixty acres, and the instrument of sasine in their favour. Subsequent infeftments were confirmed by writs of confirmation in 1868 and 1869. There can be no doubt, therefore, of the validity of the pursuers' title, or of the feudal relation between them and the defender, who is a singular successor of Mr Buchan Hepburn.

"It is a different question whether, by virtue of their admitted title, they are in a position to enforce the obligation of relief. This obligation is recited in the writs confirmed in 1814, and also in the charter of confirmation. But it is not mentioned in the charter of 1856, in the instrument thereby confirmed, or in any of the subsequent titles. The defender maintains that he is not bound, not merely because the obligation itself is collateral and extrinsic to the feu-right, but because the contract in which it is contained is altogether personal, so that none of its obligations can be held to affect singular successors in the superiority. The answer is, that the feudal relation being in fact established, its terms, *hinc inde*, must be determined by the only right to which it can be traced, which is the contract of 1764. It is said that there is nothing but the contract to fix the feu-duty, and that the superior who enforces its obligations against the vassal must also accept the corresponding obligations in the vassal's favour. On the other hand, it is said that the superior does not require to go further back than the instrument of sasine and the charter of 1856, in order to ascertain the conditions of the infeftment then confirmed. It is true that this is only a charter by progress, and its terms are therefore liable to be corrected by the original

tion of the obligation to relieve sought to be enforced, it was open to the pursuers to go back to the original grant which contained the obligation. No. 189.

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grant. But if no original grant can be produced, there is no authority for controlling the infeftments upon which the vassal has possessed for the period of prescription, by reference to previous transmissions of the *dominium utile*.

"The question thus raised would be one of considerable difficulty if the pursuers' construction of the contract were clear, and if the possession had been all along in accordance with that construction. But I think the construction by no means clear; and there is nothing to shew that the obligation ever became operative even against Mr Chalmers.

"When an obligation of this kind has been embodied in a feu-contract or feu-charter, it will in general be read as a condition of the grant, and therefore available against singular successors in the superiority. But it may bear a very different construction when it is found only in a personal contract to grant a feu, because there may be stipulations in such a contract which are not intended to enter the charter as permanent conditions of the grant. In the agreement in question there are a variety of conditions, some of which are purely personal. By the obligation immediately following that in question, the superior is taken bound to enclose the subjects with a sufficient stone dyke, which is certainly personal; and a very material part of the stipulation in dispute is purely personal also, because the granter binds himself to make the public burdens a real burden upon his other lands, that is, upon lands of which the property remains in him. There is thus a personal obligation on the superior and his heirs to relieve the feuar, and to make the right of relief a real burden on their property lands, and no similar obligation to make it a burden on the superiority as such. As a question of construction, therefore, it appears to be at least very doubtful whether the condition was intended to affect singular successors in the superiority. It is not one of the essential conditions of a feu-right, and it could not be embodied in a feudal grant as a permanent condition of the right, because an essential part of the stipulation, if it were expressed in such a grant, would be altogether inapposite and ineffectual.

"But if the construction be even doubtful, it appears to me to be conclusive in favour of the defender that no grant has in fact been executed in terms of the contract. The feu-contract is to be given in return for a payment of money, and there is nothing to shew that the payment was ever made. The proper evidence that the condition had been performed upon which, according to the argument, the proprietors of the superiority were to become bound to relieve the *dominium utile* of public burdens, would be the production of a charter or feu-contract. If no such right were granted, the inference is that the condition was not performed. It is true that the successors of the feuar are in possession. But they have possessed under a title which, in its inception, was ineffectual to bind the superior. Their right in the lands has now come to rest upon titles which are perfectly valid, but which do not import the obligation in question.

"It is a very material consideration that the successive proprietors of the *dominium utile* have made no claim for relief, at all events since 1856. The defender avers that no such claim has been ever made since 1764; and although the pursuers allege that they 'believe and aver' the contrary, there is no evidence in process to shew that the alleged obligation has ever been enforced. The inference from the titles is, that no payment of relief can have been demanded from the superior for more than forty years. The result is, that there is nothing to shew that the obligation ever came into force by performance of the condition on which it became prestable. The available evidence tends to shew the contrary.

"I am therefore of opinion, upon the construction and legal effect of the titles, that the defender is not liable in the relief claimed. In this view, it is unnecessary to consider the plea of prescription, which cannot be disposed of until the fact of non-payment for forty years has been more conclusively ascertained. But assuming non-payment to be proved, I am not satisfied that the defender's plea of prescription is excluded by any of the previous decisions. In *Hope v. Hope*, it was held by Lord Benholme that the superiority title had been relieved



No. 189. That grant was the contract and agreement of 1764, and contained a precept of sasine upon which Drysdale had duly taken infeftment. The Lord Ordinary was of opinion that this infeftment was not valid, because the terms of the original deed did not warrant present infeftment. It was, however, clear under the old law that a precept of sasine alone would be sustained as a valid title if followed by possession, even if no charter was afterwards made out.<sup>1</sup> It was said that the contract of 1764 contained no *de præsenti* words. Words *de præterito*, however, were quite as good, for a precept of sasine gave the person holding it a present right to go to the lands to take infeftment. There was a presumption that the consideration for the granting the feu-right, viz., the £600, was duly paid, and the Lord Ordinary went too far in saying that it lay upon the vassal to shew that it was paid in order to his being allowed to take infeftment. The date of payment and the term of entry were future, but both squared with each other. There was no novelty in discriminating between one set and another set of clauses in a deed, and holding that the former was to transmit against singular successors, and the latter was not to do so. It mattered then little in this view that the clause dealing with the obligation to relieve was in suspicious proximity to the clause relating to personal services, such as enclosing the subjects with a stone dyke. The pursuers then traced the obligation back to a precept granted with as good as *de præsenti* words, with no qualification as to time, by one having the power to grant it, and with infeftment taken upon it after the term of entry and payment of the £600. The obligation to relieve was of a continuing character, which transmitted to heirs, and was enforceable by the vassal's singular successor against the superior without special assignation. It was the counterpart of the vassal's obligation to pay the feu-duty.<sup>2</sup> The charter of 1814 barred the superior from maintaining that the feu-duty was due, except upon the condition of the superior's affording the relief contracted for. The obligation had not been extinguished by the negative prescription.

Argued for the defender;—The obligation of relief was not binding on him. There was no mention of it in the recent renewals of the investiture, and in order to modify the existing feudal relations the pursuers were bound to shew that it was a condition of the feu. The deed of 1764, which was founded on for the sake of correcting the recent charters, was titled a "contract and agreement," and it contained no words of *de præsenti* conveyance. It merely contained an obligation to grant a charter on some future events. It was a personal contract to make a grant of lands on the performance of a certain condition. The grant was never made, and probably because the £600 was never paid. The infeftment then proceeding upon the contract was a bad one. Even on its terms, however, the obligation to relieve was clearly intended to be a personal obligation

of a similar burden by its omission from the investiture for forty years. His Lordship's judgment was reversed by the First Division, but upon the ground that the condition as expressed in the original grant had in fact received effect. It was not decided that the negative prescription would be inapplicable, if the condition had neither been expressed in renewals of the investiture nor actually enforced."

<sup>1</sup> Ersk. Inst. ii. 3, 19; Stair ii. 3, 14, and ii. 11, 2; King v. Chalmers, Nov. 15, 1682, Ross' Leading Cases, Land Rights, vol. i. 18; Bell's Lect. on Conveyancing, p. 576 to 578.

<sup>2</sup> Bell's Lect. on Conveyancing, p. 647; Duke of Montrose v. Stewart, Feb. 15, 1860, 22 D. 755, affd. March 27, 1863, 1 Macph. (H. L.) 25, and 4 Macq. App. 499, 32 Scot. Jur. 308; Hope v. Hope, Feb. 20, 1864, 2 Macph. 670, 36 Scot. Jur. 334; Stewart v. McCallum, Feb. 14, 1868, 6 Macph. 382, affd. Feb. 17, 1870, 8 Macph. (H. L.) 1, 40 Scot. Jur. 206.

on the superior, and was not intended to run with the lands as *inter essentialia* of the feu, and to be binding on his singular successors. It was not the counterpart of the reddendo at all, another remedy being provided by the superior binding himself to make these burdens real burdens on his other lands. The inference was that the obligation had nothing to do with the lands in question. Farther, the obligation had been extinguished by the negative prescription.

At advising,—

LORD PRESIDENT.—This action is brought by the marriage-contract trustees of Dr Andrew Durie and his wife, who are proprietors of the *dominium utile* of sixty acres of the Room of Drumtuthill, lying in the parish of Dunfermline and county of Fife, against the superior in the lands, to have it found and declared that the superior is “bound to free and relieve the said lands of all minister’s stipend, schoolmaster’s salary, cess, and all other public burdens in all time coming, excepting the feu-duty payable by the said lands, and also to make repetition to the pursuers of all payments they have made, or may yet make in respect of such minister’s stipend, schoolmaster’s salary, cess and public burdens since the term of Martinmas 1882, being the date at which the defender became superior of the said lands.”

The existing investiture of the lands is a writ of confirmation by John Buchan Hepburn, dated 9th June 1869, in which under the form prescribed by the Conveyancing Act of 1868 he enters these marriage-contract trustees in place of the vassal last entered, with this qualification, “only in so far as consistent with the charter of confirmation granted by me as superior foresaid in favour of Henry Black, solicitor in Edinburgh, and others, dated 26th June 1856.”

Now, this writ of confirmation really contains nothing but what I have read. There is a mere formal statement giving the names of the parties entered, and of the parties in whose place they come. The tenendas and reddendo are not given, as they are not necessary clauses under the Act of 1868. A reference back to the charter of 1856 is accordingly necessary in order to complete the terms of entry under this writ of confirmation. In short, it must be taken here that the charter of 1856 and this writ of confirmation together constitute the existing investiture of the lands.

Now, the charter of 1856 was granted by John Buchan Hepburn of Clune, then superior of the lands, and he confirms to the disponees in the deed of settlement of the late Dr Durie the sixty acres in question, and an instrument of sasine dated 21st May 1845. The tenendas and reddendo clauses are thus expressed :—“To be holden the said lands and others immediately of me and my foresaids, superiors thereof, in feu-farm, fee, and heritage for ever: Paying therefor yearly the sum of £3 sterling at the term of Martinmas, and doubling the said feu-duty the first year at the entry of every heir and singular successor, and being thirled to Meldrum’s Mill, conform as the said lands are thirled; reserving always my own right,” and so forth.

The conditions of this tenure therefore are clearly expressed in the charter of 1856. There are no qualifications or conditions except the manner of holding, the feu-duty, and the servitude.

The obligation to relieve of minister’s stipend, &c., founded on by the pursuers is not then to be found in the existing investitures of the lands; but of course if that obligation occurs in the original constitution of the holding, it would be

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quite competent for the vassal to go back to it and say he is not barred from insisting in the conditions of the original right, because they are omitted in the charters by progress. That is, I think, quite sound.

But then is there an original feu-right in existence, and if so what is it? That inquiry does not in the least involve the consideration whether the vassal has not a perfectly good feudal title, because he possesses under a charter by a superior, and has been in such possession for a period longer than the prescriptive period. The title to the feu is therefore unimpeachable.

The vassals, however, say they possess under the deed which is really the constitution of the original feu-right, and that it contains the obligation they here seek to enforce.

This deed is dated in 1764, and is certainly a singular document. I might almost say that it is a sort of bargain or contract such as 'one has never seen before in the history of conveyancing in this country, and I think therefore, it requires precise consideration. It sets out that "Mr George Chalmers has sold and disposed, and binds and obliges him, his heirs and successors, to grant a feu-right to the said William Drysdale, his heirs and successors, of sixty acres," and so forth, being the sixty acres of which the vassal is now in possession. The words are "has sold and disposed," which words in the ordinary forms of our conveyancing writs mean always "has already agreed to sell and dispose," but they are not followed by the dispositive words, "and hereby sells and disposes." The words which follow are "binds and obliges him, his heirs and successors, to grant a feu-right." This latter therefore he has not yet granted, but he comes under a personal obligation to do so. The lands are next described, and certain boundaries are inserted, and then the deed continues that they are "to be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, and doubling the said feu for the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled, all lying within the pariah of Dunfermline and shire of Fife, and reserving the coal, freestone, limestone, and other minerals below ground, with liberty to win the same and to make pits, levels, coalhills, and roads for that purpose, upon paying damages above ground (the said William Drysdale always having liberty to win freestone and limestone for the uses of the farm allenary), and to assign the rents from and after the term of Martinmas 1765 for crop and for year 1766."

Now, all these provisions are governed by the original words "binds and obliges himself, his heirs and successors," and then comes the particular obligation in question, "and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming except the said feu-duty, and to make the said public a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his forebears to enclose the said sixty acres . . . For the which causes and on the other part" on Mr Chalmers granting a feu-contract as expressed, he, the other party, "binds and obliges him, his heirs and successors, to content and pay to the said Mr George Chalmers, his heirs, executors, and successors whatsoever, the sum of £600 sterling, and that at and against the term of Martinmas 1765."

Now, all this stands upon the obligation of the granter, and there is nothing personal contract between the parties. Of course if a feu-contract had fol-

lowed upon it which contained all these clauses, and Drysdale, the proposed No. 189.  
vassal, had paid the sum of £600 and got delivery of the feu-contract, he would  
have become vassal in the lands, and the obligations of the feu-contract would  
have been binding on both parties. But we are bound to assume that no feu-  
contract was ever executed, because we are shewn none, and further, that the  
sum of £600 was never paid. In short, this deed remains exactly what it was  
from the beginning to the end, a personal obligation on the one hand and on  
the other. There is superadded to it a precept of sasine of the purest and simplest  
form, and on this infestment was taken. Now, it is not easy to see with what  
view that precept of sasine was added to this singular deed, but certainly mere  
infestment upon an unqualified precept could never convert the contract in ques-  
tion into a valid feu-right—could not feudalise the personal obligation in the con-  
tract. That being so, it appears to me that what the vassal here refers to in order  
to correct the terms of the existing investiture is not only not a feu-contract, but  
contains only a personal obligation, and not even a personal obligation to free  
and relieve from minister's stipend, &c., but only to insert in a feu-contract an  
obligation to that effect. That is not an obligation binding on the singular  
successor of Chalmers, who granted it.

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The progress and history of the case is certainly against the proposition that it was ever supposed that the obligation in question was a condition of the right of property held by William Drysdale, or a condition of the superior drawing the feu-duty, because there was never any demand, so far as can be seen, from 1764 downwards, that this obligation of relief should be fulfilled. Something was attempted to be made of the charter of 1814, and it is necessary to refer to it in order to remove any confusion which seems to arise from its terms. It confirms a disposition dated 15th April 1769 granted by William Drysdale, the supposed feuar in the 1764 contract in favour of Charles Durie of Craighluscar, and also another deed by the same party in favour of the same party in corroboration of the former disposition, dated 8th April 1779, and then after setting out the lands the charter proceeds thus:—"Which lands, with the teinds and others foressaid, were sold and disposed to the said William Drysdale by the said George Chalmers by contract of sale entered into between them, dated the 5th day of June 1764, and which contains an obligation upon the said George Chalmers to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens except the feu-duty of £3 sterling therein mentioned, and to make the said public burdens a real burden upon his other lands, together with the obligation to infest *a me vel de me*, procuratory of resignation, precept of sasine, and other clauses contained in the said disposition."

Now, it appears pretty clear that the conveyancer who drew this charter had never seen the deed of 1764, or that if he saw it he has misunderstood it from beginning to end. In the first place, he calls it a contract of sale, which it is not. Then he says it contains an obligation on George Chalmers to free and relieve, but no mention is made of Chalmers' successors. Lastly, while he rightly says the deed contained an obligation to make the public burdens a real burden upon the other lands, he proceeds further to represent that there was contained in the deed an "obligement to infest *a me vel de me*, procuratory of resignation,"—[who ever heard of a procuratory of resignation in a feu-right?]"—"precept of sasine and other clauses contained in the said disposition." That is plainly a bungled title, whatever else may be said of it, and as I said before it is impossible the conveyancer who drew it can have seen the deed of 1764, or if he saw it he mis-

No. 189. understood its nature. It is not a contract of sale, it is not a disposition, and it contains no obligation to infest and no procuratory of resignation. But still further the obligation of relief is not one binding on singular successors, taking the words of the charter, because it is only an obligation on George Chalmers. It is a personal obligation on George Chalmers, the grantor of the deed, and an obligation upon him to make the public burdens a burden on his other lands, but there is nothing making it a condition of the feu-right, or a condition of the superior's being entitled to demand his feu-duty.

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Therefore, while the deed of 1814 introduced a certain amount of confusion into the argument, it shews how completely the nature of the deed of 1764 was misunderstood, and it also shews, by making reference to no feu-contract, that no feu-contract ever followed upon it.

I am therefore upon the whole matter of the same opinion as the Lord Ordinary, that there is no obligation of relief such as is here sought to be established.

LORD MURE.—I agree in the result arrived at by the Lord Ordinary.

We were referred to the case of the *Duke of Montrose* to the effect that an obligation of relief transmitted to and was enforceable by a singular successor of the vassal against the superior, and did not require express assignation by the vassal to his heirs and disponees. But that decision proceeded on the ground that the original feu-right granted by the Duke of Montrose created an obligation in favour of the vassal, his heirs and successors, to relieve them of these burdens, and that that obligation was contained in the feu-contract itself, and constituted by infeftment following upon it. The basis of the judgment was that there was privity of contract between the superior and vassal to the effect that the latter was to be freed and relieved of these burdens in all time coming, and the obligation was held to be feudalised against the superior in the lands because it was part of the constitution of the feu-right.

In the present case the existing investiture contains no obligations of this description, and we are thrown back to the original title of the pursuer to see whether any such obligation was in the deed then granted. Now, we have not been referred to any deed of the nature of a feu-contract which contains any such obligation on the part of the superior. We have been referred to a contract containing an obligation by Chalmers to grant a feu-right, but it appears never to have been granted, probably because it was only to be granted on payment of £600, and the fact that there never was a feu-contract granted leads to the opinion that the £600 was never paid, and that the obligation of relief was never attempted to be enforced against the superior. No such obligation was ever made part of a feu-contract. The charter of 1814 cannot be said to be of that nature. Therefore nothing more in this case can be pleaded against the superior than that the original contract granted by Chalmers laid a personal obligation on him, his heirs, and successors, to free and relieve the vassal of stipend and other public burdens. Accordingly, it has never been attempted to enforce that obligation by legal proceedings since 1764, though the obligation by the terms is to relieve of public burdens in all time coming.

I therefore concur with your Lordship.

LORD SHAND.—I am not prepared to say that I have found this case altogether free from difficulty, but after giving it full consideration I have come without difficulty to be of the same opinion as your Lordships. If the document of 1764, which is certainly unique in character, had been a feu-contract

containing clauses to the effect that the subjects were conveyed on condition of No. 189.  
 payment of feu-duty, and with an obligation to relieve of public burdens, I  
 should have had no doubt, after the decision to which we have been referred, July 19, 1889.  
 that it would have been held that the obligation of relief was the counterpart Durie's Trustees v. Earl of Elgin.  
 of the obligation to pay feu-duty. But the case falls far short of that.

The only case presented on behalf of the vassal is that he can shew from a series of titles that the parties agreed to accept this deed as a feu-contract, and I think that, looking to the terms of the deed, it would require a very clear statement of obligation in the later deeds to operate the result argued for by the pursuers. There is nothing in any deed to which we have been referred which does so operate. It is quite plain that when the document in question was originally granted, it was not intended to be a feu-contract regulating the rights of parties. No doubt the person who desired to have the lands desired to have infeftment, but there was no direct disposition of the lands, and when the obligations were inserted, and, among others, one of relief from public burdens, they were all subject to this undertaking to pay £600. Now, whether that sum was ever paid or not, as a matter of fact we do not know, but it may fairly be assumed that if it had been paid a feu-contract would have been granted. If it was not paid, what were the terms on which the parties arranged that the title should become permanent? We know nothing about them. If a feu-contract had been prepared the seller might, for aught we can tell, have decided to insert the clause of relief, or he might have refused to do so. Therefore, taking the document as we have it, unless it is made clear by subsequent titles that the superior treated this contract as a feu-right not merely as to the title of the vassal, but also as to the obligations *inter se* of the parties, the pursuers cannot succeed.

Now, we have been referred to the charter of 1814. The conveyancer who drew that deed seems to have had very imperfect knowledge of the contract of 1764, but it is to be observed that in narrating the obligation in question he does not treat it as anything but a personal obligation by Chalmers. There is no indication that he looked on it as an obligation on the heirs and successors of Chalmers in the superiority; and one might argue from that that it was probably ultimately arranged that it was not to affect persons taking the title of superior in time coming. The reference then to it for the obligation to relieve is not one which favours the view of the pursuers that the superior is liable in that obligation. The later charters also make no reference back to the conditions of the original deed.

I do not think that when a condition of this kind contained in an extraordinary deed of this sort is omitted in the subsequent charters, we can go back to the original deed to supply it. I say so for the reason that we have no original feu-charter here. In accepting this deed as the title the parties accepted it with the character it had, but I am not prepared to say that they imported all the conditions contained in it into the title, or that they intended to do so.

I am therefore of opinion that the Lord Ordinary has reached a right conclusion.

LORD ADAM.—I have no doubt at all that it is lawful to go back to the original investiture to correct an alleged omission in a charter by progress, but I am not aware that it is lawful to correct an alleged omission by reference to anything but the original investiture. It is new to me that it is possible to

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On 23d May 1889 the Lord Ordinary (Kyllachy) pronounced this further interlocutor :—" In respect the pursuer is satisfied that the vidimus

of which cannot be ascertained until the money therefor has been actually received by the executor. In such a case the accounting with the claimant for legitim must of necessity be according to the amount actually received. In the present case there was no such difficulty in the way of ascertaining the value. All the stocks of companies, except one, were quoted on the Stock Exchange, and the ship shares, although of no great value at the date of death, were still marketable. The defenders state that they endeavoured to sell the shares in the steamers and could not find a purchaser, although it is said that these have now somewhat increased in value and are saleable. This is a good reason for taking the value of the steamships, in estimating legitim, as at the present date, instead of at the small nominal value at the date of the testator's death.

"The general rule now stated rests upon this doctrine, that legitim is a claim of debt against the executry for a certain proportion of the personal estate which vests in the child claiming it at the father's death. He is entitled to that proportion and no more. If the executor delays to settle the claim, and the property sinks in value, the claim of the child is not thereby diminished, and in like manner, if it increases in value the claim is not thereby enhanced in amount. If the executor, without justifiable excuse, delays to pay the legitim, he is liable in interest, according to many decisions, and that interest is five per cent. In the case of *M' Murray v. M' Murray's Trustees* (17th July 1852, 14 D. 1048), the point was very distinctly brought out and determined. It was held 'that the legitim was a debt to be measured by the amount of the fund at the father's death, and did not infer a right to participate in profits realised by the application of the fund after the father's death.' The whole estate had been employed in the father's business, and profits had been made, of which the child claiming legitim demanded a share. Lord Ivory explained the grounds of judgment in the following terms :—"The claim of legitim is a claim of debt against the testator's estate. In the ordinary case of a debtor in business, the fund out of which the debt is to be paid is put in peril, but the creditor does not get the profits. In this case the pursuer's claim was a claim against the general fund, and was due at the moment of the testator's death. If the trustees have put the estate into peril, and made profit, that enlarges the estate—the measure of the creditors' security, but not of the claim—the debt is the same as before, unaffected by their trading. It is still due with interest, and nothing more. Legitim is a claim of debt. Suppose a party, thinking he has a right to dispose of his whole property, leaves all of it to one of his children and excludes another, and the child to whom the property was left enters into possession and uses the estate in trade, would that entitle the excluded child, on his claiming legitim, to claim a share of the profits? It would not, and he would not be worse off, for, if the business turned out ill, the other would be obliged, if he sacrificed the fund, to answer for it with his own funds.' In like manner, in the case of the *Earl of Dalhousie v. Crokat* (26th March 1868, 6 Macph. 659), the point was again submitted to the Court, although under different circumstances. A loss was sustained of the fund from which legitim was payable, in consequence of the executor having allowed his agent to embezzle it. The Court held that the executor must bear the loss, and that no part of it could be allowed to diminish the claim for legitim. 'It appears to me,' said Lord Ardmillan, 'that the child entitled to legitim is a creditor of the executor for a share of the free executry estate—that is, for a share of the free moveable estate left by the father, as at the date of his death, or as soon thereafter as it can be realised. . . . If the executor had employed the funds of the deceased in trade, the pursuer would have taken no benefit thence arising. If the executor had purchased railway or bank stock, and the stock had risen in value, I cannot think that the legitim would have been increased so as to amount to anything beyond the price paid for the stock, since, if the price had fallen, the legitim would not have been diminished. Legitim must be calculated as at the date of the father's death, and profit or loss arising after realisation, in consequence of the executor's

... correctly sets forth the market price of the stocks and shares, No. 190. other than the shares of the steamships therein mentioned, finds it unnecessary to order proof in regard thereto: Allows to the pursuer a proof of the market price at the present time of the said shares of the steamships mentioned in the vidimus, and to the defenders a conjunct probation," &c.

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Gilchrist's trustees reclaimed, and argued;—No exception was taken to the general rules dealing with the law of legitim as stated by the Lord Ordinary—that the value of the executry estate must be taken as at the date of the testator's death, or at least as soon thereafter as possible.<sup>1</sup> But his Lordship was wrong in not applying the same rule to the value of the ships equally with the rest of the estate, for the trustees never had

mode of dealing with the funds, cannot augment or diminish the claim of the child.'

"There are cases where, in consequence of arrangements between a child claiming legitim, or a widow claiming *jus relictæ*, these persons will be found entitled to a share of profits made from the application of the funds to purposes of trade, and of this class of cases there is an illustration in the case of *Ross v. Masson* (3d February 1843, 5 D. 483). The judgment was not unanimous, as Lord Medwyn dissented, and held that there was not such a specialty as to take the case out of the general rule. It was a claim by a widow for *jus relictæ*, and Lord Medwyn said,—'The widow is entitled to revert to her legal rights, notwithstanding all that she has done. But then must she not take her *jus relictæ* according to the state of the moveables at the death of her husband? She is not tied down by the valuation then made. She may shew that this is inadequate, and she will get her share estimated at their full value. I always understood that the share of the moveable estate payable out of the estate of the husband to the children as legitim, and to the widow as *jus relictæ*, was estimated as at the death, and not as it might be at any future period. If the widow had claimed her *jus relictæ* at the time, would she have been entitled to more than the estimated value of the right according to the then rate of the market? And if by some unexpected opening of trade, or the failure of some neighbouring coal work, the value of this some years afterwards greatly increased, would she have been entitled to claim this additional value, after having obtained its value at the time of her husband's death?' Lord Moncreiff assimilated the case to a contingent fund, and upon that ground allowed the widow's claim for a share of the profits. 'If,' he said, 'the claim had been a contingent fund which could not be realised at the time of the husband's death, there is no doubt that a widow would be entitled to claim upon it as at the time when it was realised.' And this doctrine is not disputed, for the general rule allows of such an exception.

"The second point made by the pursuer is, that the whole of the stocks and shares ought to be sold in order to pay off his one-twelfth proportion. Now, there is no such absolute right on the part of a claimant for legitim or *jus relictæ*. This is a matter entirely in the discretion of the Court, who are entitled and bound to look to the interests of the other beneficiaries who have claims upon the estate, and if they object to such sale, the Court will give heed to such objection. To throw all these stocks and shares into the market merely to pay the pursuer's small proportion would be putting the property to the chance of loss, and would certainly be attended with very considerable expense in brokerage charges and commission. If the pursuer challenges the statement that the stocks, &c., are not entered as at the market prices of the day at the time of death, he will be allowed to prove this, but if not, he must be settled with according to that market price, seeing that if the property had been all sold he would have got no more from the sale."

<sup>1</sup> *Minto v. Kirkpatrick*, May 23, 1833, 11 S. 632; *Fisher v. Dixon*, June 16, 1840, 2 D. 1121 (*Lord Fullerton*, p. 1138); *Chalmers' Trustees*, March 16, 1882, 9 R. 743.



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any intention of selling the ships. The pursuer could not insist on a sale. He was merely a creditor for payment of legitim; he was not a beneficiary, and had no control over the administration of the fund. If a person claiming legitim could in every case insist on realisation it might lead to great hardship, *e.g.*, in the case of a copartnership, which would have to be wound up in the case of the death of a partner against whom a claim for legitim was made. Proof should be allowed of the value of the ships as at the date of the testator's death, or within a reasonable time thereafter. It did not affect the soundness of that contention that they had as matter of fact realised the value of one of the ships within a few months after the testator's death.

The respondent argued;—The value of the ships ought to be estimated either (1) as at the present day, or (2) as at the date of *litis contestatio*, or (3) after the lapse of the usual period after death allowed for realisation. It was true that a person claiming payment of legitim had no control over the realisation of the estate. On the other hand, if at the date of death an asset happened to have a merely nominal value, either owing to the depression of trade or some other special circumstance, the claimant was entitled to say that he would not be put off with the nominal value, but would take his share of the asset itself *in forma specifica*. The right was in reality to a third or the *legitima pars liberorum* of the goods or gear; it was the bairns' part of gear,—a right to the thing itself *pro parte*,—and the claimant was entitled to the benefit of any augmentations upon the executry fund prior to realisation.<sup>1</sup> Neither party could say there had been undue delay here. Twelve months—which was an ordinary time for realisation—had barely elapsed from the death of the testator. Accordingly, it was not unreasonable that the value of the ships should be taken as at the present time.

At advising,—

LORD ADAM.—By the interlocutor of 23d May 1889, submitted to review, the Lord Ordinary, “in respect that the pursuer is satisfied that the vidimus, No. 10 of process, correctly sets forth the market price of the stocks and shares, other than the shares of the steamships therein mentioned, finds it unnecessary to order proof in respect thereto.”

I understand that the pursuer is still satisfied that the vidimus correctly sets forth the market price of the stocks and shares other than the shares of ships, including the sailing ship, as at the date of the truster's death, and if this be so, I think that a proof as regards the value of these shares is unnecessary.

But the Lord Ordinary further “allows the pursuer a proof of the market price at the present time of the said shares of the steamships mentioned in the vidimus.”

I do not concur in this part of the interlocutor, because I think the proof to be allowed ought to be one of the value of the ship shares as at the date of the testator's death.

The claim of legitim by the pursuer is undoubtedly a claim of debt against his father's estate, and the amount must be estimated according to the value of the estate at his death. But the defenders, his trustees, are not bound, in order to ascertain that value, to realise the estate. They may retain the whole or any part of it *in forma specifica*. The trustees are entitled to realise the estate or any part of it, and had they done so, the amount so realised under the deduc-

<sup>1</sup> Voet ad Pandectas, v. 2, 54; Earl of Dalhousie v. Crokat, March 26, 1868, 6 Macph. 659 (Lord Curriehill, p. 666); Fraser on Husband and Wife, ii. 983.

tion of the expenses of the realisation would be the value of the estate of which the pursuer is entitled to a share. No. 190.

On the other hand, the trustees may resolve not to realise the whole or any part of the estate, and in that case the value must be estimated as at the truster's death. July 19, 1889.  
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In this case, when the claim for legitim was intimated on 22d October 1888, no part of the estate had been realised except some shares in a sailing ship. The defenders allege that they were then, and are now, holding the estate for the benefit of the beneficiaries, and had resolved not to realise it. If that be so, it appears to me that the value of the estate must be estimated as at the date of the truster's death.

If the shares had fallen in value, the loss must have fallen on the defenders, and so if they have risen in value, they are entitled to the gain.

With reference to the value of the shares of the sailing ship which were sold on 4th September 1888, I think the question whether the pursuer is entitled to a share of the increased value depends upon the question whether or not the shares were then being held by the trustees for the beneficiaries, or were in point of fact sold with a view to realisation as at the date of the truster's death.

The Lord Ordinary recognises the general rule that the value of the estate must be estimated as at the date of the testator's death, and has given effect to it as regards all the estate except the ship shares. The defenders state (he says) that they endeavoured to sell the shares in the steamers and could not find a purchaser, although it is said that these have now somewhat increased in value and are saleable. This is a good reason (he says) for taking the value of the steamships in estimating legitim as at the present date instead of at the small nominal value as at the date of the testator's death.

While I think that the contingency of a possible or probable prospective rise in value is an element which may fairly be taken into consideration in estimating the value of the shares as at the date of the truster's death, I cannot see that the fact that the shares have increased in value since the truster's death can be a reason for taking such increased value as the value at the date of death.

I think therefore that the Lord Ordinary's interlocutor ought to be recalled.

**LORD MURE.**—The only question of difficulty for our decision relates to the time at which the shares in the ships ought to be valued. The note of Lord Fraser states his Lordship's opinion as to the general rule to be followed in valuing for legitim, and reference is made in it to such authorities as *M'Murray's Trustees*<sup>1</sup> and *Panmure v. Crokat*<sup>2</sup> as establishing the rule that the date of the father's death is the period for realisation. He applies the rule to the ordinary stocks and shares held by Gilchrist, but makes an exception as to the ship shares, because they did not admit of being sold at the time of the death.

Now, supposing the rule to be a fair one, that the period of death of the father is the time at which the value is to be taken, I am not able to see why a different rule should be applied to the shares in ships only because they were not at the time of Gilchrist's death capable of finding a ready market. I think that the general rule applies to them also, and though it may be more troublesome to apply it from the difficulty of selling such shares at the time of the death, still

<sup>1</sup> July 17, 1852, 14 D. 1048.

<sup>2</sup> March 26, 1868, 6 Macph. 659.

No. 190. it can be done by persons skilled in such property. I agree with the conclusion at which Lord Adam has arrived.

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LORD SHAND.—In common, I understand, with all of your Lordships I agree that legitim is not a right to a share of the estate which entitles the claimant to have the estate realised in order that he may have the realised value of his share. It is a debt, but at the same time it is a debt to be measured by the actual value of the moveable estate left by the father at his death.

While this is so, it appears to me, however, that it would neither be safe nor proper to lay down the rule that the value is to be taken by a valuation of each article or item of the estate made as on the very day of the father's death. What a son claiming legitim is entitled to is a share of the value of the estate—that is, a share of the amount which the estate would bring if it were realised. It is true that the executors or beneficiaries are not bound to realise if they resolve and declare that they are to hold parts of the estate, and themselves to take the risk of future loss by depreciation of value and the benefit of any profit which may accrue by a rise in value. But even if such a resolution be formed and intimated, the claimant is entitled to have a share of the value which would have been received if the different items of the estate had been realised or sold. When I say that I think this value is not necessarily to be ascertained as on the very day of the death of the deceased, I mean that a share of the value of the estate as if the estate had been realised infers that the amount to be ascertained shall be as on a reasonable and prudent realisation, made with a view to gaining the best advantage—realisation such as a person having no purpose of holding for profit, but yet being anxious to make the most of the estate in its different parts or items would adopt in the ordinary administration of a deceased's estate. There are many parts of an estate which must be advertised with a view to sale, and time must elapse to admit of this, and there may be parts of an estate which it would be quite clearly imprudent as a mere question of realisation to sell without a few days or a few weeks delay. In reference to property of which this can be said I do not think that in the ordinary case the value of these is to be taken simply as the sum which could be got for them on the day of the death. If any such hard and fast rule were to be taken, what would be said of the case of a testator having shares in a company which became insolvent some days after his death, involving it might be such consequences as in the case of the City of Glasgow Bank? The claimant for legitim could not seek to have the result to the estate thrown out of view in a question with him, if prudence and due diligence has been used in the realisation; and so it appears to me that if parts of an estate realised in the ordinary course of an administration have risen in value since the day of the testator's death, the benefit should be taken into view in fixing the amount of the estate of which the legitim fund is a fixed part. In short, if the estate is to be realised as for all concerned, then the actual realisation in the ordinary course carried out with due diligence and prudence is the amount to be looked to. If executors or beneficiaries resolve to hold and not to realise, they cannot, as it seems to me, thereby diminish the legitim fund. The value of the estate as at the deceased's death should, I think, still be fixed by ascertaining in the best way possible what would have been the amount if a diligent but prudent realisation for the best advantage had actually taken place. And I must further add that where trustees or beneficiaries in answer to a claim for legitim say—it may be at a considerable interval after the testator's death—

that they mean to hold particular parts of the estate for the beneficiaries, No. 190.  
it appears to me that they ought not on that mere statement to be allowed  
to take the entire benefit of an increased value which has arisen in the in- July 19, 1889.  
terval of these parts of the estate which it is in the general case to be assumed Gilchrist v.  
they held for realisation. If they can shew clearly that a resolution was Gilchrist's  
definitely and finally formed at a certain date to retain and hold the property, Trustees.  
the case would be different, but, I think, in so far as the property has risen before  
that resolution was formed, the additional value should be taken into view in  
ascertaining the value of the deceased's estate in order to fix the amount of  
legitim.

Now, applying these observations to the case in hand, I am not prepared to agree to a judgment in the terms which have been suggested by Lord Adam. The testator died on 14th June 1888, and I see from his settlement, which is in process, that it was a leading purpose of the deed that "my trustees shall immediately after my death, or as soon thereafter as they may deem expedient, realise my whole moveable means and estate, including my present business of wine and spirit merchant, and invest the proceeds thereof" in heritable security. We thus see that immediate realisation was one of the leading purposes of the testator. Now, six months having elapsed, the pursuer intimated his claim for legitim, and in answer the trustees intimated to him that they did not propose to realise, and did not hold the estate for that purpose.

When the pursuer's claim for legitim was made, the agent for the defenders wrote thus to his agent,—“Although our clients are averse to go on with a family litigation like this, they will have no alternative but to follow you into Court and resist the action if you will persist in proceeding; but with the view of an amicable settlement, we are instructed to offer your client, which we now do, the sum of £650 in full, but without prejudice. To enable you to judge of this offer we send you copy of the inventory of Mr Gilchrist's personal estate, and vidimus of the estate made up as at the date of the death, being the date at which the legitim fund falls to be adjusted. You will observe the sum we offer is considerably over your client's real share of the legitim fund as brought out in the statement.”

What was enclosed in this letter was a copy of the inventory for confirmation. Now, we know very well that in these inventories there is a practice of stating the value of an estate at the lowest possible figure, for the purpose of course of paying as small a duty to Government as possible. I could not find a better illustration of this than is afforded from the papers in this very case, for it appears that the defenders were willing to value the furniture at a considerably higher sum for legitim than it was valued at in the inventory given up for confirmation.

Thus, then, stood matters when this action was raised. There was no intention on the part of the beneficiaries to take over the whole estate and not to realise it. It is only when objections are stated to the vidimus made up by the defenders that we find them saying for the first time—we shall take over the whole estate as at the testator's death. By that time the value of the testator's shares in ships had risen considerably, and indeed, one of these shares had been sold at a price a good deal higher than the price stated in the inventory, and said to be the full price which could have been got on the day of the deceased's death. I take it to be clear that in a judicious administration of the estate it was desirable to hold the ship shares for a time, and to advertise them, and, if

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necessary, expose them for sale on more than one occasion. These shares were so advertised for realisation, and one was sold three months after the death at an advance. The defenders' proposal is that they should pay the pursuer's legitim by taking the value at the date of the death, and should keep the profit from increased values to themselves. I think that would be unreasonable. I think it must be taken that the defenders were holding for the purpose of realisation, and in any case, that the pursuer is entitled to the benefit of what would be a fair realisation, and as it is now conceded that the value of each ship had risen before the defenders intimated that they were to take over the shares, the pursuer ought to have the benefit of that rise in value.

I can only, therefore, agree with the proposed interlocutor if it will not exclude the pursuer from claiming the benefit of that increased value. If it does exclude him, I think it erroneous. I think he is entitled to his share of the estate as it stood at his father's death, but giving a fair interval for realisation, which in this case would give him a share of the profit which the defenders derive.

I agree, therefore, in holding that the Lord Ordinary was in error in sending to proof the question as to the "present value" of the shares (by which, I presume, is intended the value at the date of his Lordship's interlocutor), but I am also of opinion that the trustees ought not to be allowed to take the value as at the death of the deceased, retaining the profits which were made before intimation that they were to take over the shares. I think the interlocutor ought to be qualified with a declaration that the pursuer is entitled to the benefit of the rise which took place within six months after the death, that being a period during which the shares were held for the purpose of ordinary administration. As to the price of the share which was actually realised, there is no need for speculation, as the actual value is ascertained by the sale.

LORD PRESIDENT.—I agree in the opinion of Lord Adam. I cannot help thinking, after carefully listening to what has been said by my brother Lord Shand, that there is no substantial difference between the members of the Court on the principles upon which we are to proceed. I think that the considerations suggested by Lord Shand will arise when proof is taken as to the value of the ship shares at the death of the deceased Mr Gilchrist, and that it is unnecessary now to anticipate them.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of 16th March 1889; also recall the interlocutor of 23d May 1889; and in respect the pursuer is satisfied that the vidimus, No 10 of process, correctly sets forth the market price of the stocks and shares (other than the shares of the ships therein mentioned) as at the date of the testator's death, find it unnecessary to allow a proof as to the value thereof; allow to the pursuers a proof of the value of the said shares of ships as at the date of the testator's death, and to the defenders a conjunct probation."

The case was ultimately settled.

ANDREW WALLACE, Solicitor—SNODY & ASHER, S.S.C.—Agents.

WILLIAM DALZIEL MACKENZIE AND ANOTHER, Petitioners.—*Johnstone*. No. 191.  
JOHN COULTHART AND OTHERS, Respondents.

*Interdict—Breach of Interdict and Contempt of Court.*—In a petition and complaint for breach of interdict and contempt of Court against certain fishermen who had, in breach of interdict, erected stake-nets within high water-mark, the Court sentenced the respondents to imprisonment for two months, and allowed the petitioners to remove the nets at the respondents' expense. July 19, 1889.  
Mackenzie v. Coulthart.

WILLIAM DALZIEL MACKENZIE of Newbie, in Dumfriesshire, had obtained interdicts against John Coulthart and others, all residing at Powfoot, in the same county, prohibiting them "from erecting or maintaining or using, during the open salmon-fishing season, stake-nets on the shores of the Solway, between high and low water-mark, on those portions of the complainers' salmon-fishery known as the Powfoot Scaur and the Howgarth Scaur." 1st DIVISION.  
C.

Mackenzie and his tenant in the fishings, William J. P. Beattie, now presented a petition and complaint against Coulthart, William Hill, and John Birnie, praying the Court "to find that the said respondents respectively, by their actings and proceedings above set forth and complained of, acted illegally, and have been guilty of a breach and violation of interdict granted by your Lordships as above set forth, and of contempt of the authority of your Lordships; and, in respect thereof, to inflict upon them such punishment, by imprisonment or otherwise, as to your Lordships shall seem necessary."

No answers were lodged, but the respondents, when they attended at the bar in compliance with an order of the Court, denied the allegations in the petition and complaint, and the Court allowed a proof to both parties.

The complainers' proof was led before Lord Adam. Proof for the respondents (who appeared for themselves) was subsequently taken on commission.

THE COURT, after hearing counsel upon the proof,<sup>1</sup> pronounced the following interlocutor:—"Find (1) that the respondent John Coulthart has broken the interdicts granted by the Second Division of the Court of Session on 1st and 3d December 1881; (2) that the respondent William Hill has broken the interdicts granted by said Division of the Court on 3d December 1881; and (3) that the respondent John Birnie has broken the interdict granted by said Division of the Court on 1st December 1881: Therefore decern and adjudge the respondents John Coulthart, William Hill, and John Birnie each to be imprisoned for the space of two months, and to be thereafter set at liberty; and for that purpose grant warrant to officers of Court to convey the said respondents from this bar to the prison of Edinburgh, thereafter to be dealt with in due course of law: Authorise the petitioners to remove the nets complained of at the expense of the respondents, and authorise execution to pass on a copy hereof certified by the Clerk of Court: Find the respondents liable in expenses," &c.

HOPE, MANN, & KIRK, W.S.—PARTIES—Agents.

<sup>1</sup> Cases cited.—*Gilbertson v. Mackenzie*, Feb. 2, 1878, 5 R. 610; *Coulthart v. Mackenzie*, July 18, 1879, 6 R. 1322; *Earl of Galloway v. Nixon*, Oct. 24, 1877, 5 R. 28.

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July 19, 1889.\*  
Hattie v.  
Leitch.

MARGARET HATTIE, Pursuer (Appellant).—*C. N. Johnston.*  
WILLIAM LEITCH, Defender (Respondent).—*Jameson.*

*Proof—Evidence—Inspection by Court of locus after proof closed.*—After the close of a proof in a Sheriff Court the Sheriff-substitute, accompanied by the agents of the parties, examined the *locus* of the events which were the subject of proof in order to see whether it was possible in the circumstances for certain witnesses to have seen the act to which they deponed. Having come to the conclusion that it was impossible, he gave judgment to the effect that the party who relied on their evidence had not established her case.

In an appeal, *held* that the Sheriff-substitute was not entitled to use his own observation of the *locus* as evidence to contradict the evidence of the witnesses.

2D DIVISION.  
Sheriff of  
Renfrewshire.  
I.

MARGARET HATTIE raised an action in the Sheriff Court at Paisley against William Leitch, farrier, for inlying expenses, and for aliment for an illegitimate child, of which she alleged that he was the father. She averred that on the evening of 19th August 1887 the defender had connection with her in a field. The defender denied this averment. It appeared from the proof that on 19th August the pursuer had been sent to bring the defender to see a cow which had taken ill at her master's farm. The defender returned with her, and on the way they had occasion to cross the field in question, which was of a sloping and uneven character. The pursuer adduced as witnesses two men, named Farrell and Gillespie, each of whom stated that he had separately observed the pursuer and defender on the evening in question, followed them, and standing above the place at which the alleged connection took place, had seen the act of connection, but each stated that he had not seen the other. The time they and the pursuer assigned was about 9.30 P.M.

The Sheriff-substitute (Cowan), after the proof was closed, visited the place of the alleged connection, accompanied by the agents of the parties. Thereafter he pronounced this interlocutor:—"Having heard parties' procurators and considered the proof adduced and whole process, and having also, along with the agents of parties, inspected the *locus*, finds in fact that the pursuer has not established that the defender is the father of her illegitimate child, to which she gave birth on 16th May 1888: Finds in law that he is entitled to absolvitor; therefore assoilzies him from the conclusions of the libel: Finds him entitled to expenses," &c.†

\* Decided July 3, 1889.

† "NOTE.—This is a somewhat extraordinary case, and it is not without very careful consideration that the Sheriff-substitute has rejected the evidence led by the pursuer. If there had been any evidence of previous familiarity, or even intimacy between the parties, it would have been a somewhat awkward situation for the defender to have been where he candidly admits that he was—crossing unfrequented farm fields at half-past nine at night with the pursuer. But there is no such evidence. On the contrary, the pursuer negatives the supposition of such; and the explanation of the situation, so far as he is concerned, is simple and natural. He was summoned in haste as a veterinary to treat a cow suddenly taken with milk fever, and he went with the messenger in all haste by the shortest road. He was thus, in the exercise of his ordinary calling, led to be where he was, and all that can reasonably be said is that he may have yielded to temptation. His being where he was gave the opportunity—in itself there is nothing suspicious to make that probable. He swears distinctly that he laid no hand on the girl. She, no doubt, is as distinct to the contrary. What makes this case extraordinary is the corroborative evidence of Farrell and Gillespie adduced for the pursuer; and the Sheriff-substitute felt that it would be an advantage to see the ground in order to see whether the evidence they gave

On appeal, the Sheriff (Pearson) affirmed the interlocutor of the Sheriff-substitute. No. 192.

The pursuer appealed.

At advising,—

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LORD JUSTICE-CLERK.—The pursuer in this case alleges that on an occasion in August 1887 she was sent by her master from the farm on which she was working to fetch a farrier, in consequence of the illness of one of the animals in the yard, in the evening; that she went to fetch the farrier, and that he and she having to cross a field, which was the shortest cut to the farm, he took advantage of her, and in consequence of the connection which then took place

was possible. It did at first appear to him as very extraordinary, not that one, but that two men, totally separated and independent, should at that hour of night have had their attention attracted by the parties, and following them, have stood over them and seen the alleged act. He still thinks that the pursuer's case would have received greater support if only one such witness had come forward. That two should be found seems to him exceedingly unlikely and improbable. Taking first the evidence of Farrell, he was sitting on a rock playing a concertina when he saw distinctly the parties leave the Crossleehill Road and come towards him; they passed close to where he had concealed himself among whins, and then recognising them, he got up and went after them and followed them to the march-dyke, where he stood above them, again among whins, and watched the act. Now, there are rocks and whins which would make all this possible; in particular, there is, just above the place where the parties must have crossed the march-dyke, a whin-clad, rocky mound from which they could be overlooked. It may be doubted whether, looking down into the shadow of the dyke at half-past nine o'clock, the witness could have seen what he says he saw; it may still more be doubted whether in that light he could, sitting on his first rock, have seen the parties leave the Crossleehill Road, that rock being the breadth of two fields distant. And it is to be observed in his evidence that his statement that they came towards him, the man having his arm round the girl's waist, is quite opposed to the pursuer's own story of what took place; that in cross-examination he wavers as to which side of the march-dyke the connection took place upon; and that he says in cross-examination that he came off the Crossleehill Road into the field where the connection took place, and it would rather seem from what he says that the parties "came into that field" where he already was, a statement totally at variance with his first statement that he followed them. He finally, however, posts himself on the whin-clad knoll already referred to. Now, what account does Gillespie give of himself? He was on the Crossleehill Road, and seeing the parties leave it about ten yards short of where he was, he took to the fields and followed them. He did not take the same route, but took the high side of the field, and then rounded upon them, and stood for ten minutes looking on. The fields about Crossleehill farm slope continuously down, and there is no room for dubiety that the high side of the fields was that nearest the Crossleehill Road, and there is no other spot to which Gillespie's detour could have brought him when he rounded on the parties than Farrell's whin-clad knoll. Gillespie does not say, as Farrell does, that he was in the same field as the parties were. But if connection did take place where the pursuer says it did, it was on the Crossleehill side of the march-dyke, and the dyke being what it is—a somewhat high stone dyke—Gillespie must have been on the same side of the dyke. The inevitable conclusion is that Farrell and he must have been standing within a yard or two of each other, if not side by side; there is no other spot of vantage where the men who saw what each says he saw could have been stationed. And yet neither the one nor the other saw the other! The Sheriff-substitute unhesitatingly rejects their evidence. He thinks it unnecessary to go further into the evidence. He believes the defender, and he does not believe the pursuer."



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between them she has had a child. The case has this peculiar feature about it that there are two men who swear that, without either of them knowing that the other was there, they actually witnessed what took place. But in the first place, let us see what is the case of the woman herself, how she behaved, because if her conduct at the time or about the time and since had been in any way unsatisfactory or had led to any doubt, it would have been unnecessary to consider the evidence of these two witnesses at all. Now, I have considered the case with some care as regards her deposition and the evidence of the witnesses with whom she came in contact after the occasion in question, and I see no reason to doubt the truthfulness of her evidence, or to doubt the statements which she makes as to the course which was followed by her immediately after and at the subsequent time when she announced that she was in the family-way. It is a little remarkable in this case that the first indication by the pursuer of anything having taken place is not volunteered by her, but is brought out of her by the question of a woman to whom she went that night, after the farrier had come across, to get some medicine for the cow that was ill, because Mrs Hester M'Kechnie or Laird gives this account of it,—“She seemed excited, and I asked her what was wrong with her. She then told me that William Leitch had been meddling with her.” Now, that occurs on the very night and probably within an hour of the time at which she and Leitch were in company together; and having given that account, drawn from her by the question of this Mrs Laird in consequence of observing that something was wrong with her, she has adhered to that from first to last; and I say that in itself I see no reason to doubt her testimony, and in so far as it can be confirmed by an early disclosure by her, it certainly is confirmed. Whether that would have been quite enough to satisfy the Court that the pursuer had proved her case, I do not say. I think possibly it might.

But then comes in the question, whether the evidence of the two persons who allege that they saw the man engaged in having connection with this woman is to be held to be absolutely perjured evidence,—for it is either true or perjured; there is no question about that. Now, in this case the Sheriff-substitute has adopted a course which I think is most extraordinary and most reprehensible, because, after hearing the evidence of the witnesses, he goes to the spot without the witnesses to explain to him what they meant by their evidence, which he had taken without having seen the place. He goes without the witnesses to the place in order that, taking their evidence in his hand, he may form some opinion of his own as to whether they could have seen or did see what they alleged. In so doing, I think that the Sheriff is just turning himself into a witness in the case. He gives himself testimony by going there to look at the ground after the evidence had been led and in order to enable him to form his opinion, and what is the result of that?—that we, who cannot go and see the ground, are to rely upon evidence which he has given without cross-examination as to the possibility or impossibility of particular things being done and witnessed according to his view of the evidence which he had previously heard. That is not at all a satisfactory way of dealing with such a matter. The witnesses who gave their evidence at the trial gave their evidence, so far as one can judge, frankly and straightforwardly. I think it would be very easy, in almost any case where a witness gave evidence in Court in reference to something that happened when people were crossing fields where there were hedges and walls and

so on, for a person who heard the evidence to go afterwards, and, without having pointed out to him the exact spots to which the witnesses alluded, or without cross-examination having taken place of those persons in reference to the exact localities, to find out that there might be difficulties about their evidence; but these difficulties might all be explained if the evidence was taken after the Sheriff had gone to look at the ground, which is the proper course in all cases in which a Judge is going to give his opinion upon evidence as a jury and thinks it desirable to see the ground,—that is, for the purpose of understanding the evidence afterwards to be led—not for the purpose of criticising evidence which has been already led. We all understand the advantage in some cases of what is called a view; but it would be the most unsatisfactory thing possible that, after all the evidence has been led in a case, the Judge should go by himself and turn himself into a witness, and examine localities without the opportunity of any explanation on the part of witnesses who had given evidence, and form his opinion as to whether certain things were possible or not. And therefore, my Lords, I discard altogether the views of the Sheriff-substitute based upon what he himself saw after the proof had been led and without any opportunity on the part of witnesses for explanation.

Now, that being so, I am driven to the conclusion that I see no ground for thinking that these witnesses have committed wilful perjury. It is certainly a remarkable circumstance, and one which requires to be considered in a case of this kind as very remarkable, that two separate witnesses going about the fields should happen to witness an act of this kind; but can one say it is so absolutely improbable that, without any other ground for doing so, the witnesses who swear they saw the thing done are to be held to have committed perjury? If one man had been the witness, then there would have been no ground for imputing perjury to him unless there was something suspicious in the way he gave his evidence; and is it so improbable that two men should have happened to have the means of observing the same thing that we are to hold they have both committed perjury? I can see no ground for doing so; and upon the whole matter I have come to the conclusion that the pursuer has made out her case. It is not a thing to be done lightly, of course, to alter the judgment of the Sheriff and Sheriff-substitute in a matter of this kind; but I think we are placed in a very embarrassing position here by the course which the Sheriff-substitute has taken, and that really the true course for us to take in this case is to consider the evidence regardless of the fact how the judgment has gone in the past at all, and to consider it as if it came up before us as a new case altogether. Considering it in that light, so far as I am able to do so, I have come to the conclusion that the pursuer has made out her case.

**LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.**

**THE COURT** recalled the interlocutor of the Sheriffs, and found in fact that the pursuer had proved that the defender was the father of the child.

**GORDON PETRIE & SHAND, S.S.C.—N. B. CONSTABLE, W.S.—Agents.**

**No. 192.**

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**Hattie v.  
Leitch.**

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July 19, 1889.\*  
 Rose, Murison,  
 & Thomson v.  
 Wingate, Bir-  
 rell, & Co.'s  
 Trustees.

ROSE, MURISON, & THOMSON, Appellants.—*Sir Charles Pearson—Ure.*  
 JOHN GOURLAY (Wingate, Birrell, & Company's Trustee), Respondent.—  
*C. J. Guthrie—Salvesen.*

*Cautioner—Guarantee taken by association of underwriters from new member—*  
*Claim on guarantee by person assured—Jus Quæsitum Tertio.*—An association of  
 underwriters before admitting a new member were in the practice of inquiring  
 into his financial position, and in certain cases of requiring a guarantee for under-  
 writing obligations to be contracted by him.

*Held* by Lord Kyllachy that a guarantee so granted conferred a *jus quæsitum*  
 on any person subsequently assured by such underwriter.

Bill-Chamber.  
 Outer-House  
 Ld. Kyllachy.  
 Bill-Chamber  
 Clerk.

THE ASSOCIATION OF UNDERWRITERS AND INSURANCE BROKERS, Glasgow,  
 known as the Glasgow Underwriters' Room, had two classes of members  
 —brokers and underwriters.

The admission of members as underwriters was determined by the Ad-  
 mission Committee.

It was provided by bye-law (12), in regard to the admission of under-  
 writers, that "every applicant shall himself, or by the broker who repre-  
 sents him, address to the secretary a letter of application, in which he  
 shall state the maximum sum proposed to be taken on each risk by a  
 named ship, and give references to at least two parties in Glasgow."

"The admission of an underwriter represented by a broker shall in  
 all cases be subject to the production to the secretary of his mandate in  
 the form authorised by the association, and a broker shall not subscribe  
 upon a policy or policies any sum or sums exceeding the amount autho-  
 rised by his mandate." It was further provided (13),—"Intimation of the  
 admission of new members shall be given on the board" [in the under-  
 writers' room], "and remain there ten days after their admission, and in the  
 case of an underwriter it shall express the maximum sum to be taken by  
 him on each risk by a named ship."

It was the practice of the Admission Committee to inquire into the  
 financial position of applicants, and in certain cases they required guar-  
 antees. The bye-laws contained no reference to guarantees.

In February 1871, Mr James A. Birrell was admitted to the association  
 as an underwriter authorised to underwrite to the extent of £100. The  
 following guarantee was granted by the firm of Wingate, Birrell, & Com-  
 pany:—"24th February 1871.—David McCowan, Esq., secretary, Asso-  
 ciation of Underwriters.—Dear Sir,—We beg to intimate to you that we  
 guarantee the liabilities arising on the account of Mr James A. Birrell  
 underwritten by us in his name.—We are, Sir, yours respectfully, WIN-  
 GATE, BIRRELL, & COMPANY."

On 2d June 1879, a similar letter was granted by the same firm, when  
 James A. Birrell's limit was extended to £200.

In April 1888, the estates of the then existing firm of Wingate, Birrell,  
 & Company, and of Walter Birrell and James A. Birrell, the individual  
 partners, were sequestrated.

Messrs Rose, Murison, & Thomson, insurance brokers, Glasgow, and  
 members of the association, claimed to be ranked as creditors under the  
 guarantees for losses covered by policies underwritten by James A. Bir-  
 rell, and endorsed to them in trust for the owners.

The trustee rejected the claim.

Rose, Murison, & Thomson, with concurrence of the association, ap-  
 pealed, and a record was made up.

The appellants, *inter alia*, averred that had it not been for the guaran-

tees business would not have been given to the underwriter, "and the public, the brokers who effected policies, and the association, relied, as they were entitled to do, upon the guarantees being fulfilled."

The appellants pleaded;—(1) In respect of the guarantees condescended on, *et separatim*, in respect of said guarantees and the usage of the Glasgow Underwriters' Insurance Room, the appellants are entitled to rank in terms of their claim. (3) The bankrupt firm having taken over the assets and liabilities of the preceding firms, is liable for said guarantees.

The trustee pleaded;—(3) The appellants have no right or title to found on the alleged guarantees. (6) The appellants not having known of any of the alleged guarantees prior to the date of sequestration, are not entitled to found thereon. (8) The appeal should be refused, in respect none of the guarantees are in favour of the appellants.

The Lord Ordinary (Kyllachy) allowed a proof. Mr Rundell, secretary to the association, gave evidence to the following effect:—"Applicants for admission as underwriters apply through a broker, and on my receiving his letter of application I call a meeting of the committee, and I appoint two of them as inquirers. In the application there are two referees named, upon whom the inquirers call to get information as to whether the applicant is in such a position, financially, as to qualify him to be an underwriter. Then at the meeting of committee the inquirers give in their report, and on that report the committee take the application into consideration, and accept or reject the proposed underwriter. That is the procedure adopted in every case where a new member is proposed for the Room. In some cases the committee ask a guarantee, where they consider that the financial position of the applicant is such that they would desire some outside security. For instance, the money of the applicant may be locked up and not immediately available. These guarantees are granted in my favour as secretary, and are held by me. In some cases they are indorsed on the mandate. If the underwriter is guaranteed by some person outside, not a broker, then the guarantee is generally indorsed on the mandate held by the broker, and I do not hold it; but when a broker guarantees the underwriter, I receive and keep the letter. When the guarantee is written on the mandate, the mandate is exhibited to me and I satisfy myself as to the sufficiency of the guarantee. The mandate is obliged to be produced to me to shew that the broker is entitled to underwrite. Those guarantees that are indorsed upon the mandates are in general terms, and are considered and approved of by the Admission Committee. Since the institution of the Admission Committee in 1856 about twenty-two per cent of the underwriters admitted were guaranteed. . . . It was generally known in the Room that the Admission Committee would take a guarantee if necessary. It might or might not be known in the Room that guarantees had been granted for certain underwriters. The practice was known in the Room, and it was open for any member to make inquiry whether a guarantee existed or not, and I answered it. The guarantees were entered in the Admission Committee's book, which is quite open to the members. . . . In practice all underwriting is done through brokers, the broker having a set of underwriters for whom he acts and from whom he has mandates. It is the practice for the broker to select his men from the members of the Room, though sometimes he goes outside. He can come in and tender any underwriter he likes, the responsibility being with him. There is no rule against his going outside, but the practice is to select from the inside first. He knows that the Admission Committee have made investigation as to the solvency of the underwriters who are members of the Room. That is the reason why he selects from among them in the first instance—to satisfy his client. That is one

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No. 193. of the reasons of the existence of the association. If the line of an underwriter is to be guaranteed we intimate that to the broker, and then the name of the member is posted up. (Q.) Is it, in your view, in the interest of the association to enforce these guarantees for the benefit of the assured? (A.) I think, for keeping up the dignity and credit of the association, it is the proper thing to do."

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On 17th July 1889 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Finds the appellants are entitled to be ranked on the sequestrated estates of Wingate, Birrell, & Company, and individual partners of said company, mentioned in the note of appeal, for the sums due under the policies held by the appellants, so far as underwritten by (1) J. A. Birrell, . . . ."

\* "OPINION.— . . . The claim is made by the appellants in conjunction with the Underwriters' Association and their secretary, Mr Rundell, and it is founded on certain letters granted by the sequestrated firm or its predecessors in business trading under the same name, whereby the firm is said to have guaranteed due payment of the underwriting accounts of the four persons mentioned, and to have done so to the Underwriters' Association for the benefit of the pursuers and other members of the association, who became creditors in the said underwriting account.

"It may be explained that the Glasgow Underwriters' Association is a body composed of brokers and underwriters, the members of which have to a large extent the monopoly of the marine insurance business in Glasgow. They meet daily in a room called the 'Underwriters'-room.' They are governed by a set of bye-laws (of which No. 21 of process is a copy), and as a rule they only do business with each other, no underwriters being accepted for any risk who have not been admitted members of the association. There is a committee of admission, whose business it is to see to the financial soundness of any person applying for admission, and if the committee are not otherwise satisfied on that point, it is their practice to require a guarantee, which is sometimes granted by outsiders and sometimes, and more generally, by the brokers who are to act for the applicant, and who hold his mandate for that purpose.

"The procedure connected with the granting of the guarantees, and the manner in which their existence is made known to the members, is fully explained in the evidence of Mr Rundell, and I need not further refer to it. It is enough that it sufficiently appears that while the policies underwritten by guaranteed members do not bear any reference to the guarantees, the evidence shews that such policies are accepted, if not always in knowledge of and in reliance on the guarantees, yet always in reliance on the fact that all underwriters admitted have to satisfy the committee by guarantee or otherwise of their ability to fulfil their engagements.

"The first question which arises, in these circumstances, is whether the appellants (or whether the appellants suing along with the association and its secretary) have a title to enforce the guarantees in question granted by Wingate, Birrell, & Company for the several underwriters referred to.

"On this question it was maintained for the respondent that the appellants had no title, and the association had no interest to enforce such guarantees, that the same were not operative as obligations, and were not intended to be so, but were mere tests of the estimation in which the entrant's guarantee stood, or at best mere obligations in honour, which, if granted by members of the Room, carried with them a sufficient moral sanction. They referred to *Peddie v. Brown*, 3 Macq. 65, *Fennie v. The Glasgow and South-Western Railway Company*, 3 Macq. 75, *Blumer v. Scott*, 1 R. 379.

"The appellants on the other hand maintained that these guarantees must be held to have been exacted by the committee of the association in the interests of the assured, and with a view to enforcement on their account, and that this gave the assured a sufficient *jus quæsitum* under the policies on which they could sue or claim. But they further maintained that all difficulty on this score

was obviated by the concurrence in the present claim of the association and its secretary, who, having taken the guarantees, have necessarily a title to enforce them, and have also a sufficient interest in this respect that they owe a responsibility to the assured as having admitted the underwriters, and must suffer as an association by their members' default in obligations undertaken in the Room, and to brokers who are members of the association. They referred to *Smith's Leading Cases*, 9th edn. i. 586 ; *Addison on Contracts*, p. 24, 8th edn. ; *Humphreys v. Dale*, 7 E. and B. 206 ; *Fleet v. Martin*, 7 Q. B. 126. No. 193.  
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Trustees.

"My opinion in this matter is with the appellants. I think that both on principle and authority persons assuring through brokers who are members of the association have a *jus quæsitum* in these guarantees which gives them a title to sue upon them. The test, I admit, is whether the association and the guarantors could, during the currency of the risks underwritten, agree between them to discharge the guarantees. In my opinion they could not. I, at the same time, consider that the concurrence of the association is not without importance—as at least relieving the appellants of any technical difficulty which might otherwise attach to their position. . . ."

J. & J. Ross, W.S.—DAVIDSON & SYME, W.S.—Agents.



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ADMINISTRATION OF JUSTICE. *Oath*.

Administration of oath—Latent objection. *Blair v. North British and Mercantile Insurance Co.*, Jan. 8, 1889, p. 325.

AGENT AND CLIENT. *Trust—Liability of agent*.

1. *Held* that it was no part of the duty of a law-agent appointed to be factor and law-agent to the trustees under a trust-disposition and settlement to volunteer his advice to the trustees that a loan made by the testator on personal security was not such an investment of the trust funds as they were entitled to retain, and that therefore he was not liable for loss resulting from their retaining the investment. *Curror v. Walker's Trustees*, Jan. 25, 1889, p. 355.

2. *Beneficiaries held not entitled to sue the law-agents to the trust for damages for improper investment of trust funds, on the ground that the beneficiaries had not employed the law-agents*. *Rae v. Meek*, August 8, 1889, H. L., p. 31.

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3. Bank-agent also agent for customer of the bank. *Couper's Trustees v. National Bank of Scotland, Limited*, Feb. 6, 1889, p. 412.

4. Reduction of antenuptial contract by widow on the ground that the notary who executed the deed on her behalf was her husband's law-agent. *Lang's Trustees v. Lang*, March 15, 1889, p. 590.

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AGENT AND PRINCIPAL. *Trust for creditors—Responsibility of trustee*.

A trader in embarrassed circumstances conveyed to one of his creditors his whole estates and business in trust for behoof of the grantor and his creditors, the trustee to have the management of the business, and the truster to act as his submanager, and to receive such weekly allowance as the trustee should think proper, the business to be carried on by the trustee till he should think it expedient to restore it to the truster or to sell it. The business was carried on for twenty years by the truster under supervision of the trustee, the supplies being ordered by the truster and paid for by cheques drawn by the trustee upon a bank account in his name into which the drawings were paid. The trustee gave the truster a cheque for £6 monthly for his support. *Held (rev. judgment of Lord Trayner)* that the trustee was personally liable for goods supplied to the business, on the ground that it was carried on by him under the trust-deed, and that the truster had acted as his manager. *Ford & Sons v. Stephenson*, Oct. 25, 1888, p. 24.

APPEAL (HOUSE OF LORDS). *Leave to appeal—Interlocutory judgment*.

1. Circumstances in which the Court refused a petition for leave to appeal to the House of Lords against an interlocutor which did not exhaust the



**APPEAL (HOUSE OF LORDS)—Continued.**

whole conclusions of the action. *Stewart v. Kennedy*, Feb. 26, 1889, p. 521.

*Jury trial—Interlocutor approving issue—Appeal to House of Lords with view to obtaining second issue—Court of Session Act, 1850, sec. 13.*

2. In an action of reduction of missives of sale of a landed estate the pursuer proposed issues of facility and circumvention, and of essential error. The Lord Ordinary appointed the issue of facility and circumvention to be "the issue for the trial of the cause." On a reclaiming note the Court adhered, Lord Shand dissenting on the ground that the pursuer was entitled to both issues. The pursuer having appealed to the House of Lords, the defender moved the Court to allow the cause to go to a jury on the issue as adjusted, on the ground that the question whether the second issue should be granted was not "necessarily dependent" on the interlocutor appealed against within the meaning of sec. 13 of the Court of Session Act, 1850. The Court *refused* the motion, the Lord President and Lord Adam doubting whether a trial pending appeal would be competent. *Stewart v. Kennedy*, June 29, 1889, p. 890.

Appeal from Sheriff Court. See *Process*, 20, 21, 22, 23.

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**ARBITRATION. Arbitrator—Disqualification.**

1. The arbitration clause in a contract for the making of a railway provided that the arbitrator should not be disqualified from acting by being or becoming consulting engineer to the railway company. *Held* that he was not barred from acting as arbitrator by the fact that he had revised the specifications and schedules upon which the work which formed the subject of the arbitration was performed. *Adams v. Great North of Scotland Railway Co.*, June 21, 1889, p. 843.

**Decree-arbitral—Reduction.**

2. By the arbitration clause in a contract for the making of a railway, it was provided that "all disputes and differences which have arisen or shall or may arise between the parties under or in reference to this contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, . . . or as to any other matter connected with, or arising out of, this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution or failure to execute properly the works hereby contracted for or not," should be submitted and referred to the final sentence and decree-arbitral of the arbitrator named. *Held* that, as the whole matter, including the construction of the contract, had been referred to the arbitrator, the Act of Regulations prevented the Court from interfering with the arbitrator's award, even on the ground of injustice. *Adams v. Great North of Scotland Railway Co.*, June 21, 1889, p. 843.
3. In a reduction of a decree-arbitral on the ground that the arbitrator had given decree for a larger sum in name of penalties than was claimed by the party in whose favour decree was granted, the latter offered to discharge the excess. *Held* that the proper remedy was to reduce the decree *quoad* the excess. *Adams v. Great North of Scotland Railway Co.*, June 21, 1889, p. 843.

**ARRESTMENT. Foreign—English decree for costs—Charging order.**

A on the dependence of an action against B arrested in the hands of C a sum due by him to B under a decree for costs in an English action. B's English solicitors subsequently obtained a "charging order" from the English Court, which by the law of England had the effect not only of transferring B's right to them, but of invalidating any prior attachments of the fund by his creditors. *Held* (*aff. judgment of Lord Kinnear*) that the claim of the English solicitors was preferable to that of A. *Stewart v. North*, July 5, 1889, p. 927.

See *Jurisdiction*, 1, 2, 3—*Ship*, 6.

**BANK.** *Current account—Initialing of entries by bank-agent.*

1. Entries in a customer's bank pass-book of sums paid into the bank, duly initialed by a bank official, are *prima facie* evidence against the bank that the money has been paid in. *Couper's Trustees v. National Bank of Scotland, Limited*, Feb. 6, 1889, p. 412.

*Bank-agent also agent for customer of bank—Fraud—Liability for loss.*

2. The law-agent and factor of a trust was also agent of a branch bank with which the trustees had a current account, and was authorised by them to operate on the account. After some years he absconded. It was then found that four entries in the trustees' pass-book of sums paid in had no corresponding entries in the bank ledger. All the entries in the pass-book were initialed by the agent himself, and not by the bank teller, as was the usual course with such entries, and two of the four entries had also the forged initials of the bank cheque clerk. The other two, like the rest of the entries, had only the initials of the agent, who kept the pass-book in his own custody. The agent had also annually signed docquets in the bank ledger as "factor," certifying the correctness of the balance as appearing in the bank ledger. In an action by the trustees against the bank for payment of the sums as entered in their pass-book, *held* that the money had never been paid into the bank, and consequently that the bank were not liable. *Couper's Trustees v. National Bank of Scotland, Limited*, Feb. 6, 1889, p. 412.

**BANKRUPTCY.** *Constitution of bankruptcy—Notour bankruptcy—Cessio bonorum—Insolvency—Expiry of charge on undisputed debt—Debtors Act, 1880, sec. 9.*

1. *Held* that where in a petition for cessio there is produced an expired charge on an undisputed debt, neither paid nor offered to be paid, a presumption of insolvency is raised, and that therefore *prima facie* evidence of notour bankruptcy, within the meaning of section 9 of the Debtors Act, 1880, is established.

*Observed* that "insolvency" means, in the sense of the Act, present inability to pay a debt due. *M'Nab v. Clarke*, March 16, 1889, p. 610.

*Effect of bankruptcy—Security—Prior debt—Act 1696, cap. 5—Bankruptcy Act, 1856, sec. 110.*

2. *Held* that the securities which are struck at by the Act 1696, cap. 5, and the 110th section of the Bankruptcy Act, 1856, are securities created by some act or deed of the bankrupt or deceased debtor, and that these provisions do not apply where it is the creditor who has rendered the securities effectual. *Scottish Provident Institution v. Cohen & Co.*, Nov. 20, 1888, p. 112.

*Effect of bankruptcy—Illegal preference—Deed of arrangement—Right to challenge.*

3. *Held* that a deed of arrangement in a sequestration conveying the sequestrated estates to a purchaser does not carry a right to challenge illegal preferences. *Smith & Co. v. Smyth*, Feb. 5, 1889, p. 392.

*Effect of bankruptcy—Illegal preference—Act 1696, cap. 5.*

4. A firm, within sixty days of their sequestration, assigned their book debts to the amount of £387, 15s., in security of an immediate advance of £330, and in exchange for a bill for £57, 15s. previously granted by them to the assignee.

*Question* whether this assignation was struck at by the Act 1696, cap. 5, to the extent of the £57, 15s.

*Opinion per Lord Young* that it was not. *Smith & Co. v. Smyth*, Feb. 5, 1889, p. 392.

*Effect of bankruptcy—Illegal preference—Act 1696, cap. 5.*

5. A, being indebted to B, granted along with a friend C, a promissory-note to B for the amount of the debt. Of the same date A disposed in favour of C certain heritable subjects by disposition *ex facie* absolute, but by back-letter declared to be in security merely of C if he should be called to pay under the promissory-note. A was sequestrated within sixty days of this

**BANKRUPTCY—Continued.**

transaction. The trustee in the sequestration brought a reduction of the disposition on the ground that it conferred a preference on B indirectly, in contravention of the Act 1696, cap. 5, but did not conclude for reduction of the promissory-note, nor call B as a defender. *Held (diss. Lord Lee)* that looking to the transaction between A and C alone there was no ground for reduction under the Act 1696, as C was not a prior creditor of A, and that as B was not called as a party to the action the transaction as a whole could not be considered. The defender was therefore *assolvizid*. *McDougall's Trustees v. Gibbon*, June 4, 1889, p. 740.

*Sequestration—Trustee—Appointment of new trustee—Nobile Officium.*

6. Where a bankrupt and the trustee in his sequestration had both died,—neither having been discharged,—and there remained, more than eighty years after the sequestration, certain funds for distribution, the Court, on the petition of the representatives of one of the commissioners, *remitted* to the Lord Ordinary on the Bills to appoint a meeting of creditors to be held for the election of a new trustee. *Young*, Nov. 13, 1888, p. 92.

*Sequestration—Trustee—Discharge—Radical right of bankrupt—Title to sue.*

7. Where the trustee in a sequestration has been discharged, and no other trustee has been appointed, the bankrupt, although not reinvested, has in virtue of his radical right a good title to sue for behoof of his estate. *Whyte v. Murray*, Nov. 16, 1888, p. 95.

*Sequestration—Trustee—Discharge of both trustee and bankrupt—Appointment of new trustee—Abandonment of claim.*

8. Certain creditors upon a sequestrated estate on which both the trustee and the bankrupt had been discharged, the latter without composition, presented a petition for a remit to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a new trustee, averring that there were funds belonging to the sequestrated estate which had not been recovered, and that the petitioners had not been paid their debts in full. It was objected that all claim to these funds had been abandoned by the trustee. *Objection repelled*, and *petition granted*. *Northern Heritable Securities Investment Co., Limited, v. Whyte*, Nov. 21, 1888, p. 100.

*Sequestration—Recall—Affidavit—Specification of securities—Bankruptcy Act, 1856, sec. 22.*

9. A advanced a sum of £4300, for the purpose of carrying on a limited company, and by bond he took the company and its six directors, of whom he was one, bound to repay the loan. Thereafter A charged B, one of the six co-obligants, to refund the £4300, under deduction of one-sixth part for which he (A) was liable, and the charge having expired without payment, A thereupon obtained sequestration of B's estates. A's affidavit, produced along with the petition for sequestration, set forth the amount (£3583, 6s. 8d.) of the debt and the names of the company and of the other five directors as co-obligants. It did not mention an inhibition which A had used against B, but which was admittedly valueless, and had attached nothing. A petition by B for recall of the sequestration was thereupon presented, founding upon the 22d section of the Bankruptcy (Scotland) Act, 1856, on the grounds (1) that the affidavit did not state that he himself was liable as a co-obligant for the whole debt; and (2) that it failed to specify a security held by A over the bankrupt estate. The Court repelled the first objection, and, as regarded the second, *held* that as the objection was one which did not appear *ex facie* of the proceedings, they had a discretion as to recalling the sequestration, and that in the present case there was no ground for recalling it. *Mitchell v. Motherwell*, Nov. 22, 1888, p. 122.

*Sequestration—Recall—Affidavit—Administration of oath to petitioning creditor—Latent objection—Bankruptcy Act, 1856, sec. 22.*

10. The affidavit produced with a petition for sequestration bore that the petitioning creditor appeared before a Justice of the Peace named, and, "being solemnly sworn and interrogated, deposed" to the amount of the debt, &c., and concluded with the words "all which is truth, as the deponent shall

BANKRUPTCY—*Continued.*

answer to God," and bore the signature of the deponent and of the Justice. In a petition by the bankrupt for recall of the sequestration (which was opposed only by the petitioning creditor) on the ground that the affidavit was invalid by reason of the granter not having been put on oath, it was proved that though the creditor had signed the affidavit in presence of the Justice he had not been put on oath, but had merely, in answer to a question by the Justice, stated that what was set forth in the affidavit was true. The Court *recalled* the sequestration, holding (1) that the affidavit was invalid, and (2) that the objection to the affidavit, though latent, should in the circumstances be sustained, as it had not been shewn that the recall would be prejudicial to other creditors. *Blair v. North British and Mercantile Insurance Co.*, Jan. 8, 1889, p. 325.

*Sequestration—Recall—Affidavit—Verity of debt—Constitution anew of notour bankruptcy on same debt after four months—Bankruptcy Act, 1856, secs. 9, 15, and 22.*

11. A debtor was charged in July 1888 by the assignees to a debt to make payment thereof. On failure to pay, his estates were sequestered, but in January 1889 the sequestration was recalled in respect of an informality in the oath of the petitioning creditor. On 17th January he was charged of new on the same debt, and on his failure to pay the creditor again petitioned for sequestration. The oath produced with the petition bore that the debtor "was justly indebted and resting owing" to the creditor the amount of the debt, and that "no part of said sum has been paid or compensated." Sequestration having been awarded, the debtor petitioned for recall on the grounds (1) that the oath was disconform to the requirements of section 22 of the Bankruptcy Act, 1856, in respect it did not set forth in terms that the debt had not been paid either to the cedent or to the assignee, and (2) that the petition for sequestration was incompetent under sections 9 and 15 of the Act, in respect it was presented more than four months from the commencement of notour bankruptcy in July 1888. The Court *refused* the prayer of the petition. *Blair v. North British and Mercantile Insurance Co.*, July 10, 1889, p. 947.

*Sequestration—Compromise approved by general body of creditors—Bankruptcy Act, 1856, sec. 169.*

12. A trustee in a sequestration entered into a compromise with a debtor to the estate, whereby he waived certain claims against the debtor on payment of a certain sum, and the debtor waived claims of retention, which, if sustained, would have extinguished the trustee's claim. At a meeting of creditors a resolution was passed approving the compromise. A creditor appealed against that resolution, and prayed the Court to ordain the trustee to grant his consent, as concurring pursuer, to an action which he proposed to raise against the debtor for the full amount of his debt, the appellant guaranteeing the expense of the proposed action. The Court *refused* the appeal, on the ground that the re-opening of the question settled by the compromise might result in loss to the estate. *Marshall & Aitken v. Campbell's Trustee*, July 2, 1889, p. 895.

*Sequestration—Catholic and secondary creditors—First and second bondholder—Poinding of the ground.*

13. The holder of a first bond over heritable subjects, who had by poinding the ground obtained a preference over his debtor's moveables to the extent of £122 (of interest), after obtaining payment of his bond by realising the heritage, assigned his preference over the moveables to the holder of a second bond. In a question between the trustee on the debtor's sequestered estate and the holder of the second bond, *held* that the holder of the first bond was bound as far as possible to take payment from the moveables or to assign his preference over them to the second bondholder, and that having taken payment entirely from the heritage the second bondholder had right to his preference over the moveables. *Nicol's Trustee v. Hill*, Feb. 8, 1889, p. 416.

BANKRUPTCY—*Continued.*

*Sequestration—Company—Bankrupt shareholder—Discharge on composition and reinvestiture—Liability for subsequent calls on shares.*

14. A shareholder in a limited company, the shares of which were only partly paid up, was sequestrated, but in 1885 was discharged, on payment of a composition "of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," and reinvested in his estate. The company did not claim in the sequestration. In 1887 the shareholder, for the first time, requested the company to remove his name from their register, on the ground that his estates had been sequestrated, but the company refused to do so, and subsequently made a call upon him in respect of his shares. In a petition at his instance to have his name removed from the register on the ground that the amount unpaid on his shares was a debt for which he was liable at the date of his sequestration, the Court *refused* the prayer. *Taylor v. Union Heritable Securities Co., Limited*, June 1, 1889, p. 711.

*Cessio bonorum—Decree—Trust-deed for behoof of creditors—Discretion of Sheriff—Debtors Act, 1880, sec. 9.*

15. A creditor of a bankrupt gave notice to him that he was about to present a petition for cessio. The day after the notice was given the bankrupt granted a trust-deed for behoof of his creditors in favour of a person who had been trustee under a previous trust-deed, and to whom he knew the creditor would object. The Sheriff refused decree of cessio on the ground that the estate was almost realised under the trust-deed. The Court, in the circumstances, *sustained* an appeal at the instance of the petitioner, and remitted to the Sheriff to grant decree of cessio. *Robertson & Sons v. Falconer*, Dec. 15, 1888, p. 235.

*Cessio bonorum—Decree—Decree in debtor's absence—Bankruptcy and Cessio Act, 1881, sec. 9.*

16. In a creditor's petition for cessio the debtor was cited to appear for examination on 28th February 1888. At the diet the Sheriff, on the petitioning creditor's motion, adjourned the diet to 16th March 1888, "in respect that there was a prospect of an arrangement being come to." The debtor was not present at the diet, and the adjourned diet was not intimated to him. Disputes having arisen as to a trust-deed, the creditor at the adjourned diet moved the Sheriff to grant decree of cessio, and the Sheriff, "in respect of no appearance by or for the defender," granted decree. *Held* that as notice of the diet had not been given to the debtor, the decree was disconform to the above statute, and fell to be reduced. *Reid v. Somerville & Co.*, June 6, 1889, p. 751.

*Cessio bonorum—Right of debtor to benefit of—Parish minister—Assignment of Stipend.*

17. The emoluments of an assistant and successor to a parish minister amounted to £100 a-year. He applied for cessio, his debts being £1100. *Held* that he was entitled to the benefit of cessio on his assigning £20 a-year to his creditors. *Simpson v. Jack*, Nov. 23, 1888, p. 131.

*Cessio bonorum—Trustee—Vesting of estate—Poinding—Personal Diligence Act, 1838, sec. 26.*

18. A Sheriff having refused to a poinding creditor a warrant to sell under sec. 26 of the Personal Diligence Act, 1838, on the ground that the debtor had applied for the benefit of cessio, the creditor appealed under sec. 65 of the Court of Session Act, 1868. *Held* that the creditor was entitled to a warrant of sale. *Simpson v. Jack*, Nov. 23, 1888, p. 131.

*Trust for creditors—Responsibility of trustee who carries on business—Principal and Agent.*

19. A trader in embarrassed circumstances conveyed to one of his creditors his whole estates and business in trust for behoof of the grantor and his creditors, the trustee to have the management of the business, and the truster to act as his submanager, and to receive such weekly allowance as the trustee should think proper, the business to be carried on by the trustee till he

**BANKRUPTCY—Continued.**

should think it expedient to restore it to the truster or to sell it. The business was carried on for twenty years by the truster under supervision of the trustee, the supplies being ordered by the truster and paid for by cheques drawn by the trustee upon a bank account in his name into which the drawings were paid. The trustee gave the truster a cheque for £6 monthly for his support. *Held* (rev. judgment of Lord Trayner) that the trustee was personally liable for goods supplied to the business, on the ground that it was carried on by him under the trust-deed, and that the truster had acted as his manager. *Ford & Sons v. Stephenson*, Oct. 25, 1888, p. 24.

See *Justiciary Cases*, 10—*Partnership*, 2—*Process*, 5.

**BILL OF EXCHANGE. Necessity for presentment for payment—Bills of Exchange Act, 1882, secs. 45, 46.**

1. The affairs of a firm being involved, they, in November 1885, entered into an agreement with, *inter alios*, their principal creditors, including the Bank of Scotland, and L., a trader, who held their acceptance for £700, whereby, on the narrative that the creditors were willing to wait the result of the liquidation after mentioned, the firm conveyed their whole estates to certain persons as attorneys and managers to carry on the business, to ingather the debts due to the firm, and from time to time to make a rateable division of them among the creditors who were parties to the agreement. The attorneys and managers, by virtue of powers in the agreement, renewed from time to time L.'s bill above mentioned until April 1888, when they refused to renew it. In an action for payment against L., the drawer, by the Bank of Scotland, with whom he had discounted it, the defender pleaded that he was discharged from liability in respect of the fact, which was admitted, that the bank had not presented the bill to the acceptors for payment. *Held* that presentment for payment to the acceptors was not necessary, seeing that by the agreement the acceptors were not bound to pay the bill, and that the drawer had no reason to believe that it would be paid if presented, the acceptors being bound only to make payment rateably among the creditors of the funds in hand. *Bank of Scotland v. Lamont & Co.*, June 12, 1889, p. 769.

**Signature in representative capacity—Personal liability.**

2. A, B, and C, signed a promissory-note in the following terms:—"We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," &c. *Held* that A, B, and C, were personally liable for payment of the note. *M'Meekin v. Easton*, Jan. 25, 1889, p. 363.

**Cancellation without authority—Liability of agent employed to collect bill.**

3. The agent of the Bank of S. offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the condition on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill as cancelled. They then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the acceptors became bankrupt before summary diligence could be used against them. The holders thereupon raised an action against the Bank of S., concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors. *Held* (*dis.* Lord Mure) that the evidence shewed that if the bill had not been cancelled without authority through the error of the agent of the bank, the holders might have recovered payment by summary diligence before the acceptors were sequestrated, and that the bank was liable.

BILL OF EXCHANGE—*Continued.*

*Observations* as to the *onus* of proof. *Dominion Bank v. Bank of Scotland*, July 19, 1889, p. 1081.

See *Stamp*, 1.

BURGH. *Burgh Court—Jurisdiction—Heritable Right.*

1. Under a mutual disposition and settlement a husband assigned to his wife, "in liferent for her liferent alimentary use alienarly," certain house property. After the husband's death, his heir-at-law by onerous deed disposed the fee to the widow, "as liferenter of the said subjects." This disposition was placed on record. The widow thereafter married again, and after residing some time with her second husband, she separated from him, and brought an action of ejectment from the house property above mentioned against him in the Court of the royal burgh in which it was situated. The husband defended the action, on the ground that the liferent had been extinguished by the conveyance of the fee, and that the *jus mariti* was not excluded. The Magistrates granted warrant of ejectment, on the ground that the alimentary liferent still subsisted, and that the *jus mariti* of the husband was excluded. In a note of suspension at the instance of the husband, *held* (rev. judgment of Lord Fraser) that the question was one of heritable right, and that the Burgh Court had no jurisdiction to entertain it. *Wales v. Wales*, Nov. 28, 1888, p. 164.

*Dean of Guild—Jurisdiction—Nuisance.*

2. In a petition to a Dean of Guild for a warrant for the erection of byres for thirty-two cows within burgh, certain neighbouring proprietors objected that the proposed buildings, if erected, would be a nuisance and injurious to health, as well as otherwise prejudicial. The Dean of Guild found that the answers raised questions which were outwith his jurisdiction, and sisted process to allow of an interdict being applied for. The respondents having failed to apply for interdict, the Dean of Guild granted the warrant craved. On appeal by the respondents, the Court *sisted* process to enable them, if so advised, to apply for an interdict.

*Observations* (per the Lord President) on the jurisdiction of the Dean of Guild in questions of nuisance. *Kirkwood's Trustees v. Leith and Bremner*, Dec. 20, 1888, p. 255.

CARRIER. *Agreement—Construction—Common carrier—"Statuary."*

C. & Co., Edinburgh, wrote to S. & Co., London,—"We have a large quantity of goods for shipment, both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra cotta busts, marble columns, wood frames, &c. Will you kindly let us know your rates for such goods from both the above ports to Glasgow by steamer, and the name of your agents at both places?" S. & Co. replied,—"We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." Certain large terra cotta figures, of the value of £7, 10s. each, and small figures of men and animals, the property of C. & Co., were carried from Leghorn to Edinburgh on these terms through S. & Co., who contracted with steamship and railway companies for the carriage of goods, and charged through rates to the owners of the goods. The goods having been damaged *in transitu*, C. & Co. brought an action against S. & Co. for damages as having failed to carry the goods in safety, in implement of their contract. *Held* (1) that the defenders were liable as carriers for the safety of goods within their contract, and (2) (*dis.* Lord Lee, rev. judgment of Lord Trayner), that the terra cotta busts did not fall within the exception of "statuary." *Ciceri & Co. v. Sutton & Co.*, June 21, 1889, p. 814.

See *Railway*, 2, 3, 4, 5.

CAUTIONER. *Writ—Mandate—Onus.*

1. A father, at the request of his son, signed and delivered to him to be filled up a blank paper stamped with a sixpenny stamp. The son filled in above the signature the words:—"Messrs A and B,—I hereby guarantee payment of £500 by my son J. H., and the payment of the premiums of insur-

CAUTIONER—*Continued.*

ance on his policies . . . assigned to your firm." The son, a few days afterwards, assigned the policies by assignment *ex facie* absolute to the creditor to whom the guarantee was to be delivered. The £500 was paid, but the father, on being informed of the obligation to pay the premiums, repudiated liability. In an action raised against the father by the creditor to enforce the obligation for payment of the premiums, *held* that as the document founded on was not tested or holograph the *onus* lay upon the pursuer to prove that the defender had authorised the obligation to pay the premiums to be inserted above his signature, and that the pursuer had failed to prove such authority. *Wylie & Lochhead, Limited, v. Hornsby, July 3, 1889, p. 907.*

*Security given by principal debtor to particular cautioner—Consent by co-cautioner.*

2. A cautioner who has obtained from the principal debtor a special security over part of the debtor's estate for the liability he has undertaken is not bound to communicate to his co-cautioners the benefit of that security if he agreed to be cautioner only on the condition of having the security, and if the co-cautioners, when they entered into the cautionary obligation, knew of and consented to that arrangement. *Hamilton & Co. v. Freeth, July 17, 1889, p. 1022.*

*Proof—Parole.*

3. Where one of several co-cautioners, equally bound by the same deed, claimed the exclusive benefit of a security he had obtained from the principal debtor over part of his estate, on the ground that his co-cautioners had orally agreed to this, *held (diss. Lord Lee)* that he was entitled to prove this agreement by parole evidence. *Hamilton & Co. v. Freeth, July 17, 1889, p. 1022.*

See *Insurance, 4.*

CESSIO BONORUM. See *Bankruptcy, 1, 15, 16, 17, 18.*

CHURCH. Minister—*Stipend—Cessio—Assignment to creditors.*

1. The emoluments of an assistant and successor to a parish minister amounted to £100 a-year. He applied for cessio, his debts being £1100. *Held* that he was entitled to the benefit of cessio on his assigning £20 a-year to his creditors. *Simpson v. Jack, Nov. 23, 1888, p. 131.*

*Principal of Missionary Institution—Contract or munus publicum.*

2. Under regulations approved by the General Assembly of the Church of Scotland, in reference to the employment of missionaries in India, the Foreign Mission Committee of the Church had power, *inter alia*, to dispense with the services of a missionary at any time by giving six months' notice. W. H., a licentiate, having accepted the office of principal of the General Assembly's institution at Calcutta, and having sustained his trials, was (as the minute of the presbytery bore) "set apart to the office of the holy ministry and inducted to the office of principal of the General Assembly's institution at Calcutta." After he had been principal for five years the committee decided to dispense with his further services, and recalled him, paying him six months' salary in lieu of notice. He then raised an action of declarator, payment, and damages against the committee, in which he maintained that they had acted illegally in recalling him, in respect (1) that, as matter of fact, he had, before accepting office, stipulated that he should not be bound by the regulations above referred to, and (2) that having been ordained and inducted to his office in due form by the presbytery, he held it *ad vitam aut culpam*. *Held*, after a proof (1) that the office in question was not a *munus publicum*, but that the pursuer's employment depended on an ordinary contract of service; and (2) that his engagement was terminable at six months' notice by either party in terms of the regulations. The defenders were therefore *assolized*. *Hastie v. M'Murtrie, June 4, 1889, p. 715.*

See *Bill of Exchange, 2.*



## COMPANY. "Capital."

1. The prospectus of a public company set out,—“Share capital, £100,000, in 20,000 shares of £5 each. First issue £80,000, in 16,000 £5 shares. In addition to the above shares, £30,000 of six per cent debentures to be issued. . . . The consideration to be paid by the company for the whole of the before-mentioned property, together with the goodwill, has been fixed by the vendor at £90,000, of which £55,000 is payable in cash, and the balance, £35,000, in fully paid-up shares, debentures, or cash, or partly in each, at the option of the directors . . . This will leave for working capital, stock, and extension of plant, £20,000.” An applicant for 120 shares added to his letter of application the condition,—“If capital all subscribed for.” At the date of allotment the 16,000 shares were allotted, except certain shares which the company had the option of allotting to the vendor in lieu of cash, as part payment of the price of the works, &c., sold to the company, and a portion of the debentures offered to the public had not been taken up. In an action for payment of calls against the applicant, *held* that the whole capital had been subscribed for in the sense of his letter of application, and that he was in consequence liable in payment of the calls. *Swedish Match Co., Limited, v. Seivwright, July 16, 1889, p. 989.*

*Capital—Issue of shares at a discount—Memorandum of Association—Illegal provision—Companies Acts, 1862 and 1867—Companies Clauses Act, 1845—Companies Clauses Consolidation Act, 1863.*

2. *Held* that it is *ultra vires* of a company registered under the Companies Acts to issue its shares at a discount.

The memorandum and articles of association of a company registered under the Companies Acts contained provisions to the effect that the company might issue its shares “at par, or at a discount, or at a premium.” A person to whom new shares had been allotted at a discount presented a petition to the Court for rectification of the register of the company by the deletion of his name therefrom, and for an order on the company for repayment of the amount paid by him on his shares. The Court *granted* the prayer of the petition on the ground that the provision in the memorandum of association with regard to the issue of shares at a discount was illegal, and that such issue of shares was *ultra vires* of the company under the provisions of the Companies Acts, 1862 and 1867. *Klenck v. East India Co. for Exploration and Mining, Limited, Dec. 21, 1888, p. 271.*

*Capital—Power of Company to purchase its own shares—Ultra vires—Companies Act, 1862 and 1867.*

3. *Held* that it is *ultra vires* of a company registered under the Companies Acts, 1862 and 1867, to purchase its own shares, and that such a purchase is not only voidable but void.

A, a shareholder in a limited company incorporated under the Companies Acts, 1862 and 1867, sold his shares to the company in 1876, there being a provision in the articles of association binding him to offer them to the company in the first instance. A transfer was executed, and his name removed from the register. The company was successful for some years afterwards, and paid large dividends. Subsequently calls were made, and the whole nominal capital was exhausted; and ten years after the sale, and nine after A's death, the company went into liquidation. Proceedings were thereafter taken by the liquidator to have A's transfer reduced, and the names of his representatives placed upon the list of contributories, and the calls which had been made paid by them, in respect that it was *ultra vires* of the company to purchase its own shares. It appeared that the shareholders generally were aware that the company was in the habit of purchasing its own shares, that other purchasers than the company could easily have been found for the shares in question, and that a considerable amount of debt, still outstanding, had been incurred before as well as after the sale. *Held* that the transfer fell to be reduced as being *ab initio* void, and that in terms of the 35th section of the Companies Act,

COMPANY—*Continued.*

1862, "the justice of the case" required that the names of A's representatives should be placed upon the list of contributories. *General Property Investment Co. and Liquidator v. Matheson's Trustees*, Dec. 21, 1888, p. 282.

*Capital—Bankrupt shareholder—Discharge on composition and reinvestiture—Liability for subsequent calls on shares.*

4. A shareholder in a limited company, the shares of which were only partly paid up, was sequestrated, but in 1885 was discharged, on payment of a composition, "of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," and reinvested in his estate. The company did not claim in the sequestration. In 1887 the shareholder, for the first time, requested the company to remove his name from their register, on the ground that his estates had been sequestrated, but the company refused to do so, and subsequently made a call upon him in respect of his shares. In a petition at his instance to have his name removed from the register on the ground that the amount unpaid on his shares was a debt for which he was liable at the date of his sequestration, the Court *refused* the prayer. *Taylor v. Union Heritable Securities Co., Limited*, June 1, 1889, p. 711.

*Shareholder—Title to sue—Reduction.*

5. A shareholder in a public company brought an action against the company concluding for reduction of an agreement between the company and certain other parties thereto, on the allegation that the agreement which had been concluded by the directors without consulting the company was to the prejudice of himself and the other independent shareholders, that it was entered into "fraudulently and collusively," and that it would have the effect of seriously and unjustly depreciating the company's shares. There were further allegations that the agreement was *ultra vires* of the company. The Court (*rev. judgment of Lord Kinnear*) *held* that a plea of no title to sue fell to be repelled as an objection to satisfying the production, but that the pursuer was bound to call as defenders the whole parties to the agreement, and sisted the cause to allow of that being done. *Rixon v. Edinburgh Northern Tramways Co.*, March 20, 1889, p. 653.

*Winding-up—Supervision order—Companies Act, 1862, secs. 147, 149, and 150.*

6. On 1st November 1888 a coal company (limited) went into voluntary liquidation, and on the same day the liquidator issued a circular to the shareholders intimating that it was proposed to form a new company, and to advertise the colliery for sale at the upset price of £3000, and requesting answers before 12th November. On 3d November one of the shareholders presented a petition to have the liquidation put under the supervision of the Court, and to have an additional liquidator appointed, stating, *inter alia*, that coal was rising in value, and that the present was an unfavourable time to sell the colliery. On 12th November, no answers to the circular having been returned, the liquidator advertised the colliery for sale on 21st November at the upset price of £3000. The case was put out for hearing in the Summar Roll on 20th November. On 19th November a minute was lodged for the petitioner and certain concurring shareholders stating that the upset price was too low, that the notice of sale was too short, and that the liquidator was a relative of certain directors who had formed the design of starting a new company, and were anxious to acquire the colliery for an inadequate consideration. The Court *refused* the supervision order. *Mitchell v. Rawyards Coal Co. and Liquidator*, Nov. 20, 1888, p. 117.

*Winding-up—Voluntary liquidation—Rectification of register by Court,—Companies Act, 1862, sec. 138.*

7. Interlocutor pronounced, of consent of the liquidator under a voluntary liquidation, rectifying the register of members by deleting the name of the petitioner. *Simpson v. Boson Oil Co., Limited*, Feb. 5, 1889, p. 391.

COMPANY—*Continued.*

*Winding-up—Powers of provisional liquidator—Companies Act, 1862, secs. 95, 96, and 97.*

8. Circumstances in which the Court appointed an official liquidator in the winding-up of a company, and gave him the powers conferred by the 95th, 96th, and 97th sections of the Companies Act, 1862, with special power to borrow money on the security of the assets of the company. *Lochore and Capledrae Cannel Coal Co., March 2, 1889, p. 556.*

CONTRACT. *Constitution—Implied contract—Employment—Recompense.*

1. At a meeting of creditors called by a debtor to consider the state of his affairs and an offer of composition, an accountant, who appeared for two creditors, was instructed by the whole creditors present to prepare a state of the debtor's affairs. After considerable negotiation a composition settlement was carried through by the accountant, who prepared a scheme of ranking and the promissory-notes for the instalments of the composition. The debtor had a separate agent. In an action brought by the accountant against the debtor for his services in carrying through the composition settlement, the defender pleaded that he had never employed the pursuer. *Held* that the defender was not liable,—Lord Rutherford Clark *dissenting*, on the ground that all the expenses necessarily incurred in carrying through the composition arrangement ought to be borne by the defender. *Thomson, Jackson, Gourlay, & Taylor v. Lochhead, Jan. 29, 1889, p. 373.*

*Pactum illicitum—Contract to sell stocks to be purchased.*

2. Two persons entered into a joint adventure to sell stocks in name of one of them. They did not possess the stock in which they intended to deal, but they sold it, intending to buy it in before delivery should be required by the purchaser. The market rose, and the account was continued for some time, and then closed at a loss. *Held* that the contract was not as between the joint adventurers a gaming transaction, and that one of the joint adventurers, who had paid the whole loss, was entitled to recover payment of half of it from the other. *Mollison v. Noltie, Jan. 24, 1889, p. 350.*

*Executory Contract—Damages—Timeous rejection—Defence.*

3. An engineer undertook in February 1883 to erect an engine on the premises of a manufacturer for a price payable one-half when the principal parts were delivered, one-fourth on the engine being started, and the remaining one-fourth three months thereafter. On 3d December 1883 the principal parts were delivered, and the first instalment of the price was paid. The engine was started on 30th September 1886, prior to which time part of the second instalment had been paid.

In an action by the engineer for payment of the remainder of this instalment the manufacturer pleaded that he was not liable in the sum sued for in respect that the engine furnished was disconform to contract, and was worth less than the engine contracted for to an extent exceeding the sum sued for. *Held* that the statement that the pursuer by supplying an inferior engine had not fulfilled his contract, and that the defender was in consequence entitled to an abatement of the price, was a relevant defence (seeing that the remedy of rejection was not available) to a demand for the whole price, but that as the abatement claimed was more than covered by the last instalment of the price it could not be sustained as an answer to the demand for payment of the second instalment. *Dick & Stevenson v. Woodside Steel and Iron Co., Dec. 18, 1888, p. 242.*

*Construction—"30,000 tons more or less."*

4. A steel company made the following offer to T., A., & Co., the contractors for the construction of the Forth Bridge. "We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices. . . . The estimated quantity of the steel we understand to be 30,000 tons, more or less." T., A., & Co. wrote in reply,—  
"We hereby accept your offer to supply the whole of the steel required

**CONTRACT—Continued.**

by us for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained." The terms and conditions in the offer were repeated, and among these the sentence, "The estimated quantity of steel we understand to be 30,000 tons, more or less." In an action brought by the steel company against T., A., & Co. for declarator that the defenders were bound to take from the pursuers the whole steel required in the construction of the bridge, and for damages in respect of the defenders having supplied themselves elsewhere with steel required for the bridge, *held* that the defenders were bound to take from the pursuers the whole steel required for the bridge, the mention of the 30,000 tons being merely by way of estimate of the quantity to be required. *Steel Company of Scotland v. Tancred, Arrol, & Co.*, Feb. 8, 1889, p. 440.

**Entailed estate—Essential error.**

5. Sale of entailed estate "subject to the ratification of the Court"—Specific performance—Reduction—Essential error. *Stewart v. Kennedy*, Feb. 8, 1889, p. 421, June 25, 1889, p. 857.

See *Church*, 2—*Marriage-contract*.

**COPYRIGHT OF DESIGNS. Infringement—Registration for shape or configuration—Patents, Designs, and Trade-Marks Act, 1883, sec. 58.**

A design was registered for shape or configuration, under the 60th section of the Patents, Designs, and Trade-Marks Act, 1883, the application being for "a range door with moulding on top, moulding forming front of range, shape to be registered." The drawing shewed a moulding on the top of the door fitting into the moulding on the front of the range and flush with it. *Held* (in aff. judgment of First Division), that another design, which differed from the above in this, that the moulding on the door overlapped the moulding on the front of the range, was, when compared with the other, an obvious imitation of the registered design, and an infringement of it. *Hecla Foundry Co. v. Walker, Hunter, & Co.*, Aug. 8, 1889, H. L., p. 27.

**CROFTER.** See *Lease*, 6—*Sheriff*, 4—*Public burdens*.

**DEAN OF GUILD.** See *Burgh*, 2.

**DOMICILE. Change of domicile—Proof—Onus.**

1. A Scotswoman, the daughter of a Scottish peer, married the proprietor of an entailed estate in Scotland, on which the spouses resided till the husband's death in 1883, when the estate passed to his nephew. The widow thereafter resided in London till her death in 1888. A petition by her nephew, her sole next of kin according to the law of Scotland, to be decerned her executor-dative was opposed by her brother consanguinean, who claimed to be one of the next of kin according to the law of England. He alleged that she died domiciled in England. It was proved that the deceased for a few months after her husband's death continued to reside in his house in London, which, with the furniture, he had left to her; that she then sold this house and subsequently lived in furnished houses or in lodgings in London, sometimes leaving London for a few months to reside on the Continent. She frequently expressed her intention to have no permanent home anywhere, and stated that she had no intention of returning to live in Scotland, as the climate did not suit her. Her principal adviser in business matters was the factor on the entailed estate, and her late husband's law-agents in Edinburgh continued to manage two farms in Scotland left to her by her husband (which she desired to sell), and her investments generally. It appeared that she resided in London chiefly for the sake of being near her stepmother. *Held* that the *onus* lay upon the respondent of proving that the deceased had *animo et facto* abandoned her domicile of origin, and that he had failed to prove her intention to abandon it. *Vincent v. Earl of Buchan*, March 19, 1889, p. 637.

**Executor—Confirmation—Proof of domicile—Sheriff Courts Act, 1876, sec. 41.**

2. The executors-nominate of a deceased Scotsman who had died in England

**DOMICILE—Continued.**

after residing there for many years applied for confirmation in the Sheriff Court of Lanarkshire, in which county there was heritage belonging to the deceased. They produced an affidavit, in terms of the 41st section of the Sheriff Courts Act of 1876, to the effect that the deceased was a domiciled Scotsman at the date of his death. Confirmation was objected to by a person who alleged that she was one of the testator's next of kin, and that the deceased died domiciled in England, where, accordingly, the will ought to have been proved. She stated further that the testamentary deed was liable to reduction on the ground of incapacity and undue influence. *Held* that no ground had been set forth to justify the Court in interfering with the granting of confirmation. *Hamilton v. Hardie*, Dec. 7, 1888, p. 192.

**DONATION. Mortis causa donation—Deposit-receipt—Effect of destination in deposit-receipt in proof of donation.**

- J. M. took from a bank a deposit-receipt in these terms,—“Received from J. M., and A. M. his brother, to be drawn by them, or either, or survivor, £286, 19s. 2d.” Some months thereafter J. M. died while on a visit to A. M. After his death A. M., who became his executor, produced the receipt and claimed to have right to it as having been given to him when the deceased was ill, and in prospect of death. In an action of count and reckoning against A. M. as executor, after a proof in which, apart from the terms of the receipt, the only evidence of donation was the testimony of the alleged donee and his daughter, *held* that A. M. was in lawful possession of the deposit-receipt as creditor therein, and that it did not form part of J. M.'s estate. *Macdonald v. Macdonald*, June 11, 1889, p. 758.

**ELECTION LAW. Lodger.**

1. *Held* that a son who was allowed by his father, without contract or payment of rent, the sole use of two rooms in the father's house of the requisite yearly value, was not entitled to be enrolled as a lodger. *Macdonald v. Dickson*, Nov. 26, 1888, p. 143.

**County Franchise—Inhabitant-occupier—Service Franchise—Dwelling-house—Representation of the People Act, 1884, sec. 3 and sec. 7, subsec. 4.**

2. The manager of a farm, of which his mother was tenant, had the exclusive use and occupation of a bedroom in the farm-house, by virtue of his employment. His mother and sisters also resided in the farm-house, and he took his meals along with them in another room in the house. *Held* that the whole farm-house was inhabited by the person under whom he served, and therefore that he was not entitled to be registered as an “inhabitant-occupier of a dwelling-house” in respect of his occupancy of the bedroom. *Philip v. Roxburgh*, Dec. 21, 1888, p. 261.

**County Franchise—Inhabitant-occupier—Imprisonment during a portion of the qualifying period—Representation of the People Acts, 1868 and 1884.**

3. *Held* that where a man occupied a dwelling-house as the ordinary habitation of himself and his family during the qualifying period, his compulsory absence in prison during a portion of that period did not interrupt the continuity of his inhabitancy, to the effect of preventing his acquiring a qualification to vote as an “inhabitant-occupier” in the sense of the Representation of the People Acts, 1868 and 1884. *Watt v. M'Guire*, Dec. 21, 1888, p. 263.

**ENTAIL. Sale of entailed estate “subject to ratification of Court”—Specific performance—Entail Amendment Acts, 1848, sec. 4; 1853, sec. 5; 1875, secs. 5 and 6—Entail Act, 1882, secs. 13, 19, 20, 21, 22.**

- S., an heir of entail in possession, sent to K. a holograph offer to sell the entailed estate at a specified price, containing these words,—“In the event of your acceptance the sale is made subject to the ratification of the Court.” The offer was accepted. Thereafter S. presented a petition to the Court, setting forth the above missives, and sections 19-22 of the Entail Act, 1882, and praying the Court to ratify the contract constituted by the missives, and to grant an order of sale in terms thereof. The heir next

**ENTAIL—Continued.**

entitled to succeed (who was the only other existing heir) lodged answers, in which he founded on section 22 of the Act of 1882, which gave him a right to refuse his consent to a sale by private bargain. In an action brought by K. against S., concluding for declarator that by the missives a valid contract was entered into for the sale of the estate, and that in respect thereof the defender was under a legal obligation to apply to the Court for authority and power, under the Entail Amendment Acts, to sell and dispose the estate, and for implement, the Court *held* that the procedure under sections 19-22 of the Act of 1882 was not applicable to the circumstances, and that the heir in possession was bound to present and prosecute to a conclusion a petition, in terms of section 4 of the Entail Amendment Act, 1848, and section 5 of the Entail Amendment Act, 1853, as amended by section 13 of the Entail Act, 1882, for a sale of the estate on the footing of compensating the next heir, and, further, *ordained* the pursuer to lodge in process a draft of a disposition by the defender of the entailed estate. *Stewart v. Kennedy*, Feb. 8, 1889, p. 421.

**ERROR. Sale of entailed estate "subject to the ratification of the Court"—Issues—Reduction.**

S., an heir of entail in possession, sent to K. a holograph offer to sell the entailed estate at a specified price, containing these words,—“In the event of your acceptance the sale is made subject to the ratification of the Court.” The offer was accepted in writing. In an action of declarator and implement brought by K. he contended that S. was bound to execute a disposition in favour of the purchaser at the price stated in the offer, and thereafter to obtain a ratification of the sale from the Court under the Entail Amendment Act, 1853, as amended by the 13th section of the Entail Act, 1882. In granting such ratification it was not open to the Court to consider the adequacy of the price except as affecting the interest of creditors. On the other hand S. contended that by the contract he was bound only to apply for an order of sale under the Act of 1882, whereby an entailed estate might be converted into entailed money, and the adequacy of the price would fall to be considered by the Court in the interest of the heirs of entail. The Court gave effect to the pursuer's contention. S. subsequently brought an action of reduction of the missives against K., averring, *inter alia*, that throughout the negotiations for a sale he had had in his mind a sale under the Entail Act, 1882, and the conversion of the estate into entailed money—conditionally upon the Court approving of the whole terms of the bargain as fair and reasonable,—which was a mode of selling an entailed estate of which he had himself had experience, and the only mode of which he was aware,—and that he had never thought of committing himself to a sale on the footing of paying compensation to the next heir under the Act of 1853, and he proposed an issue of essential error on his part as to the “import and effect of the contract.” *Held* that as the error alleged was not in the essentials of the contract, which were complete, but concerned only its import and effect, there was no relevant ground for an issue of essential error,—*diss.* Lord Shand, who held that, assuming the defender's averments to be proved, there had been no *consensus in idem placitum* between the parties, the pursuer by the words “subject to the ratification of the Court” having meant that the sale should be subject to the suspensive condition that the Court after inquiry should be satisfied that the transaction was advantageous to the heirs of entail generally, and that there should be no sale unless the Court considered the price adequate, while the defender intended an absolute sale with a potestative condition. *Stewart v. Kennedy*, June 25, 1889, p. 857.

See *Payment*.

**EXECUTOR. Confirmation—Proof of domicile—Sheriff Courts Act, 1876, sec. 41.**

The executors-nominate of a deceased Scotsman who had died in England after residing there for many years applied for confirmation in the Sheriff

**EXECUTOR—Continued.**

Court of Lanarkshire, in which county there was heritage belonging to the deceased. They produced an affidavit, in terms of the 41st section of the Sheriff Courts Act of 1876, to the effect that the deceased was a domiciled Scotsman at the date of his death. Confirmation was objected to by a person who alleged that she was one of the testator's next of kin, and that the deceased died domiciled in England, where, accordingly, the will ought to have been proved. She stated further that the testamentary deed was liable to reduction on the ground of incapacity and undue influence. *Held* that no ground had been set forth to justify the Court in interfering with the granting of confirmation. *Hamilton v. Hardie*, Dec. 7, 1888, p. 192.

See *Judicial Factor*, 2.

**EXPENSES. Amendment—Condition of payment of expenses in previous actions.**

1. In an action of damages for slander, the defender was assoltized from the conclusions of the summons on the ground that the record contained no relevant statement of malice, and the pursuer was found liable in expenses. In a second action founded on the same alleged slander, but containing averments of malice, *held* that the pursuer could not be allowed to proceed until he had paid the expenses in the former action. *M'Murphy v. MacInlich*, May 21, 1889, p. 678.

**Incidental procedure in cause—Reservation followed by general decree for expenses.**

2. *Held* that where the expenses of any incidental procedure in a cause are reserved, they fall to be dealt with by the Court which disposes of the general question of expenses, and that a general finding for expenses covers the expenses so reserved. *Caledonian Railway Co. v. Chisholm*, March 19, 1889, p. 622.

**Taxation—Case under Taxes Management Act, 1880, sec. 59—Expenses of preparation and adjustment.**

3. *Held* that the expenses of preparation and adjustment of a case stated under sec. 59 of the Taxes Management Act, 1880, incurred before the case is sent to the roll, are not proper charges against the unsuccessful party in the case. *Scottish Union and National Insurance Co. v. Surveyor of Taxes*, March 19, 1889, p. 624.

**Taxation—Fees to counsel.**

4. *Held* that when no fee has been sent to counsel for a particular piece of business in a cause, it may be sent and made a charge against the opposite party after the party who instructed the counsel has been found entitled to expenses. *Sim v. Scottish National Heritable Property Co., Limited*, March 12, 1889, p. 583.

**Multiplepoining—Claimants benefiting by the litigation of one of their number.**

5. In a multiplepoining where only one of several next of kin, who were all called and had the same interest in the fund *in medio*, put in a claim and succeeded in making it good against the heir-at-law, the others who appeared afterwards were ordained to pay their shares of the whole expenses incurred by him in the litigation, not excluding the expenses of a part of it in which he had been unsuccessful. *Cowan's Trustees v. Cowan*, Oct. 17, 1888, p. 7.

**Husband and Wife.**

6. A wife is not entitled to the expense of unsuccessfully defending an action of divorce if she is possessed of separate estate. *Henderson v. Henderson*, Nov. 9, 1888, p. 84.

Caution for Expenses. See *Process*, 5, 6.

**FISHING.** See *Justiciary Cases*, 11, 12.

**FOREIGN. Right in security—Bankruptcy—Assignment—Loan—Life insurance.**

1. A domiciled Scotsman obtained a loan in England from a domiciled Englishman, and in security therefor delivered to the latter a policy of insurance

## FOREIGN—Continued.

on his life with a Scottish company. The borrower died soon afterwards, and after his death the lender gave notice by letter to the Insurance Company that the policy had been assigned to him, and was in his possession. Thereafter the estates of the deceased were sequestrated, and a trustee appointed. *Held* (1) that the transaction having taken place in England the rights of the holder fell to be determined by the law of that country, and (2) upon an admission by the parties as to the law of England, that the deposit of the policy and the intimation to the Insurance Company were effectual to confer a preference upon the holder of the policy. *Scottish Provident Institution v. Cohen & Co.*, Nov. 20, 1888, p. 112.

*Arrestment—English decree for costs.*

2. A on the dependence of an action against B arrested in the hands of C a sum due by him to B under a decree for costs in an English action. B's English solicitors subsequently obtained a "charging order" from the English Court, which by the law of England had the effect not only of transferring B's right to them, but of invalidating any prior attachments of the fund by his creditors. *Held* that the claim of the English solicitors was preferable to that of A. *Stewart v. North*, July 5, 1889, p. 927.

*Husband and Wife—Sale of English heritage belonging to wife—Surrogatum.*

3. The wife of a domiciled Scotsman, with her husband's concurrence, sold the estate of X, in England, belonging to her, and acknowledged the conveyance before two commissioners in terms of the Act 3 and 4 Will. IV. cap. 74, for the Abolition of Fines and Recoveries, declaring at the same time that she intended to give up her interest in the estate without having any provision made for her in lieu thereof. Her husband received the price and applied it to his own uses. The spouses afterwards separated by mutual consent, and the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action against him for declarator that the £18,000 in his hands was either (1) a *surrogatum* for her heritage, and not subject to the *jus mariti*, or (2) was a donation to him which she had validly revoked. The Court—after obtaining the opinion of the English Court to the effect that by the law of England, the law of the *situs*, (1) the estate of X, after the marriage, continued to belong to the wife in fee-simple, subject to a freehold estate in the husband during coverture (which entitled him to the rents); and (2) by the wife's conveyance, and her refusal of any provision, her interest in the estate was converted into personalty, and became the property of the husband—*held* (1) that on the wife's interest being converted into personalty the respective rights of the spouses fell to be determined by the law of Scotland, the law of their domicile; and (2) that the price of the wife's interest belonged to her as a *surrogatum*, exclusive of the *jus mariti*. *Tennent v. Tennent's Executor*, June 28, 1889, p. 876.

See *Revenue*, 3.

FRAUD. See *Bank*, 2—*Justiciary Cases*, 6, 10.

GAME. See *Justiciary Cases*, 8, 9.

GAMING. See *Contract*, 2.

GUILD, DEAN OF. See *Burgh*, 2.

HERITABLE AND MOVEABLE. See *Succession*, 5, 6, 7.

HORSE. See *Insurance*, 3—*Loan*.

HUSBAND AND WIFE. *Aliment—Widow—Legitim.*

1. A husband died leaving a will by which he gave his widow a liferent of his whole estate, with power to appropriate such part of the capital as from time to time she should think necessary for her maintenance. Some months after the husband's death a child claimed legitim. *Held* that the widow was not entitled in an accounting for legitim to credit for aliment



## HUSBAND AND WIFE—Continued.

out of the estate from her husband's death till the claim for legitim was made. *Morrison v. Tawse's Executrix*, Dec. 18, 1888, p. 247.

*Terce and jus relictæ—Conversion.*

2. A bondholder infert sold the security subject under his bond, but died before granting a disposition. His widow maintained that the bond formed part of her husband's moveable estate at the date of his death, subject to *jus relictæ*. *Held* that the bond had not been rendered moveable in a question between the executor and the widow. *Rossborough's Trustees v. Rossborough*, Nov. 28, 1888, p. 157.

*Surrogatum—Donation inter virum et uxorem—Foreign—Sale of English heritage belonging to wife.*

3. The wife of a domiciled Scotsman, with her husband's concurrence, sold the estate of X, in England, belonging to her, and acknowledged the conveyance before two commissioners in terms of the Act 3 and 4 Will. IV. cap. 74, for the Abolition of Fines and Recoveries, declaring at the same time that she intended to give up her interest in the estate without having any provision made for her in lieu thereof. Her husband received the price and applied it to his own uses. The spouses afterwards separated by mutual consent, and the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action against him for declarator that the £18,000 in his hands was either (1) a *surrogatum* for her heritage, and not subject to the *jus mariti*, or (2) was a donation to him which she had validly revoked. The Court—after obtaining the opinion of the English Court to the effect that by the law of England, the law of the *situs*, (1) the estate of X, after the marriage, continued to belong to the wife in fee-simple, subject to a freehold estate in the husband during coverture (which entitled him to the rents); and (2) by the wife's conveyance, and her refusal of any provision, her interest in the estate was converted into personalty, and became the property of the husband—*held* (1) that on the wife's interest being converted into personalty the respective rights of the spouses fell to be determined by the law of Scotland, the law of their domicile; and (2) that the price of the wife's interest in the estate belonged to her as a *surrogatum* for her heritage, exclusive of the *jus mariti*.

*Opinion per curiam* that the gift of the price of the subjects to the husband, assuming it to have been made, was a donation *inter virum et uxorem*, and had been competently recalled by the wife's deed of revocation. *Tennent v. Tennent's Executor*, June 28, 1889, p. 876.

*Wife's English heritage—Husband's rights after sale of heritage.*

4. A married woman sold certain heritage belonging to her in England, of which according to English law her husband had right to the rents during coverture, his right being a freehold. The husband received the price and applied it to his own uses during the marriage. In an action against his executor for recovery of the price without interest, the latter contended that the proportion of the price corresponding to the husband's freehold belonged to him. *Held* that although the husband might have been entitled to have the purchase money apportioned according to the value of the respective rights of husband and wife as at the date of the sale, he having enjoyed the interest of the whole price subsequently thereto, had received an equivalent for the rents of the heritage, and had no further claim. *Tennent v. Tennent's Executor*, June 28, 1889, p. 876.

*Wife's separate estate—Earnings of wife in business carried on by her—Married Women's Property Act, 1877, sec. 3.*

5. A wife living with her husband carried on in the house in which they lived the business of a washerwoman. She put her own and her husband's earnings, which were about equal in amount, into a common purse, from which the expenses of the household were defrayed, and she placed their savings from their joint earnings in deposit-receipts, repayable "to either of them and the survivor." The husband predeceased the wife. *Held*

**HUSBAND AND WIFE—Continued.**

(*dis.* Lord Young) that one-half of the sums so deposited belonged to his widow in her own right, in virtue of the provisions of the above Act. *Morrison v. Tawse's Executrix*, Dec. 18, 1888, p. 247.

**Married Women's Property Act, 1881, sec.-3.**

6. *Held* that the *jus mariti* and right of administration of a husband are not excluded from the income of heritable estate, the fee of which has vested in his wife prior to the passing of the Married Women's Property Act, 1881. *Scott's Trustee v. Scotts*, Feb. 20, 1889, p. 507.

**Married Women's Property Act, 1881, sec. 6.**

7. The above section applies to marriages whether contracted prior or subsequent to the date of the Act.

By an antenuptial marriage-contract entered into prior to the passing of the Married Women's Property Act, 1881, which dealt exclusively with the wife's estate, the wife conveyed to trustees her moveable estate with directions to them to hold the same "for behoof of herself, whom failing, then for behoof of her own representatives, . . . excluding always the *jus mariti* and right of administration of her said intended husband, and the debts and diligence of his creditors," and "in order that this trust and arrangement may receive effect" the husband renounced his *jus mariti* and right of administration over the estate so conveyed. The wife died leaving children of the marriage, but without having executed any further writing disposing of her estate. In a special case between the marriage-contract trustees and the husband of the deceased, *held* that the husband was entitled, under section 6 of the Act of 1881, to one-third of his wife's estate. *Fotheringham's Trustees v. Fotheringham*, June 27, 1889, p. 873.

**Divorce—Wife's expenses—Separate estate.**

8. A wife is not entitled to the expense of unsuccessfully defending an action of divorce if she is possessed of separate estate. *Henderson v. Henderson*, Nov. 9, 1888, p. 84.

**Divorce for adultery—Reduction—Perjury—Subornation of perjury.**

9. A wife against whom decree of divorce on the ground of adultery had been pronounced raised an action of reduction of the decree on the ground that the material evidence against her was perjured, and that it had been obtained by subornation of perjury on the part of a detective employed by her husband for that purpose. The Court allowed a proof before answer of the allegations of subornation of perjury, and thereafter, the pursuer having failed to establish these, *held* that the averments of perjury were irrelevant, and *dismissed* the action. *Begg v. Begg*, Feb. 27, 1889, p. 550.

**INSURANCE. Policy—Construction—Liability "under or by virtue of Employers' Liability Act, 1880"—Action at common law.**

1. An assurance company granted a policy of insurance in favour of a firm of contractors under which they contracted to "pay to the employer all sums which such employer shall become liable for under or by virtue of the Employers' Liability Act, 1880, as and for any compensation for personal injury caused to any workman in their service, while engaged in the employer's work," during the currency of the policy. A workman in the employment of the contractors raised an action against them for personal injury suffered by him while in their employment through the fault of one of the firm. The action was laid solely at common law, and damages were found due. *Held* that the assurance company was not bound under the policy to indemnify the contractors. *Morrison & Mason v. Scottish Employers' Liability and Accident Assurance Co. Limited*, Dec. 14, 1888, p. 212.

**Policy—Construction—Liability defined by notice on policy.**

2. A policy of insurance with an accident insurance company set forth that "if the insured shall sustain any bodily injury . . . which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200," and in the event

**INSURANCE—Continued.**

of permanent partial disablement not being suffered £3 a-week for a period not exceeding twenty-six weeks was allowed. On the back of the policy there was the following:—"Notice.— . . . Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight." In an action on this policy for £200 the pursuer averred that he had met with an accident whereby he had suffered permanent partial disablement, but he admitted that he had lost neither a hand, nor a foot, nor his sight. *Held* (rev. judgment of Lord Trayner) that the action was relevant. *Scott v. Scottish Accident Insurance Co., Limited*, March 19, 1889, p. 630.

**Horse—Insurance—Policy—Condition—Personal bar.**

3. A policy of insurance granted to the owner of a horse against its death from accident or from natural disease contained, *inter alia*, the condition—which was declared to be a condition precedent to the owner's right to recover—that in the event of the animal insured receiving any injury, the owner should have it attended at once by a qualified veterinary surgeon, and should forward his report to the insurance company, and that on the death of an insured animal notice should be sent to the company's office accompanied, or followed as speedily as possible, by the report of a qualified veterinary surgeon. It was further provided that notice to an agent of the company should not be sufficient compliance with the condition. The horse having sustained a compound comminuted fracture of a fore leg, the owner, on the advice of a veterinary surgeon, who was not registered as such, had it killed at once, and by telegraph intimated to an agent of the company that the horse had broken its leg and had been condemned by a veterinary surgeon. This intimation was at once communicated by the agent to the manager of the company, by whom liability was at once repudiated. No report by a veterinary surgeon was forwarded to the company. In an action against the insurance company *held*, after a proof (rev. judgment of Lord Trayner, *dub.* Lord Rutherford Clark), (1) that as it had been proved that the horse was fatally injured, and that in the circumstances the proper course was to kill it at once, the case was to be taken as one of death and not of injury in the sense of the above condition; (2) that although the notice had been sent to an agent of the company, as it had *de facto* reached the manager timeously, it was sufficient; (3) that the instant repudiation of liability by the company had rendered it unnecessary for the pursuer thereafter to send the report required by the condition, and barred the company from objecting to the want of it. *Shiells v. Scottish Assurance Corporation, Limited*, July 17, 1889, p. 1014.

**Guarantee taken by association of underwriters from new member—Claim on guarantee by person assured—Jus quæsitum tertio.**

4. An association of underwriters before admitting a new member were in the practice of inquiring into his financial position, and in certain cases of requiring a guarantee for underwriting obligations to be contracted by him. *Held* by Lord Kyllachy that a guarantee so granted conferred a *jus quæsitum* on any person subsequently assured by such underwriter. *Rose, Murison, & Thomson v. Wingate, Birrell, & Co.'s Trustee*, July 19, 1889, p. 1132.

See *Foreign*, 1—*Revenue*, 5.

**INTERDICT. Breach of interdict and contempt of Court.**

Sentence. *Mackenzie v. Coulthart*, July 19, 1889, p. 1127.

**INTEREST. See Succession**, 4.**ISSUE. See Process**, 12, 13—*Reparation*, 14, 15, 19, 20, 21.**JUDICIAL FACTOR. Appointment.**

1. *Appointment to protect contingent interests.* *Rae v. Meek*, August 8, 1889, H. L., p. 31.

*Wille to sue.*

*'d* that a judicial factor appointed on certain heritable subjects "with all

JUDICIAL FACTOR—*Continued.*

the usual powers" had no title to sue a person for rents uplifted by him prior to the factor's appointment. *Gordon v. Williams' Trustees*, July 16, 1889, p. 980.

*Curator Bonis—Statement of accounts.*

3. The uncle of three minor children was appointed executor-dative *qua* factor to their deceased father, and he thereafter agreed to carry on for behoof of the children a farm of which the father had been tenant. He was subsequently appointed *curator bonis* to the children on their succeeding to certain monies from a relation on their mother's side. In a petition for his discharge as *curator bonis* held that the curatorial funds must be kept separate, and that he was not entitled in his accounts to deduct the losses he had sustained as executor. *Matheson's Curator Bonis v. Mathesons*, May 31, 1889, p. 701.

JURISDICTION. *Arrestment ad fundandam jurisdictionem—Status.*

1. The daughter of A B deceased raised an action against the trustee under his deed of settlement, C B his widow, and his sister, concluding (1) for declarator of legitimacy; (2) for payment of legitim out of his estate; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The pursuer averred that her mother had been regularly married to A B in ignorance of the fact that he was married to C B. None of the defenders were resident within the jurisdiction of the Court, but as regarded the trustee the pursuer averred that jurisdiction had been constituted against him by arrestments *ad fundandam jurisdictionem*. The defenders pleaded that the arrestment did not found jurisdiction as the action raised a question of status, that A B had been domiciled in England, and that the law of England did not recognise legitimacy by a putative marriage. At adjustment the pursuer amended the summons by deleting the averments as to C B's marriage to A B, and stating that A B's marriage to the pursuer's mother was a lawful marriage. The Court *dismissed* the action, holding that it raised a question of status, and that jurisdiction could not in such an action be founded by arrestments *ad fundandam jurisdictionem*.

*Opinions, per Lord Shand and Lord Adam*, that if a summons as served is bad for want of jurisdiction it cannot be made good by subsequent alterations. *Morley v. Jackson*, Nov. 9, 1888, p. 78.

*Arrestment ad fundandam jurisdictionem—Partnership debt.*

2. A person to found jurisdiction against A, a domiciled Englishman, arrested in the hands of B all sums due by him to A. It was proved that B had in his hands a fund belonging to an English copartnery, of which A was a partner (and no other property in which A had an interest), and that while by the law of England a partnership has no *persona*, and the title to the partnership assets is in the individual partners, a partner has no beneficial right other than a right to a share of the surplus assets of the partnership on realisation. *Held* by Lord Kinnear, Ordinary, that the arrestment was not effectual to found jurisdiction against A. *Parnell v. Walter*, July 3, 1889, p. 917.

*Arrestment ad fundandam jurisdictionem—Defeasible right.*

3. On 26th May 1887 A, to found jurisdiction against B, a domiciled Englishman, arrested in the hands of C a sum due by him to B under a decree for costs in an English action, and on the following day A served a summons upon B. On 13th June 1887 B's English solicitors obtained from the English Court a charging order, which by the law of England had the effect not only of transferring B's claim for costs to them, but of invalidating any prior attachment by a creditor of B. B pleaded no jurisdiction, and the Lord Ordinary (Kinnear) sustained the plea, on the ground that B's claim for costs against C being defeasible the arrestment was *ab initio* ineffectual to attach the debt. On a reclaiming note the Court *reversed* the Lord Ordinary's judgment, holding that as there was a debt due by C to B at the date of the arrestment jurisdiction had been duly constituted when

JURISDICTION—*Continued.*

the summons was served, and that the subsequent transfer of B's right did not affect the jurisdiction already constituted. *Stewart v. North*, July 5, 1889, p. 927.

*Slander—Publication.*

4. *Held* by Lord Kinneir, Ordinary, that neither the direct dispatch by post of an English newspaper from the publishing office in England to persons in Scotland, nor the sale of the newspaper in Scotland, is sufficient to give the Scots Courts jurisdiction to entertain an action of damages for slander alleged to have been published in the newspaper. *Parnell v. Walter*, July 3, 1889, p. 917.

*Forum conveniens.*

5. The child of a deceased person raised an action concluding (1) for declarator of legitimacy; (2) for payment of legitim out of his estate; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The action was directed against the trustee of the deceased under his deed of settlement, his widow, and his sister, the two latter of whom were interested in respect of their pecuniary rights and interests in the estate of the deceased. All the defenders were in England, but the pursuer alleged that she had used arrestments to found jurisdiction against the trustee. *Opinions, per* Lord Shand and Lord Adam, that in the absence of the widow and sister, who were the real parties interested in the action as defenders, the Court of Session was *non forum conveniens* to try the question with the trustee, who was only interested as a holder of funds. *Morley v. Jackson*, Nov. 9, 1888, p. 78.

Of Burgh Court and of Dean of Guild. See *Burgh*.

Of Court of Justiciary. See *Justiciary Cases*, 1, 2, 3.

Of Sheriff Court. See *Justiciary Cases*, 4—*Sheriff*, 1.

JUS QUÆSITUM TERTIO. *Insurance—Guarantee.*

An association of underwriters before admitting a new member were in the practice of inquiring into his financial position, and in certain cases of requiring a guarantee for underwriting obligations to be contracted by him. *Held* by Lord Kyllachy that a guarantee so granted conferred a *jus quæsitum* on any person subsequently assured by such underwriter. *Ross, Murison, & Thomson v. Wingate, Birrell & Co.'s Trustee*, July 19, 1889, p. 1132.

JUSTICIARY CASES. *Jurisdiction—Circuit Court—Winter Sitting in Glasgow—Appeal—Act 9 Geo. IV. c. 29, sec. 1—The Criminal Procedure Act, 1887, sec. 46.*

1. *Held* that the Winter Sitting of the High Court of Justiciary at Glasgow is, notwithstanding the provisions of the Criminal Procedure Act, 1887, held under the Act 9 Geo. IV. c. 29, and therefore that it is not competent to hear or dispose of any appeals thereat. *M'Kenzie v. M'Phee*, Dec. 29, 1888, Just. Cases, p. 43.

*Jurisdiction—High Court—Circuit Court—Suspension—Competency—Fundamental nullity—Glasgow Police Act, 1866, secs. 131 and 132.*

2. *Objection* to the competency of a suspension of a conviction in the Glasgow Police Court on the ground that the jurisdiction of the High Court was excluded by sections 131 and 132 of the Glasgow Police Act, 1866, *repelled*, the Court (*dis.* Lord Adam) holding that the proceedings on which the conviction followed, were contrary to the recognised forms of criminal procedure, and were *funditus* null. *M'Kenzie v. M'Phee*, Jan. 28, 1889, Just. Cases, p. 53.

See also *Kidger v. M'Phee*, Nov. 22, 1888, Just. Cases, p. 24.

*Jurisdiction—High Court—Circuit Court—Suspension—Industrial Schools Act, 1866—Glasgow Police Act, 1866, secs. 131 and 132.*

3. A girl, ten years of age, was taken with her mother to a Police Court and charged with theft under the Glasgow Police Act, 1866. The magistrate sent the child to an industrial school for five years, "in pursuance of the Industrial Schools Act, 1866." He pronounced this order without intima-

JUSTICIARY CASES—*Continued.*

tion to and in the absence of the child's father, and in the face of her mother's remonstrances. The Court *repelled* an objection to the competency of a bill of suspension founded on sections 131 and 132 of the Glasgow Police Act, 1866, holding that though the proceedings originated under that Act, the order was pronounced under the Industrial Schools Act, 1866, which contained no exclusion of review by the High Court, and *quashed* the order as, in the circumstances, improper. *M'Kenzies v. M'Phee*, Jan. 28, 1889, Just. Cases, p. 53.

*Jurisdiction—Sheriff—Citation out of Jurisdiction—Endorsement of warrant of Judge of Police Court—Edinburgh Municipal and Police Act, 1879, secs. 333 and 5.*

4. *Held* that under sections 333 and 5 of the Edinburgh Municipal and Police Act, 1879, the warrant of the Judge of Police in Edinburgh is sufficient for citing or apprehending any person resident in another county who is charged with an offence which may be tried by him, if such warrant be endorsed by the Sheriff of the county of Edinburgh or Midlothian, or any one of his substitutes. *Cairns v. Linton*, March 4, 1889, Just. Cases, p. 81.

*Crimes—Breach of the Peace—Disturbance in accused's own house.*

5. Under a complaint for a breach of the peace, it was proved that the accused, in his house, which was situated in a street in a burgh, had, early on Sunday morning, for a considerable period, used loud language and oaths and imprecations, which had been heard by two constables at a distance of thirty yards from his house. The Court *sustained* a conviction, holding that the acts proved amounted to a breach of the peace, as being acts calculated to cause reasonable apprehension to the lieges. *Ferguson v. Carnochan*, July 8, 1889, Just. Cases, p. 93.

*Crimes—Falsehood, fraud, and wilful imposition—Trader obtaining goods on credit by means of false representations as to capital.*

6. Two persons were indicted on the charge that "you having" while carrying on business in partnership "formed a fraudulent scheme for obtaining on credit the goods of others on false pretences, and appropriating them to your own use, did in pursuance thereof" make certain specified false representations "concerning your means and financial position" to other traders, and did thereby deceive and impose upon them, "and did thus induce" them "to supply you on credit with . . . goods to the value specified" in the indictment, "towards the settlement of which you did not pay more" than certain sums specified, "and you did thus cheat and defraud" these traders of certain specified amounts, being the difference between the sum paid by the accused and the total value of the goods. Objections were taken to the relevancy of the charge, viz., first, that the alleged false representations were not stated to be the cause of obtaining the goods, and second, that the indictment did not set forth a crime, because it appeared from its own terms that part of the goods had been paid for, and that to the credit thence arising the delivery of the other goods must be ascribed. The Court *repelled* both objections. *Her Majesty's Advocate v. Macleods*, Sept. 12, 1888, Just. Cases, p. 1.

*Statutory offences—Contagious Diseases Animals Acts 1878 to 1886—Permitting cattle to be moved without declaration of freedom from pleuro-pneumonia—Animals Order, 1886.*

7. A cattle-dealer was charged with an offence against the above Acts and Order, in respect that he "did move or cause, direct, and permit to be moved" certain cattle without their being accompanied by a declaration in terms of the regulations of the Lanarkshire Local Authority, into whose district they were to be moved, and was convicted. A case on appeal obtained by him stated that the appellant sold the cattle in Ayrshire, that the purchaser's drover who removed them into Lanarkshire had not a declaration properly filled up and countersigned by a police-officer, in terms of the regulations of the Local Authority of Lanarkshire, and that

JUDICIARY CASES—*Continued.*

the Justices were "of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanark, was guilty of the offence charged." *Held* that there were no grounds stated in the case to justify the conviction, and that it must be set aside. *Dunlop v. Weir*, Nov. 22, 1888, *Just. Cases*, p. 14.

*Statutory offences—Day Trespass Act, 1832—Son of tenant with permission to shoot rabbits on farm.*

8. *Held* that a person who had verbal permission from his father, the tenant of a farm, to shoot rabbits, and who shot while upon the farm two grouse, was guilty of a trespass under the Day Trespass Act. *Maxwell v. Maraland*, Jan. 28, 1889, *Just. Cases*, p. 48.

*Statutory offences—Day Trespass Act, 1832—Alternative charge—General conviction.*

9. *Held* that the enumeration of "deer, roe, woodcocks, snipes, quails, land-rails, wild ducks, or conies," contained in the first section of the Day Trespass Act, was not inserted for the purpose of stating a number of alternative ways in which a contravention of the statute could be committed, but as shewing to what animals the protection of the Act extended, and that therefore a general conviction following upon such a charge was good, even though the person convicted had a right to kill "conies." *Maxwell v. Maraland*, Jan. 28, 1889, *Just. Cases*, p. 48.

*Statutory offences—Debtors Act, 1880, sec. 13, subsection B (3)—Obtaining property by any fraud within four months of sequestration.*

10. Two persons who were sequestered on 17th March 1888 were charged with an offence against the Debtors Act, 1880, sec. 13, subsection B (3), in respect that within four months prior to sequestration they obtained by means of fraudulent representations, made more than four months prior thereto, property on credit, and which had not been paid for, viz., "from R. Walker & Sons to the extent of £297, 6s. 7d.," and from four other traders specified "to the extent of" certain specified sums. *Held* that the charge was irrelevant, because it did not specify the particular goods supplied within the four months.

*Opinion, per Lord McLaren*, that in order to a relevant charge under the subsection the prosecutor must aver that the false representation by means of which the goods were obtained was itself made within the four months prior to the sequestration. *Her Majesty's Advocate v. Macleoda*, Sept. 12, 1888, *Just. Cases*, p. 1.

*Statutory offences—Salmon Fisheries Act, 1868, sec. 22—Place for exportation—Inland railway station.*

11. A person who had delivered certain boxes of salmon to a railway company in Aberdeen, addressed to a firm in Paris, for transmission by inland railway to Newhaven in England and by shipment thence to France, was convicted of a contravention of the 22d section of the Salmon Fisheries Act, 1868. The Court *quashed* the conviction, holding that an inland railway station was not a "wharf, quay, or other place for exportation" within the meaning of the section. *Adams v. Cadenhead*, Jan. 28, 1889, *Just. Cases*, p. 51.

*Statutory offences—Salmon Fisheries Act, 1868 (31 and 32 Vict. c. 123), sec. 21—Possession of salmon in close time.*

12. *Held* that "annual close time" in the Salmon Fisheries Act, 1868, means the period during which net-fishing for salmon is prohibited, and not the period during which fishing by rod and line is also prohibited.

*Held*, therefore, that a complaint which charged a contravention of sec. 21 of the Salmon Fisheries Act, 1868, in respect that the accused had, on 29th November 1888, "in their possession salmon . . . taken within the limits of the said Act between the commencement of the latest and the termination of the earliest annual close time for any district in Scotland,"

JUSTICIARY CASES—*Continued.*

was relevant, although on the day libelled it was lawful to fish for salmon in the Tweed district by rod and line. *Chalmers v. Bain*, March 4, 1889, Just. Cases, p. 77.

*Statutory offences—Truck Act, 1831, sec. 2, sec. 23—Miner—Contract that employer may retain wages for "rent" after employment has ceased.*

13. In a complaint against the manager of a coal company, on the ground that an agreement with a workman in terms of the regulations of the company was a contravention of the Truck Act, 1831, *held* that as the written agreement contained in the pay-ticket signed by a workman was limited to the period of his employment, and did not authorise deduction of one shilling per day for his subsequent occupation of his house in terms of article 4 of the regulations, the stipulation in that article that the employer should be entitled to make that deduction was a contravention of the Act, and did not fall under sec. 23, in respect (1) that it was not covered by the written agreement; and (2) that the payment for occupation without a title was not rent in the sense of the Act; and (3) that these payments were not due by a person employed. *McFarlane v. Birrell*, Dec. 7, 1888, Just. Cases, p. 28.

*Statutory offences—Vaccination Act, 1863, secs. 8, 18, 26—Continuing offence—Competency of second complaint.*

14. *Held* that, under sections 8 and 18 of the Vaccination Act, 1863, the name of a person who has failed to transmit a certificate of vaccination of his child must be placed on the registrar's list during each successive period of six months for which such failure may subsist, and that the offence is committed on each occasion on which the order to have the child vaccinated, following on such list being laid before the parochial board, is disobeyed.

A person charged with a contravention of section 18 of the Vaccination Act, 1863, by refusing to allow his child to be vaccinated by the vaccinator appointed by the parochial board after an order made by the board under that section, objected to the competency of the complaint on the ground that he had a year previously been convicted under the same section of refusing to allow the same child to be vaccinated. *Held* that the objection to the competency was bad. *Skene v. Falconer*, March 4, 1889, Just. Cases, p. 72.

*Bail—Rape—Bail (Scotland) Act, 1888.*

15. *Per* Lord Justice-Clerk, in a charge of rape bail should only be allowed in very exceptional cases, and not at all where the Lord Advocate objects and states on his responsibility that his investigation of the case does not disclose any facts tending to shew that it should be dealt with as exceptional. *Wilson v. McGuire*, June 20, 1889, Just. Cases, p. 89.

*Indictment—Relevancy—Use of qualifying words—Criminal Law Procedure Act, 1887, sec. 8.*

16. *Held* that a libel was a relevant charge of culpable homicide, although not containing words such as "culpably and recklessly" qualifying the acts charged. *Her Majesty's Advocate v. Parker and Barrie*, Nov. 5, 1888, Just. Cases, p. 5.

17. An indictment against J. S. bore,—“You did pretend to J. H. . . . that you were possessed of a sum of money amounting to £1900 . . . and that you were about to receive payment of the said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay and had no intention of paying.” *Objection* to the relevancy in respect that the facts set forth did not constitute a crime *repelled* (*diss.* Lord Young), on the ground that under the Criminal Procedure Act, 1887, the words “falsely and fraudulently” were to be read into the indictment as qualifying the word “pretend,” and that when this was done the indictment was relevant. *Her Majesty's Advocate v. Swan*, Dec. 10, 1888, Just. Cases, p. 34.

18. The master and mate of a vessel were charged on an indictment which set forth that, certain insurances having been effected on the vessel, and these



JUSTICIARY CASES—*Continued.*

insurances being still in force, they did bore one or more holes in the vessel, and did attempt to force out her bow ports in order that she might sink, and did spread oil over her in order that she might be set on fire, and “did thus attempt to sink and destroy the said barque with intent to defraud the insurers liable under said insurances.” Objection was taken to the relevancy on the ground that the indictment failed to set forth knowledge on the part of the accused that the vessel had been insured, without which fraudulent intent could not be inferred. *Held* (per Lord Justice-Clerk) that the allegation of an attempt to destroy the vessel “with intent to defraud” the insurers implied knowledge of the insurances, and that the qualifying words “you well knowing that the ship had been so insured” were to be implied by virtue of section 8 of the Criminal Procedure Act, 1887, and that the indictment was relevant.

*Opinion* that in the event of the prosecutor failing to prove fraudulent intent, it would be competent for the jury to convict the accused of an attempt to sink the ship maliciously, the word “maliciously” being in that event read in to qualify the acts charged, and a conviction of a part of what was charged in an indictment, if in itself an indictable crime, being competent by section 60 of the Criminal Procedure Act, 1887. *Her Majesty's Advocate v. Bourdais*, Jan. 28, 1889, *Just. Cases*, p. 68.

*Indictment—Specification—Relevancy.*

19. In an indictment the charge against the accused was that he did make certain pretences to an innkeeper, “and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay and had no intention of paying.” *Held* that the indictment was irrelevant, in respect of failure to specify the money or goods constituting the sum of which the innkeeper was to be proved to have been defrauded. *Her Majesty's Advocate v. Swan*, Dec. 10, 1888, *Just. Cases*, p. 34.

*Indictment—Ship—Collision—Competency of charging pilots of respective ships in one indictment—Culpable and reckless steering—Culpable homicide.*

20. Two pilots, J. P. and J. B., were charged in one indictment, setting forth that on an occasion and at a place libelled, “you, J. P., when pilot in charge of the ship ‘Balmoral Castle,’ there being risk of a collision between the said vessel and the steamship ‘Princess of Wales,’ did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Acts Amendment Act, 1862, and you, J. B., when pilot in charge of the said steamship ‘Princess of Wales,’ there being risk of collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship ‘Princess of Wales,’ contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill certain persons.” *Held* (1) that it was competent to try both the accused under one indictment for their alleged separate and unconnected acts of negligence; and (2) on a motion to separate the trials, that the trials ought not to be separated.

*Held* further, that the indictment was relevant, repelling objections to the relevancy (1) that the Regulations founded on were neither referred to in the manner prescribed by sec. 9 of the Criminal Procedure (Scotland) Act, 1887, rendering quotation of statutes unnecessary, nor fully and correctly quoted; (2) that the charge of “failing to navigate your respective vessels with proper and reasonable care” was defective in specification. *Her Majesty's Advocate v. Parker and Barrie*, Nov. 5, 1888, *Just. Cases*, p. 5.

*Sentence—Prosecution in forms prescribed by local Police Act—Summary Jurisdiction Act, 1881—Dundee Police and Improvement Consolidation Act, 1882—Public-Houses Acts Amendment Act, 1862.*

21. On a complaint brought in Dundee, under the form prescribed by the

JUSTICIARY CASES—*Continued.*

Dundee Police and Improvement Consolidation Act, 1882, the accused was charged and convicted of a second offence of shebeening, and sentenced by the magistrate to pay a fine of £15 or to be imprisoned for three months, in terms of sec. 17 of the Public-Houses Acts Amendment Act, 1862. The Court *suspended* the sentence *simpliciter*, holding that secs. 3 and 6 of the Summary Jurisdiction Act of 1881 applied to the complaint, and that, therefore, the period of imprisonment adjudged was illegal, in respect that it should not have exceeded two months. *Gray v. Dewar*, July 18, 1889, Just. Cases, p. 97.

*Sentence—Sentence proceeding upon an illegal previous conviction.*

22. A boy, nine years of age, was charged with theft aggravated by two previous convictions. He pleaded guilty, and was sentenced. One of the previous convictions had been obtained against him when he was five years of age. The Court *quashed* the sentence, holding that the previous conviction in question was null, and ought not to have been under the consideration of the Judge in giving sentence. *Grant v. Allan*, June 3, 1889, Just. Cases, p. 87.

*Review—Appeal—Amendment of case.*

23. Where a case obtained by a person convicted of a statutory offence disclosed no ground for a conviction, and its amendment would have involved the statement of a totally new case after a considerable interval from the date of the proof, the Court *refused* to remit the case to the inferior Court for amendment. *Dunlop v. Weir*, Nov. 22, 1888, Just. Cases, p. 14.

LEASE. *Constitution—Rei interventus.*

1. *Question*, whether a tenant's abstaining from giving the statutory notice of his intention to terminate a lease in consequence of an informal agreement with his landlord for a new lease at a reduced rent could be held to be sufficient *rei interventus* to validate the agreement. *Sutherland's Trustee v. Miller's Trustee*, Oct. 19, 1888, p. 10.

*Tacit Relocation.*

2. An agricultural tenant whose lease was to expire at Whitsunday 1885 made a verbal arrangement with his landlord as to a new lease at a reduced rent. The landlord, on 1st December 1884, delivered to him an open letter to the factor stating the terms of the new lease, and desiring the factor to prepare a formal lease. Owing to delay on the part of the factor, and to the insolvency of the landlord, who was obliged to execute a trust-deed for behoof of creditors, the formal lease was never executed. The tenant remained in possession of the holding till 1887. In an action by the landlord's trustee for the rent under the old lease on the ground that it had been renewed by tacit relocation, *held* that the tenant's possession was to be referred not to tacit relocation, but to the new arrangement. *Sutherland's Trustee v. Miller's Trustee*, Oct. 19, 1888, p. 10.

*Abatement of rent—Liquid and Illiquid.*

3. In an action for payment of rent the defender alleged that the landlord had in the missives of lease bound himself to give possession of certain farm buildings in tenantable condition, and that he had failed to do so, and that the tenant was entitled to an abatement of rent. *Held* that the defence was relevant. *Munro v. McGeoghs*, Nov. 15, 1888, p. 93.
4. A farm was let from year to year under a lease, which was terminable on either side by written notice six months before the term of Whitsunday, and in which the landlord undertook to put the existing buildings into complete repair. The landlord spent a considerable sum on repairs on the entry of the tenants, who continued in occupation for five years, when the lease terminated. In the third year they asked for certain new buildings, but the request was refused. They paid the rent for four and a-half years without reservation of any claim against the landlord, and left the farm at the end of five years. In an action by the landlord to recover the last half year's rent, the tenants maintained that they were entitled to an abatement of that rent or compensation for loss sustained by them during the

**LEASE—Continued.**

whole of the currency of the lease from the pursuer's failure to put the buildings into complete repair. The Court *repelled* the defences and *granted* decree. *Stewart v. Campbell*, Jan. 19, 1889, p. 346.

*Use of subjects—Restriction against sale of spirits—Consent of landlord—Acquiescence.*

5. A building lease granted in 1876 for ninety-nine years contained a provision that the tenant "shall not sell or retail spirits upon the premises without the express consent of the proprietor or his factor for the time being," the proprietor or his factor "being the sole judge of all such matters." In 1876 the landlord consented to an application by the tenant for a grocer's licence which was granted for that year, and renewed without objection for seven years afterwards. The alterations made by the tenant to adapt his premises for the sale of spirits were very slight. In 1884 the landlord objected to the renewal of the licence, and subsequently he brought an interdict against the continued sale of spirits by the tenant. In answer, the defender pleaded (1) that the pursuer had once for all discharged the prohibition in the lease; and (2) that he was barred by acquiescence for seven years from insisting in the action. *Held*, after a proof, (1) that the landlord had neither expressly nor by acquiescence discharged the conditions in the lease, and (2) that he was entitled to recall his consent if the defender's actings justified his doing so, and that the defender's conduct of his business had been shewn to be such as to entitle the pursuer to interdict. *Lord Macdonald v. Campbell*, Feb. 27, 1889, p. 540.

*Right to cut peats—Crofters Holdings Act, 1886.*

6. The yearly tenant of a croft, with the right to cut peats in the moss of A, in 1867 obtained permission from the landlord to cut peats from the moss of B, said permission to continue during the pleasure of the landlord. The crofter thereafter got his peats from B and not from A. In 1887 the landlord withdrew the permission to cut peats in B. The crofter having continued to take peats from B, the landlord applied for interdict against him. The defender maintained that the right to cut peats from B formed part of his holding in the sense of the Crofters Holdings Act, 1886, and that the application for interdict was therefore incompetent. *Held* that the landlord was entitled to withdraw the permission to cut peats conditionally given, and that interdict fell to be granted. *Parr v. Maclean*, June 19, 1889, p. 810.

*Summary ejection—Failure to stock—Process—Irregularity in proceedings—Sheriff—Jurisdiction.*

7. In a Sheriff Court petition by the landlord of a farm for warrant to sequester and sell his tenant's effects for rent past due, and for an order on the tenant to replenish the farm if necessary, decree of sale was pronounced of consent, and the sale having exhausted the subjects, the landlord moved for an order on the tenant to re-stock, and on his failure to do so within fourteen days, for decree of summary ejection, and warrant to re-let. The tenant by minute stated that he was proceeding to stock. The Sheriff in respect of this minute remitted to a man of skill to see the stocking carried out, and to report within one month. The man of skill reported at the end of the month that the farm had not been re-stocked. The Sheriff thereupon granted warrant for summary ejection. In an action for reduction of this warrant by the tenant, *held (diss. Lord Young)* that as the Sheriff had not fixed a time within which the re-stocking must be carried out, the tenant was not in default, and that decree of reduction of the warrant to eject fell in consequence to be pronounced.

*Question*, whether the Sheriff has jurisdiction to grant warrant for the summary ejection of the tenant of an agricultural subject on account of failure to stock. *Opinion per Lord Young* that he has. *Macdonald v. Mackessack*, Nov. 30, 1888, p. 169.

**LEGITIM.** See *Succession*, 1, 2, 3, 4.

**LOAN.** *Injury to borrowed article—Onus—Reasonable care—Horse.*

Where a borrower returns the article borrowed in a damaged condition, and damages are claimed in respect thereof, the *onus* lies on him to prove that he exercised reasonable care in the use he made of the article. *Bain v. Strang*, Dec. 6, 1888, p. 186.

**MAILS AND DUTIES.** *Right in Security—Heritable creditor.*

When a heritable creditor has obtained a decree of mails and duties against the tenants on an estate in an action in which the proprietor has been called for his interest, and has not appeared, he is thereafter in possession of the estate, and has a good title to use sequestration for rent against any one subsequently possessing as tenant, although he may not have been called in the action of mails and duties. *Robertson's Trustees v. Gardner*, May 31, 1889, p. 705.

**MANDATE.** See *Cautioner*, 1—*Proof*, 2.**MARRIAGE-CONTRACT.** *Informality—Rei interventus—Writ—Notarial execution—Agent and Client.*

1. A widow brought an action of reduction of her antenuptial marriage-contract against her husband's trustees on the ground that the notary-public who executed the deed on her behalf, she being unable to write, was at the time acting as her husband's law-agent in the matter. *Held* that, assuming that the execution of the deed was invalid, the marriage, which took place on the faith of the contract, validated the deed *rei interventu*. *Lang v. Lang's Trustees*, March 15, 1889, p. 590.

*Construction—Statute passed after date of contract.*

2. Observed, where a postnuptial marriage-contract was dated in 1840, that the construction of the words "nearest of kin" occurring in the deed was not affected by the passing of the *Moveable Succession Act*, 1855. *Gregory's Trustees v. Alison*, April 8, 1889, H. L., p. 10.

See *Succession*, 16, 17.

**MASTER AND SERVANT.** *Constitution of Contract—Proof—Presumption.*

A father claimed wages from his son, who was a country grocer, for his services as vanman for a period of eight years. The trustee on the son's sequestrated estate rejected the claim on the ground that the father, as appeared from the bankrupt's deposition, had been maintained and clothed by the son, and that there was no agreement to give wages. In an appeal against that deliverance the Court *held* that there was a presumption in favour of wages being due, and allowed a proof. *Thomson v. Thomson's Trustee*, Jan. 12, 1889, p. 333.

See *Justiciary Cases*, 13—*Reparation*, 8, 9, 10, 11, 12.

**MINOR AND PUPIL.** *Tutor and Curator—Power to grant bonds and dispositions in security on pupil's estate to pay younger children's provisions—Nobile Officium.*

Where the pupil proprietor of a landed estate, who had no moveable funds, was under a personal obligation to pay certain provisions to his younger brothers and sisters, and was paying 5 per cent of interest on these provisions, power was granted to his tutors-nominate to grant bonds and dispositions in security over the pupil's estate in order to pay off the provisions, on the ground that money could be borrowed on such security at 3½ per cent, and that thus a large saving of interest would be effected. *Grant*, Jan. 26, 1889, p. 365.

See *Judicial Factor*, 3, and *Parent and Child*.

**MUNUS PUBLICUM.** See *Church*, 2, and *Public Officer*.**NOBILE OFFICIUM.** See *Bankruptcy*, 6—*Minor and Pupil—Process*, 9.**NUISANCE.** See *Burgh*, 2.**PACTUM ILLICITUM.** See *Contract*, 2.

PARENT AND CHILD. *Custody—Conjugal Rights Act, 1861, sec. 9—Guardianship of Infants Act, 1886, sec. 5.*

1. *Held* that where in an action of separation a father has been deprived of the custody of his child, it is competent for him to present a petition under section 2 of the Guardianship of Infants Act, 1886.

*Observed* that in a petition under section 5 the Court could give effect to considerations which could not be regarded in determining an action of separation and aliment. *Beedie v. Beedie*, March 20, 1889, p. 648.

*Custody—Bastard—Wish of deceased parent—Nobile Officium.*

2. The mother of a bastard gave up the custody of the child, aged one year, to Mrs S., a member of the Scottish Episcopal Church, who maintained the child until the death of the mother, about 4½ years thereafter. A few weeks before her death, the mother, who had meanwhile become a Roman Catholic, and was living in a Roman Catholic Convent, executed a settlement, in which she nominated J. B., a Roman Catholic, to be tutor and guardian to her child, and said, "being a Roman Catholic myself, it is my desire that my said son be brought up in that faith." On the day on which she executed the settlement she raised an action against Mrs S. for delivery of the child, but died during the dependence of the action, which was accordingly dismissed. In a petition at the instance of J. B. against Mrs S. for delivery of the child, *held* that as it was not disputed that the child would be equally well cared for and educated, whether it was in the custody of the petitioner or of Mrs S., the expressed wishes of the mother should be given effect to. The Court therefore *granted* the prayer of the petition. *Brand v. Shaws*, Dec. 22, 1888, p. 315.

*Custody—Charitable institution—Responsibility of directors.*

3. Prior to 1884 S. established and managed a home for destitute children in Edinburgh. In December 1882 a man applied to have his three children (all under five years of age) admitted to the home, and agreed to pay for their board at the rate of 2s. 6d. per week. The children were admitted, and he made payments to account of board down to June 1883, but not thereafter. In May 1884 S. appointed a board of directors. In May 1886 S. removed the children, without their father's consent, to a home she had established in Nova Scotia. The father having applied to the directors to have his children restored, S., at the request of the directors brought the children to Edinburgh in November 1886, and this fact was intimated to the father, but neither he nor the directors took any proceedings to obtain the custody of the children. S., who had concealed the children's address from the directors and from their father, again removed the children to Nova Scotia. In June 1888 the father presented a petition against S. and the directors of the home, praying to have the respondents ordained to restore the children to him. The directors maintained that they were not responsible for the delivery of the children, in respect (1) that they were not parties to their removal, and had never had them in their custody since; and (2) that they had intimated to the father the return of the children to this country in order that he might recover them if he wished to do so. The Court, *holding* that the directors of the home had, by accepting office in 1884, become responsible for the custody of the children, pronounced an order ordaining them and S. to deliver the children to their father. *Delaney v. Directors of Edinburgh and Leith Children's Aid and Refuge*, June 7, 1889, p. 753.

*Guardianship—Bastard—Guardianship of Infants Act, 1886.*

4. A mother cannot appoint a tutor to her bastard child.

*Held* that the Guardianship of Infants Act, 1886, does not apply to bastards, and that therefore a mother cannot nominate a guardian to her bastard child under the provisions of that Act. *Brand v. Shaws*, Dec. 22, 1888, p. 315.

*Guardianship—Mother—Guardianship of Infants Act, 1886, sec. 2.*

5. On the petition of the nearest of kin to a pupil on its deceased father's side to have one of their number appointed to act as tutor to the child jointly

**PARENT AND CHILD—Continued.**

with the mother, the Court *appointed* a person, nominated by the mother, to act jointly with her as tutor, in terms of section 2 of the Guardianship of Infants Act, 1886. *Martin v. Stewart*, Dec. 1, 1888, p. 185.

See *Reparation*, 1.

**PARTNERSHIP. Goodwill—Exclusive use of firm name.**

1. Smith, one of the partners of Smith & M'Bride, bought the business and goodwill, and carried the business on for three years in his own name. At the end of that time his former partner M'Bride and a person also named Smith, who had entered into partnership with him, began to trade in the same business in the same town, under the name Smith & M'Bride. *Held* that Smith was entitled to interdict against their trading under that name. *Smith v. M'Bride & Smith*, Oct. 27, 1888, p. 36.

**Liability of assumed partner for prior debts—Bankruptcy.**

2. A creditor lent money to a firm on the security of certain heritable subjects belonging to it—the obligation for repayment being granted by the firm and by its two partners. The money was expended upon the erection of buildings upon the ground, which were used partly as business premises, and partly as a house for the manager. Three years later the two partners proposed to take a new partner, and a new contract of copartnership was executed for carrying on the business in the same firm name as before by the three partners. The contract contained a stipulation that the new firm should have no concern with the debts due to or by the old firm. The right to the security subjects was not transferred to the new firm, which paid a rent to the old firm for the use of the premises occupied by them, and the creditor in the bond knew nothing of the change of partnership. The actings of the new firm were in keeping with the provisions of the contract of copartnership—sets of books being kept for each of the old and new firms, and payments of debts due by the old firm being entered to its debit. On the bankruptcy of the new firm, *held* that the heritable creditor was not entitled to rank in the sequestration. *Stephen's Trustee v. Macdougall & Co.'s Trustee*, June 14, 1889, p. 779.

**Foreign—Share in partnership—Inventory-duty.**

3. In an action at the instance of the Inland Revenue against the executors of a partner of a trading company connected with India concluding for additional inventory-duty in respect of the value of the share of the deceased in the company, *held* that whether the partnership was to be regarded as an Indian or a British partnership, the additional duty was exigible on the ground that the executors being precluded by the contract from holding shares in the partnership, the right vested in them was a right to a sum of money recoverable in this country, *dis.* Lord Shand, who *held* that the right vested in the executors at the deceased's death was a share in an Indian company, and that that share was not liable for inventory-duty in the United Kingdom. *Lord Advocate v. Laidlay's Trustees*, July 12, 1889, p. 959.

See *Jurisdiction*, 2.

**PATENT. See Copyright of Designs.****PAYMENT. Conductio indebiti—Error—Knowledge.**

Where a person makes a payment in the knowledge that the sum paid is not due, he is presumed to have waived all objection, and to have admitted the debt. In order, however, to bar his right to repetition of the payment it must be established that the knowledge that the sum was not due either was, or should have been, present to his mind at the time of payment. *Dalmellington Iron Co., Limited, v. Glasgow and South-Western Railway Co.*, Feb. 26, 1889, p. 523.

See *Sale*, 8.

**POINDING. Bankruptcy—Catholic and secondary creditors.**

1. The holder of a first bond over heritable subjects, who had by poinding the ground obtained a preference over his debtor's moveables to the extent of

POINDING—*Continued.*

£122 (of interest), after obtaining payment of his bond by realising the heritage, assigned his preference over the moveables to the holder of a second bond. In a question between the trustee on the debtor's sequestrated estate and the holder of the second bond, *held* that the holder of the first bond was bound as far as possible to take payment from the moveables or to assign his preference over them to the second bondholder, and that having taken payment entirely from the heritage the second bondholder had right to his preference over the moveables. *Nicol's Trustee v. Hill*, Feb. 8, 1889, p. 416.

*Cessio—Appeal—Personal Diligence Act*, 1838, *sec.* 26.

2. A Sheriff having refused to a poinding creditor a warrant to sell under *sec.* 26 of the Personal Diligence Act, 1838, on the ground that the debtor had applied for the benefit of *cessio*, the creditor appealed under *sec.* 65 of the Court of Session Act, 1868. *Held* that the creditor was entitled to a warrant of sale. *Simpson v. Jack*, Nov. 23, 1888, p. 131.

POLICE. *Street—Burgh Footway—Maintenance—Police and Improvement Act*, 1862, *sec.* 149.

1. *Held* that, under the above enactment, in the cases where the commissioners are not entitled to require the owner to construct a footway, but may construct one themselves and recover one-third of the expense from the owner, the obligation of maintenance, if such footway be constructed by them, is divisible between them and the owner in the same proportion,—*dis.* Lord Rutherford Clark, who held that the obligation of maintenance rested solely on the owner. *Commissioners of Police of Dalkeith v. Duke of Buccleuch*, March 8, 1889, p. 575.

*Affixing bills to building without authority—Glasgow Police Act*, 1866, *secs.* 149, 131, 132—*Exclusion of review except by Circuit Court.*

2. In a suspension of the conviction of the owner of a house under the above Act, the Court *held* that section 149 of the Act did not apply to the case of the occupier or owner of the building placing bills upon it, but only to third parties, and therefore that the charge and whole proceedings thereon were outwith the statute and illegal, and *quashed* the conviction, repelling objection to the competency of the suspension founded on sections 131 and 132 of the statute, which exclude review except by the next Circuit Court, on the ground that the complaint and conviction were *ex facie* illegal. *Kidger v. McPhee*, Nov. 22, 1888, *Just. Cases*, p. 24.

*Petition against custodier of stolen property under Glasgow Police Act*, 1866—*Multiplepoinding.*

3. Necessity for action of multiplepoinding to determine the right to stolen property in the hands of a custodier in the public interest. *Eaglesham & Co. v. Dickson*, March 2, 1889, p. 557.

POOR. *Settlement—Poor-Law Amendment Act*, 1845, *sec.* 76—*Continuity of residence.*

1. A tailor, who lived with his wife and family in a house which he rented in the parish of South Leith, accepted a situation in Cupar-Fife, when there were still six weeks to run of the five years necessary to give him a residential settlement in South Leith. At first he took lodgings in Cupar, generally returning to visit his wife in Leith from Saturday to Monday. At the end of the six weeks, 26th May 1884, he removed his wife and family to Cupar to a house he had taken for them there immediately after he went to reside at Cupar, but of which he could not get possession till the May term. *Held* that he had not acquired a residential settlement in South Leith. *Greig v. Simpson*, Oct. 25, 1888, p. 18.

*Assessment—Concurrence of Board of Supervision to alteration of mode of assessment—Poor-Law Act*, 1845, *secs.* 34, 36—*Poor Assessments Act*, 1861, *sec.* 1.

2. *Held* that a parochial board, which had, under *sec.* 36 of the Poor-Law Act, 1845, with the concurrence of the Board of Supervision, adopted, for pur-

**POOR—Continued.**

poses of assessment to poor-rates, a classification of lands and heritages, was entitled to abandon the classification without obtaining the concurrence of the Board of Supervision. *Bruce v. Ratepayers of Fordoun*, March 7, 1889, p. 568. See *Public Burdens*.

**POOR'S-ROLL.** *Appeal from Sheriff Court and reporters divided in opinion.*

A pursuer in a Sheriff Court action for damages for personal injury appealed to the Court of Session against a judgment of a Sheriff, affirming the judgment of his Substitute, and assoilzieing the defenders. The pursuer applied for the benefit of the poor's-roll, and the reporters on the *probabilis causa* were equally divided in opinion. The Court *refused* the application. *Watson v. Callander Coal Co.*, Nov. 17, 1888, p. 111.

**PRESCRIPTION (TRIENNIAL).** *Tradesman's account.*

1. A joiner after the death of a customer, raised in December 1887 an action against his representative for payment of an account, stated continuously, and containing entries from June 1875 to May 1886. A portion of the account, from June 1876 to May 1877, amounting to upwards of £350, consisted of charges incurred for work and materials supplied in a building adventure in which the customer had been engaged at that time. *Quoad ultra*, it was a jobbing account, and for the last nine years of its currency amounted only to £3, 9s. 7d. The defender maintained that the portion which related to the building adventure was a separate account, and pleaded prescription in regard to it. The Court *repelled* the plea, holding that the whole account was to be considered as one. *Ross v. Cowie's Executrix*, Dec. 14, 1888, p. 224.

*Entries made to avoid plea of prescription.*

2. Where in an action on a tradesman's account the defender stated that the last two entries therein were fictitious, and had been stated in order to avoid the operation of prescription, the Court *allowed* proof before answer as to these items. *Ross v. Cowie's Executrix*, Dec. 14, 1888, p. 224.

**PROCESS.** *Amendment of Summons—Court of Session Act, 1868, sec. 29.*

1. An action was raised to have a steamship forthwith delivered to the pursuers, "or alternatively, in the event of the defender . . . failing so to deliver to the pursuers the said steamship," to have the whole defenders found liable in damages. After evidence had been led, which dealt with damage sustained before the raising of the action as well as after, and judgment had been pronounced in the Outer-House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words "and in any event." *Held* (1) (*diss.* Lord Lee) that the summons as laid did not conclude for damage from non-delivery prior to the date of the action, and (2) that as the effect of the amendment would be to include such damage, the amendment was incompetent. *Laming & Co. v. Seater*, June 21, 1889, p. 828.

*Summons—Amendment—Sheriff Court Act, 1876.*

2. *Held* that a summons raised in the Sheriff Court by a widow in her individual capacity could not on her being subsequently decerned executrix-dative to her husband, be amended so as to admit of her suing also as executrix, the power of amendment given in sec. 24 of the Sheriff Court Act, 1876, not being applicable to such a case. *Turnbull v. Veitch*, July 18, 1889, p. 1079.
3. *Opinions per* Lord Shand and Lord Adam, that if a summons as served is bad for want of jurisdiction, it cannot be made good by subsequent alterations. *Morley v. Jackson*, Nov. 9, 1888, p. 78.

*Res noviter.*

4. *Observations on res noviter.* *Dick & Stevenson v. Woodside Steel and Iron Co.*, Dec. 18, 1888, p. 242.
- Caution for expenses—Pursuer resident in England—Notour bankruptcy—Debtors (Scotland) Act, 1880, sec. 6.*
5. In an action of damages for slander brought by a person residing in England, the defender averred that he had obtained a decree for payment of £20



**Process—Continued.**

against the pursuer, that a charge for payment had expired without payment, and that the pursuer was therefore notour bankrupt within the meaning of the Debtors Act, 1880. He pleaded that the pursuer should, *ante omnia*, be ordained to find caution for expenses. The Court refused to ordain the pursuer to find caution. *Macrae v. Sutherland*, Feb. 9, 1889, p. 476.

**Caution for expenses—Defender.**

6. As a general rule the Court will not ordain an insolvent defender to find caution for expenses. *Lawrie v. Pearson*, Nov. 3, 1888, p. 62.

For Expenses generally, see *Expenses*.

**Reclaiming note—Interlocutor assigning day for adjustment of issues.**

7. In an action for damages for wrongous dismissal, the Lord Ordinary pronounced an interlocutor closing the record and assigning a day for the adjustment of issues. The defender reclaimed against this interlocutor, and moved that the cause should be sent to a proof before the Lord Ordinary. The Court *refused* the reclaiming note on the ground that such a reclaiming note, even if competent, was inconvenient, as the interlocutor reclaimed against left the Lord Ordinary's discretion as to the mode of proof unexercised. *Brown v. Virtue & Co., Limited*, July 16, 1889, p. 987.

**Reclaiming Note—Expiry of reclaiming days in vacation—Personal Diligence Act, 1838, sec. 20.**

8. In cases where the time for reclaiming expires on a day when the Clerk's office is not open, the provision of the above statute is sufficiently complied with if the reclaiming note is lodged on the first day thereafter on which it is open. *Henderson v. Henderson*, Oct. 17, 1888, p. 5.

**Certified copy of proceedings in Scottish Courts—Clerk's certificate—Nobile Officium.**

9. On the petition of one of the parties to a cause the Court authorised and required the Principal Clerk of the Division to certify a copy of the proceedings for production in the Irish Courts in a similar action there between the same parties. *Walter*, July 3, 1889, p. 926.

**Proof.**

10. In an action of damages brought by the beneficiaries under a trust-settlement against the trustees the pursuers averred that in 1857 and 1858 when the trustees entered upon office, the testator's heritable property might have been sold for £42,980, which was sufficient to pay the testator's debts and leave a surplus of £17,000; that instead of selling, the trustees had borrowed £26,000 on the security of the heritage, and that the result was that the trust-estate had proved insufficient to pay debts. The Court remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the amount of debts due by the truster and paid by the trustees, and the yearly income and expenditure of the trust, and to report." The accountant reported valuations of the heritage at various dates, and the Court, on the basis of his report, found that if the heritage had been sold soon after the testator's death, the trust-estate would have been insufficient to pay his debts, and assuizied the defenders, on the ground that the pursuers had failed to prove that they had sustained loss. In an appeal the pursuers maintained that as they had not renounced probation, they were entitled to a proof of their averments as to the value of the testator's heritage. The defenders craved that in the event of the pursuers being allowed a proof, they (the defenders) should be allowed a proof of their averments as to the circumstances which led them to borrow. Held that as the pursuers had not renounced probation, they were entitled to a proof of their averment as to the value of the testator's heritage, and that the defenders were entitled to a proof of their averments relating to the circumstances which induced them to borrow on the security of the heritage. *Binnie v. Binnie's Trustees*, August 8, 1889, H. L., p. 23.

**Jury Trial—Special Cause—Action of damages for seduction and for payment of aliment—Evidence Act, 1866, sec. 2.**

11. In an action of damages for breach of promise of marriage and seduction, in

**PROCESS—Continued.**

which there was also a conclusion for payment of the aliment of an illegitimate child, *held* (rev. judgment of Lord Fraser, *diss.* Lord Shand), that no special cause had been shewn, in terms of the 2d section of the Evidence Act, 1866, why the case should not be tried by a jury. *Trotter v. Happer*, Nov. 24, 1888, p. 141.

*Jury trial—Motion to vary issue—Court of Session Act, 1850, sec. 40—Court of Session Act, 1868, sec. 28.*

12. A Lord Ordinary approved of certain issues, and on the motion of the pursuer, which was not opposed by the defender, by the same interlocutor fixed a day for the trial of the cause. *Held* that a motion by the defender to vary the terms of the issues was not incompetent. *Croucher v. Inglis*, June 14, 1889, p. 774.

*Jury trial—Competency of trial on one issue pending appeal to House of Lords with view to obtaining second issue—Court of Session Act, 1850, sec. 13.*

13. In an action of reduction of missives of sale of a landed estate the pursuer proposed issues of facility and circumvention, and of essential error. The Lord Ordinary appointed the issue of facility and circumvention to be "the issue for the trial of the cause." On a reclaiming note the Court adhered, Lord Shand dissenting, on the ground that the pursuer was entitled to both issues. The pursuer having appealed to the House of Lords, the defender moved the Court to allow the cause to go to a jury on the issue as adjusted, on the ground that the question whether the second issue should be granted was not "necessarily dependent" on the interlocutor appealed against within the meaning of sec. 13 of the Court of Session Act, 1850. The Court *refused* the motion, the Lord President and Lord Adam doubting whether a trial pending appeal would be competent. *Stewart v. Kennedy*, June 29, 1889, p. 890.

*Jury trial—Abandonment—Decree of absolvitor—Judicature Act, 1825, sec. 10—A. S., 16th Feb. 1841, sec. 46.*

14. The pursuer in an action lodged a minute of abandonment, in terms of sec. 10 of the Judicature Act, 1825, after issues were adjusted, but before the trial. Thereafter the Court allowed the defender to lodge an account of his expenses. The pursuer failed to pay the account as taxed. The defender moved for absolvitor. The Court, being satisfied that the pursuer had abandoned the suit, and having regard to sec. 46 of the A. S., 16th Feb. 1841, *assolized* the defender. *Ross v. Mackenzie*, June 26, 1889, p. 871.

*Multiplepinding—Stolen goods.*

15. Necessity for multiplepinding to determine the right to stolen property in possession of a custodian for the public interest. *Eaglesham & Company v. Dickson*, March 2, 1889, p. 557.

*Multiplepinding—Competency.*

16. A creditor of a deceased person raised an action against his executor to constitute a claim against the estate which, if found due, would render the estate insolvent, and the executor defended the action. Thereupon another creditor, who maintained that the claim was excessive, raised a process of multiplepinding in name of the executor, calling all the other creditors of the deceased as defenders. It was stated at the bar that the multiplepinding was raised with the consent of the executor. The pursuer of the action of constitution objected to the multiplepinding as incompetent and unnecessary. Objection *repelled*. *Jamieson v. Robertson*, Oct. 23, 1888, p. 15.

*Multiplepinding—Direct claim—Riding claim—Title to sue.*

17. A creditor has no title to claim in a multiplepinding funds to which his debtor has right except by way of a riding claim upon a claim lodged by his debtor. *Gill's Trustees v. Patrick and Others*, Feb. 6, 1889, p. 403.

*Multiplepinding—Claimants benefiting by the litigation of one of their number—Expenses.*

18. In a multiplepinding where only one of several next of kin, who were all

PROCESS—*Continued.*

called and had the same interest in the fund *in medio*, put in a claim and succeeded in making it good against the heir-at-law, the others who appeared afterwards were ordained to pay their shares of the whole expenses incurred by him in the litigation, not excluding the expenses of a part of it in which he had been unsuccessful. *Cowan's Trustees v. Cowan*, Oct. 17, 1888, p. 7.

*Reduction—Decree-arbitral.*

19. In a reduction of a decree-arbitral on the ground that the arbiter had given decree for a larger sum in name of penalties than was claimed by the party in whose favour decree was granted, the latter offered to discharge the excess. *Held* that the proper remedy was to reduce the decree *quoad* the excess. *Adams v. Great North of Scotland Railway Co.*, June 21, 1889, p. 843.

*Appeal—Sheriff—Competency—Extract—Sheriff Court Act, 1876, sec. 32.*

20. An interlocutor in a Sheriff Court allowed "extract of this decree to go out upon caution being found," and extract was taken on the day after the interlocutor was issued. *Held* that the words quoted did not restrict the time for appealing, provided by sec. 32 of the Sheriff Court Act of 1876, and meant merely that extract was to go out only upon caution being found. *Simpson v. Jack*, Nov. 23, 1888, p. 131.

*Appeal—Sheriff—Competency—Value of cause—Sheriff Court Act, 1853, sec. 22—Personal Diligence Act, 1838, sec. 30.*

21. A Sheriff Court action concluded for warrant to commit the defender to prison "until he restore" certain pointed goods, "or until he pay to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of said articles, all as provided for in the Act 1 and 2 Vict. cap. 114, sec. 30." *Held* that as the prayer of the petition shewed that the value of the cause did not exceed £25, an appeal to the Court of Session against an interlocutor of the Sheriff dismissing the action was incompetent. *Dickson v. Bryan*, May 14, 1889, p. 673.

*Appeal—Competency—Court of Session Act, 1868, sec. 71—A. S., 10th March 1870, sec. 3—Omission to lodge prints in time.*

22. In an appeal in vacation from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the Clerk of Court had received the process, and to box them on the first box-day thereafter, as required by sec. 3, subsec. 2, of A. S., March 10, 1870. An objection having been taken to the competency of the appeal, the Second Division, after consulting with the Judges of the First Division, *held* (1) that the Court have a discretion as to whether they will enforce the penal provisions of the Act of Sederunt; and (2) that as in the present case the omission was unintentional, and had caused no inconvenience or delay, the objection should be overruled. *Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co.*, Nov. 16, 1888, p. 104.

*Appeal—Sheriff—Judicature Act, 1825, sec. 40—Act of Sederunt, 12th July 1828, sec. 5.*

23. *Held* that an appeal for jury trial in a Sheriff Court action must, in terms of sec. 5 of A. S., 12th July 1828, be presented within fifteen days after the date of an interlocutor allowing a proof, although the diet for proof is only fixed by an interlocutor of later date. *Williams v. Watt & Wilson*, May 28, 1889, p. 687.

PROOF. *Secondary evidence—Skilled witnesses—Value of colliery.*

1. In an action of reduction of a *mortis causa* trust-settlement and codicil on the ground of facility and circumvention, the Court *granted* a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of certain collieries—a large share in which belonged to the trust-estate—the object being to obtain evidence of their value for the purposes of the pursuers' case. *Bell v. Hamilton's Trustees*, July 16, 1889, p. 1001.

*Advance of money—Mandate.*

2. A tradesman in an action for payment of an account containing charges for

PROOF—*Continued.*

sums said to have been paid by him on behalf of his customer, produced receipts by the creditors in the sums said to have been so paid. *Held* that it was competent to prove by parole that the payments had been made on the authority of the customer. *Ross v. Cowie's Executrix*, Dec. 14, 1888, p. 224.

*Parole—Cautioner—Security to cautioner—Consent by co-cautioner.*

3. Where one of several co-cautioners, equally bound by the same deed, claimed the exclusive benefit of a security he had obtained from the principal debtor over part of his estate, on the ground that his co-cautioners had orally agreed to this, *held (diss. Lord Lee)* that he was entitled to prove this agreement by parole evidence. *Hamilton & Co. v. Freeth*, July 17, 1889, p. 1022.

*Inspection by Court of locus after proof closed.*

4. After the close of a proof in a Sheriff Court the Sheriff-substitute, accompanied by the agents of the parties, examined the *locus* of the events which were the subject of proof in order to see whether it was possible in the circumstances for certain witnesses to have seen the act to which they deponed. Having come to the conclusion that it was impossible, he gave judgment to the effect that the party who relied on their evidence had not established her case. In an appeal, *held* that the Sheriff-substitute was not entitled to use his own observation of the *locus* as evidence to contradict the evidence of the witnesses. *Hattie v. Leitch*, July 19, 1889, p. 1128.

See *Prescription*, 2—*Process*, 10—*Reparation*, 16, 17.

Burden of Proof. See *Bill of Exchange*, 3—*Cautioner*, 1—*Domicile*, 1—*Ship*, 3.

PROPERTY. *Sale—Description by boundaries inconsistent with measurements—Plan.*

1. A feu-contract described the subject by boundaries. It also described it by measurements, and referred to a plan or sketch annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In an action brought by the vassal for declarator that his property extended to the limits shewn by the measurements and plan, *held (diss. Lord Young)* that the description by boundaries must prevail, and defenders assoltized. *Currie v. Campbell's Trustees*, Dec. 18, 1888, p. 237.

*Common interest—Mutual wall.*

2. The proprietor of two houses separated by a wall which formed the end wall of one house and the side wall of the other disposed by his settlement the two houses, one to each of his two daughters, describing each house as bounded by the other. In a question between one of the daughters, who claimed exclusive right to the wall, and the heirs of the other, *held* that the wall was mutual. *Cuthbert v. Whitton*, Dec. 20, 1888, p. 259.

See *Title to sue*, 5.

PUBLIC BURDENS. *Poor-rate—Valuation-roll—Crofters Holdings Act, 1886.*

In an action for payment of an assessment of poor-rates laid upon the defender (1) as proprietor and (2) as occupier, in respect of tenants paying under £4 of rent,—the entries in the Valuation-roll being the basis of assessment,—the defender stated that she was unable to recover payment (1) of her rents, and (2) of the rates which she had paid for tenants under £4; that her tenants were crofters, and that prior to the making up of the Valuation-roll they had made application to the Crofters Commission for reductions of rent, which, if granted, would take effect from the date of application, and that the Commission had pronounced an order sisting *in hoc statu* her right to sell in execution of any decree for rent she might obtain. She maintained that as, subsequent to the date of the Valuation-roll, her only available remedy for the recovery of rents and rates had been suspended by the action of the Crofters Commission under the Crofters Acts, the remedies of the collector for enforcing payment from her of rates founded on the Valuation-roll ought also to be suspended. *Held (diss.*

PUBLIC BURDENS—*Continued.*

Lord Lee) that the defence was irrelevant. *Macfarlane v. Matheson*, Dec. 14, 1888, p. 230.

PUBLIC HEALTH. *Unsound meat*—"Possession as or for human food"—*Meat consigned by rail to manager of dead meat company*—*Edinburgh Municipal and Police Act, 1879, sec. 261.*

A farmer in Perthshire despatched from Crieff Junction in the ordinary course of business the carcase of a bull addressed to the Dead Meat Company, Fountainbridge, Edinburgh. The carcase arrived at the Dead Meat Market, and in consequence of its appearance was examined by the manager of the market and condemned as unfit for human food. The farmer was charged with and convicted of a contravention of the 261st section of the Edinburgh Municipal and Police Act, in respect he had unsound beef in Edinburgh, "in his possession as or for human food." On appeal, the Court (*dub.* Lord Trayner) *quashed* the conviction, holding that facts had not been proved sufficient to infer that the accused had the carcase in Edinburgh in his possession either actually or constructively as or for human food. *Cairns v. Linton*, March 4, 1889, Just. Cases, p. 81.

PUBLIC-HOUSE. *Breach of certificate—Keeping open house—Alternative charge and general conviction.*

1. A hotel-keeper was charged with a breach of his certificate, in so far as on two occasions he did "keep open house, or sell or give out" liquor during prohibited hours. He was convicted of "the offences charged." In a suspension *held* that the conviction was a general conviction on an alternative charge, and must therefore be set aside. *Duncan v. Laing*, Nov. 21, 1888, Just. Cases, p. 20.

*Breach of certificate—Name of person to whom liquor sold.*

2. It is not essential to the relevancy of a complaint for breach of a public-house certificate by selling or giving out liquors on Sunday that the name of the person to whom the liquor was given out should be stated.

*Observed* that where the prosecutor knows the name of the person he ought to state it, and where he does not know the words "to the prosecutor unknown" ought to be inserted. *Muir v. Campbell*, Nov. 21, 1888, Just. Cases, p. 20.

*Breach of certificate—Hawking spirits—Selling or giving out on Sunday.*

3. The holder of a public-house license received a bottle from a person on a Sunday, outside his licensed premises, and having entered his premises and filled the bottle with whisky, he thereafter, a short distance outside the premises, delivered it to the purchaser. *Held* that he was properly convicted of a breach of his certificate by selling or giving out liquor on Sunday. *Muir v. Campbell*, Nov. 21, 1888, Just. Cases, p. 20.

*Breach of certificate—Hotel certificate—Bona fide traveller.*

4. A resident of the town of Lerwick who had been absent for some months arrived there by steamer early on a Sunday morning, and went home and slept there. At noon of the same day he went to a hotel where he was supplied with refreshments by the waiter, to whom he was unknown, on the mere statement that he had arrived by the steamer, and was a *bona fide* traveller. *Held* (1) that he was not a *bona fide* traveller; (2) that the waiter had not made sufficient inquiry to justify his regarding him as such; (3) that the master of the hotel must be held, in respect of the actings of his servant, to have been guilty of a breach of his certificate. *Galloway v. Weber*, Jan. 14, 1889, Just. Cases, p. 46.

*Breach of certificate—Dominoes played for a stake—"Unlawful game"—Public-Houses Acts Amendment Act, 1862, Schedule A, No. 2.*

5. The Form of Certificate for Public-houses in Schedule A, No. 2 of the Public-Houses Acts Amendment (Scotland) Act, 1862, makes it imperative that the person licensed "do not suffer or permit any unlawful games within his premises." A publican was charged and convicted of the offence of having permitted a number of persons "to play at dominoes for a stake, an unlawful game," within his premises. The Court *quashed* the conviction,

**PUBLIC-HOUSE—Continued.**

holding that the game of dominoes was not "unlawful" in itself, and did not become so by being played for a money stake. *Hoggan v. Wood*, July 18, 1889, Just. Cases, p. 95.

*Certificate—Early-closing licence—Remission of one-seventh of duty—Inland Revenue Act, 1880, sec. 44—Public-Houses Hours of Closing Act, 1887, sec. 4 (b).*

6. The licensing authority of Midlothian resolved that from and after Whitsunday 1888, and until the licensing authority shall otherwise determine, all licensed houses within the county "shall be closed at ten o'clock at night." The holder of a certificate which, in terms of that resolution, fixed the hour for closing at ten P.M., raised an action against the Commissioners of Inland Revenue, concluding for repayment of one-seventh of the duty paid by him under protest for his certificate, in respect that the ordinary hour of closing being eleven o'clock he held an "early-closing certificate" within the meaning of section 7 of the Licensing Act, 1874, as extended to Scotland. *Held (aff. judgment of Lord Fraser)* that under the Licensing Act of 1887 there was no ordinary hour for closing within the district other than that fixed by the magistrates, and that ten o'clock being the hour so fixed, the pursuer was not entitled to the remission claimed. *Henderson v. Lord Advocate*, Nov. 27, 1888, p. 147.

*Complaint—Deviation from statutory form—Trafficking without certificate—Public-Houses Acts Amendment Act, 1862, sec. 17.*

7. A B was charged under the 17th section of the Public-Houses Acts Amendment (Scotland) Act, 1862, with trafficking in liquor in L. "without having a certificate, empowering him the said A B to keep premises in L. for the sale of exciseable liquors therein." He was convicted, and in a suspension he averred (and it was admitted) that while he held no certificate for the premises, he was managing them for a person in whose name there was a current certificate, and who had prior to the date of the conviction granted a trust-deed for behoof of creditors. The Court *suspended* the conviction, holding that as the charge, which was in effect one of trafficking without having obtained a personal certificate, had not been framed in the form prescribed by the 17th section of the Public-Houses (Scotland) Acts Amendment Act, 1862, under which it was brought, and which made it an offence to traffic without having obtained a certificate "in that behalf," the complainer had been debarred from pleading his employer's certificate, and had thus been prejudiced. *Wylie v. Thom*, July 4, 1889, Just. Cases, p. 90.

**PUBLIC OFFICER. Nature of office—Appointment *ad vitam aut culpam*.**

*Observed per* the Lord President,—“The law applicable to appointments *ad vitam aut culpam* may be summarised thus—Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last class are embraced only offices of the nature of *munera publica*. Public officers are irremovable except for fault. Holders of benefices in the church are public officers, and these offices are *munera publica*.” *Hastie v. M'Murtrie*, June 4, 1889, p. 715.

**RAILWAY. Lands Clauses Consolidation Act, 1845 (8 Vict. cap. 19), sec. 120—“Superfluous lands.”**

1. A piece of ground, acquired by a railway company under compulsory powers, had not been used by the company for more than ten years after the completion of their works, and had not been sold by them. It could not be utilised by the company unless they could take additional land from the adjoining proprietor, which was beyond their statutory powers. *Held* that the ground was superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act, 1845. *Stewart v. Highland Railway Co.*, March 8, 1889, p. 580.

*o action for carriage of goods—Railway Com-  
f action—Railways Clauses Consolidation Act,  
nd Canal Traffic Act, 1854, secs. 2 and 3—  
ct, 1873, sec. 6—Railway and Canal Traffic*

sued a firm for sums due in respect of the car-  
e company's line. The defenders pleaded that  
gal, and averred in their defences, as originally  
ad conceded to other traders mileage rates for  
"which they refused to concede to the defenders,  
s are of the same description." Subsequently  
at the company had charged them with higher  
the carriage of the same class of goods over pre-  
The Lord Ordinary allowed the defenders a proof  
ded, but disallowed a proof of their original aver-  
the preference therein set forth was only struck  
al Traffic Act of 1854, and that (on the authority  
*South-Western Railway Company*, 11 R. 205)  
t Act was irrelevant, as interdict was the only  
atute. The defenders reclaimed, and moved the  
e to the Railway Commissioners, under sec. 58  
Traffic Act, 1888, which came into operation on  
urt *adhered*, but, further, *refused* to transfer the  
, on the ground that the defence under the Act  
iority of *Murray's* case) be as irrelevant before  
as it was in the Court of Session, and that, there-  
not take any benefit by the transference. *Cale-  
ss & Sons*, March 14, 1889, p. 584.  
*rtion of the line of railway*"—*Railway Clauses*  
c. 83.

a certain rate per mile, every incomplete mile  
ie sidings of two collieries joined the main line  
welfth mile from Troon, but one was 415 yards  
r. *Held* that in determining, in the sense of  
tion of the railway used by the collieries respec-  
was to be considered as a whole mile in each

ression in the above section "passing over the  
of railway." *Yeats's Trustees v. Glasgow and*  
., Feb. 26, 1889, p. 535.

—*Error—Knowledge.*

ilway company entered into an agreement by  
r, *inter alia*, undertook "not to carry traffic for  
proportionate rates than those charged to the iron  
latter on the same footing as that enjoyed by  
n the line." The iron company regularly paid  
harged by the railway company on their traffic.  
ompany against the railway company, founded  
n of certain sums which they averred they had  
ct that lower rates had been charged to two  
ompany pleaded that the pursuers were barred  
hat they had paid the alleged overcharge in the  
eir manager, who was one of their partners, and  
o traders were being charged lower rates. *Held*,  
uers were entitled to repetition in respect (1)  
and their secretary had had some information  
other traders this information was not in fact  
the time of payment, and was not of such a  
have been present; and (2) that the defenders

REPARATION—*Continued.*

"looser." She stumbled at the top of the ladder and fell, and her leg was wrenched off by the drum of the machine. In an action of damages raised by the girl, with consent of her father, against the contractor, it was proved that it was customary, and was regarded as an adequate precaution against accidents, to have a guard over the drum of such threshing-machines, and that all the machines belonging to the contractor were provided with guards. The Court *awarded* damages, holding that the machine was defective and dangerous in respect of the want of the guard, and that the injury to the girl was attributable thereto. *Edwards v. Hutcheon*, May 31, 1889, p. 694.

*School Board—Liability of Board for condition of school premises—Child.*

7. A child of seven years attending a public school was injured through the fall of an iron gate, which formed part of the school premises. The gate was in a defective condition, and fell in consequence of the school children swinging on it. *Held* that it was the duty of the school board to keep the gate in a safe condition, and that they were liable in damages for the injury. *Cormack v. School Board of Wick and Pulteneytown*, June 21, 1889, p. 812.

*Master and Servant—Reasonable precautions for safety of workmen.*

8. A surfaceman in the employment of a railway company was killed, when engaged in work on a siding, by being struck by the tender of an engine which was proceeding, tender first, along the siding towards an engine-shed. It was necessary to take the engine in that way to the engine-shed, and it was not being driven at excessive speed. The engine-driver's view of the place where the deceased and the men working with him were engaged was obstructed by the coals on the tender till it was too late to avert the accident. No other precaution to warn the deceased had been taken than a whistle from the engine, but this, owing to frequent whistling and other noises at the place in question, had not attracted notice. In an action by the widow of the deceased against the railway company for damages for his death, *held* that the defenders were responsible for the accident, in respect that they had failed to take precautions for securing that the line should be cleared before engines moving tender first were allowed to pass the place at which the accident occurred. *Cairns v. Caledonian Railway Company*, March 19, 1889, p. 618.
9. A workman engaged in charging an iron smelting furnace was fatally injured by a sudden outburst of flame, caused by the fall of incrustations in the furnace (known as "scaffolds"). The furnace had for about nine months been in a dangerous state from scaffolding, during which period the employer had made various ineffectual attempts to remove the defect. The only remaining remedy was to blow out and clear the furnace, which would have removed, for a time at least, the cause of danger, but would have been expensive. *Held* that the employer was liable in damages for the workman's death, in respect that there had been fault in allowing the furnace to be worked for so long a period in a dangerous condition. *Henderson v. Carron Co.*, March 19, 1889, p. 633.
10. A brewer sent his men to deliver barrels of beer in a customer's cellar. In elevating one of the barrels into its position in an upper tier one of the men was injured. In an action of damages brought by him against his employer on the ground that the defender had failed to supply the necessary appliances for elevating the barrel, it was proved that the defender had furnished the men with the ordinary appliances, but that the men, finding that these could not be used, owing to the narrowness of the cellar, had, without applying to their master, proceeded to lift the barrels into position. The jury having returned a verdict for the pursuer, the Court *granted* a new trial, on the ground that there was no evidence of fault. *Ramsay v. Robin, McMillan, & Co.*, May 29, 1889, p. 690.

*Master and Servant—Statute—Construction of statute—Factory and Workshop Act, 1883, secs. 2, 3.*

11. The Factory and Workshop Act, 1883, enacted (by sec. 2), that it "shall



REPARATION—*Continued.*

not be lawful to carry on a white lead factory unless such factory is certified by an inspector to be in conformity with this Act," and (by sec. 3) that a white lead factory shall not be so certified unless certain conditions specified in the schedule to the Act have been complied with. At the date of the passing of the Act the expression "white lead" denoted carbonate of lead, a substance very soluble and therefore dangerous to the health of workmen engaged in its manufacture. After the passing of the Act there was invented a process by which a sulphate of lead having the same appearance and fitted for the same uses could be manufactured. It was sold as white lead. It was nearly insoluble, and was not dangerous to the workmen engaged in its manufacture, if certain simple precautions were observed. A workman who, when engaged in a sulphate of lead factory, suffered from lead-poisoning sued his employers, whose factory was not certified under the Act, for damages, founding on their alleged neglect to conform to the provisions of the Act and to take the various precautions specified in the schedule. *Held*, after a proof (*diss.* Lord Lee), that the sulphate of lead was not "white lead" within the meaning of the Act, and that the provisions of the Act, in regard to white lead factories, did not apply; *et separatim*, that it had not been proved that the pursuer's illness was caused by the failure of the defenders to take proper precautions for the protection of their workmen. *Creedy v. Hannay's Patents Co., Limited*, July 16, 1889, p. 993.

*Master and Servant—Employers Liability Act, 1880.*

12. *Observations* on the new liability introduced by the Employers Liability Act, 1880. *Morrison & Mason v. Scottish Employers' Liability and Accident Assurance Co. Limited*, Dec. 14, 1888, p. 212.

*Slander—Privilege—Malice.*

13. The chairman of the public health committee of a local authority stated, at a meeting of the committee, that a case of typhoid fever had been reported to him by a medical man, "who said that it was probably to be traced to the milk supplied" by a certain dairyman. In an action of damages against him by the dairyman it was proved that the medical man had not been of that opinion, and had not said so; but that the defender had misunderstood a conversation which he had held with him, and had made the statement in the belief of its truth and in the discharge of his public duty. *Held* that in these circumstances the defender was entitled to be absolved. *McLean v. Adam*, Nov. 30, 1888, p. 175.

*Slander—Issue—Want of probable cause—Parish minister.*

14. In an action of damages for slander the pursuer alleged that the defender, the minister of the parish in which the pursuer resided, had, by letters written by him to the inspector of poor of another parish and to the Board of Supervision, represented the pursuer as grossly unfit to have the charge of pauper children boarded with him by the parochial board of that other parish. *Held* that the pursuer was bound to put in issue want of probable cause as well as malice. *Croucher v. Inglis*, June 14, 1889, p. 774.

*Slander—Newspaper report of proceedings in Court of Justice—Issue.*

15. In an action of damages against the proprietors of a newspaper for slander alleged to be contained in a report in the newspaper of proceedings in a Court of justice, the pursuers averred that certain statements reported to have been made in Court were not made, and that these statements were false and calumnious. The pursuers proposed the following issue:—Whether the defenders published in the newspaper a paragraph in terms of the schedule annexed: "Whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers," &c., "to the loss, injury, and damage of the pursuers?" The defenders contended that the pursuers were bound to put malice in the issue, and proposed as a counter issue whether the report was a fair and accurate report of the proceedings. The Court *approved* the proposed issue, and *disallowed*

**REPARATION—Continued.**

the counter issue as unnecessary. *Wright & Greig v. Outram & Co.*, July 17, 1889, p. 1004.

*Slander—Newspaper—Circumstances in which slander uttered—Amount of damages.*

16. When an action for damages is directed against the publisher of a slander, who is not the writer, he will not be allowed to prove in mitigation of damages circumstances which might have affected the writer, but of which the defender was ignorant, and this rule applies to the publisher of a newspaper who publishes a slander and refuses to disclose the name of the writer. *Browne v. McFarlane*, Jan. 29, 1889, p. 368.
17. In an action of damages for slander, it is competent for the pursuer as well as for the defender to prove the circumstances in which the slander was written where the defender is the writer,—or published where the defender is the publisher,—as affecting the amount of damages. *Cunningham v. Duncan & Jamieson*, Feb. 2, 1889, p. 383.

*Slander—Newspaper publication.*

18. *Held* by Lord Kinnear, Ordinary, that neither the direct dispatch by post of an English newspaper from the publishing office in England to persons in Scotland, nor the sale of the newspaper in Scotland, is sufficient to give the Scots Courts jurisdiction to entertain an action of damages for slander alleged to have been published in the newspaper. *Parnell v. Walter*, July 3, 1889, p. 917.

*Slander—Issue—Innuendo.*

19. An action of damages at the instance of the manager at Ayr Farina Mills was brought against the proprietors of a newspaper for slander alleged to be contained in the following article:—"Fire at Ayr Farina Mills—Singular conduct of the manager.—A fire occurred at a late hour last night in Messrs Hyland & Company's Farina Mills, Ayr, and before the flames were got under damage to the extent of £150 was done. It appears that the proceedings at the fire were somewhat unusual. The alarm was given, and the fire brigade turned out, but on their arrival at the gate of the establishment they were refused admittance by the manager, Mr Gudgeon, who said they could manage the fire themselves. Superintendent M'Kay, the chief of the police, and some of his men were also refused admittance, although the fire was breaking through the roof of the buildings. Superintendent M'Kay and his men eventually got into the premises by climbing over the wall, and the fire brigade seem to have got in by forcing open the gate. They were followed by the crowd. Mr Gudgeon ordered Superintendent M'Kay to take away the hose, but the superintendent said he had no power to do so, and the fire brigade commenced to play on the flames, which were soon got under. . . ." The Court *held* that the pursuer was entitled to an issue whether the article falsely and calumniously represented that he "had endeavoured to prevent the fire at the works referred to in the said article from being subdued, so as to cause destruction of the said works and stock therein, to the loss, injury, and damage of the pursuer." *Gudgeon v. Outram & Co.*, Dec. 1, 1888, p. 183.
20. The proprietor of a house wrote to the agent of his tenant (Macrae), who had ceased to occupy the premises,—“That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent, on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods.” In an action of damages for slander by the tenant, *held* that the words would bear the innuendo “that the pursuer is of dishonourable character.” *Macrae v. Sutherland*, Feb. 9, 1889, p. 476.

*Slander—Counter issue.*

21. In an action of damages for slander, the pursuer obtained the following issue:—" (1) Whether, on or about 5th October 1888, within the ring or paddock of the 'Lothians Racing Club and Edinburgh Meeting' at Mussel-

**REPARATION—Continued.**

burgh, the defender, in the presence and hearing of" A B "and others, falsely and calumniously said of and concerning the pursuer, 'this is the man who owes me money,' or used words of similar import, meaning that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer!" The defender proposed the following counter issue:—"Whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay!" The pursuer contended that the words "and was a person who ought not to be allowed to remain in the said ring or paddock" should be added to the counter issue. The Court *held* that those words should be added to the counter issue. *Blasquez v. Lothians Racing Club and Reid*, June 29, 1889, p. 893.

*Apprehension and imprisonment for civil debt—Necessity for notice of petition for warrant to imprison—Civil Imprisonment Act, 1882, secs. 3 and 4.*

22. The defender in an action for aliment of an illegitimate child was charged to make payment of the sums contained in a decree in the action. On his failure to implement the decree, a petition was presented to the Sheriff, under the Civil Imprisonment Act, 1882, craving a warrant to commit him to prison. The Sheriff *de plano* granted warrant to search for and apprehend the debtor, and "to bring him before the Sheriff for examination." The law-agents of the creditor caused the warrant to be executed. In an action for damages at the instance of the debtor against the law-agents, on the ground that they had put in force an illegal warrant, *held* (1) that the warrant for the debtor's apprehension was illegal, and (2) that the action against the law-agents who executed the warrant was relevant. *Cook v. Wallace & Wilson*, March 7, 1889, p. 565.

**REVENUE. Inhabited house duties—Hunt-kennels—House Tax Act, 1808, schedule B, rule 2—Inhabited House Duty Act, 1851, schedule.**

1. The master and committee of subscribers to a pack of fox-hounds were tenants of premises used for the purposes of the hunt—viz., dwelling-houses for the huntsman and whips, stables for twenty horses, kennels for about fifty couples of hounds, and two or three acres of land for exercising, &c. The premises were all in one enclosure, and the *cumulo* rent was £40, but none of the houses was by itself of the annual value of £20. *Held* that the premises were liable for inhabited house duty at 9d. per £ under schedule B, rule 2, of the House Tax Act of 1808, and the schedule appended to the Inhabited House Duty Act, 1851. *Cheape v. Kinmont*, Nov. 27, 1888, p. 144.

*Inhabited House Duty—Different tenements let to one tenant for cumulo rent—Verbal lease—Customs and Inland Revenue Act, 1878, sec. 13, subsec. 1.*

2. *Held* that the exemption provided in the above statute applied in a case where different tenements (one of which was used solely for business purposes) were let to the same tenant from year to year under a verbal lease at a *cumulo* rent. *Allan v. Miller*, March 6, 1889, p. 557.

*Inventory-duty—Share in trading company—Foreign.*

3. In an action at the instance of the Inland Revenue against the executors of a partner of trading company connected with India concluding for additional inventory-duty in respect of the value of the share of the deceased in the company, *held* that whether the partnership was to be regarded as an Indian or a British partnership, the additional duty was exigible on the ground that the executors being precluded by the contract from holding shares in the partnership, the right vested in them was a right to a sum of money recoverable in this country, *diss.* Lord Shand, who *held* that the right vested in the executors at the deceased's death was a share in an Indian company, and that that share was not liable for inventory-duty in the United Kingdom. *Lord Advocate v. Laidlay's Trustees*, July 12, 1889, p. 959.

**REVENUE—Continued.**

*Income-tax—Casualty—Superior and vassal—Income-Tax Act, 1842, sec. 60, schedule A—Taxes Management Act, 1880, sec. 60.*

4. A singular successor paid to the superior for his entry a casualty of a year's rent of the lands, without deduction of income-tax. The Crown, after receiving payment from the superior of income-tax on the casualty, assessed the vassal for income-tax on the rent. The vassal objected to the assessment, on the grounds (1) that the superior had received the whole rent for the year, and (2) that a casualty was of the same nature as feu-duty, for which deduction was allowed. The Court *sustained* the assessment. *Macgregor v. Commissioners of Inland Revenue*, Feb. 8, 1889, p. 438.

*Income-tax—Fire and Life Insurance Company—Profits or gains—Property and Income-Tax Act, 1842, schedule D, First Case.*

5. In a question as to the assessment of income-tax, under the Income-Tax Act, 1842, schedule D, on the profits or gains of a company carrying on the businesses both of fire and life insurance, *held* (1) that the nett profits and gains from the two branches of the business must be massed together as one undivided income assessable according to the rules applicable to the First Case under schedule D; (2) that in estimating profits and gains there fell to be taken into account interest on investments which had not suffered deduction of income-tax at its source; (3) that as fire insurance policies are contracts for one year only, the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period, and ordinary expenses, may be fairly taken as the profits and gains of the company without making any allowance for the balance of annual risks unexpired at the end of the financial year; (4) that the profits or gains upon the life business could be ascertained by actuarial calculation only, and that this actuarial calculation might be obtained by taking the result of the quinquennial investigation prescribed by statute, or of the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by schedule D of the Income-Tax Acts; and (5) that where a gain is made by the company (within the year of assessment or the three years prescribed by the Income-Tax Act, schedule D) by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company. *Scottish Union and National Insurance Company v. Inland Revenue*, Feb. 8, 1889, p. 461.

*Income-tax—Railway—Expenditure on permanent improvements.*

6. A railway company, in making their return for assessment of income-tax, claimed as deductions from the revenue of the year of assessment (1) a sum expended upon the improvement of the permanent way of a line of railway which they had acquired and amalgamated with their concern, in order to bring it up to the standard of the rest of the line; (2) a sum representing the cost of the extra weight in relaying part of the main line with steel in place of iron rails, and with chairs of additional weight. In the books of the company, these sums were charged against capital. The Commissioners of Income-tax disallowed the sums as deductions from revenue, holding that they were properly chargeable to capital. On appeal, the Court *affirmed* their determination. *Highland Railway Co. v. Special Commissioners of Income-Tax*, July 10, 1889, p. 950.

See *Public-House*, 6—*Stamp*.

**RIGHT IN SECURITY. Real Burden—Obligation *ad factum præstandum*—Obligation to purchase and transfer consols.**

1. *Held* that a bond and disposition in security binding the granter to purchase and to transfer to the grantee the capital stock or sum of £5000 3 per cent Consolidated Bank Annuities, and until such purchase and transfer to pay to the grantee the interest payable on that amount of stock, was effectual to make these obligations real burdens on the lands conveyed. *Edmonstone v. Seton*, Oct. 16, 1888, p. 1.

**REPARATION—Continued.**

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## REVENUE—Continued.

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RIGHT IN SECURITY. *Real Burden—Obligation ad factum præstandum—Obligation to purchase and transfer consols.*

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**RIGHT IN SECURITY—Continued.***Bond and disposition in security—Personal obligation—Sale.*

2. Held that the creditor in a bond and disposition in security, in the form prescribed by the Titles to Land Consolidation Act, 1868, is entitled to recover his debt either by proceeding on the personal obligation, or by exercising the power of sale contained in the bond. *M'Nab v. Clarke*, March 16, 1889, p. 610.

*Mailles and duties—Heritable creditor.*

3. When a heritable creditor has obtained a decree of mailles and duties against the tenants on an estate in an action in which the proprietor has been called for his interest, and has not appeared, he is thereafter in possession of the estate, and has a good title to use sequestration for rent against any one subsequently possessing as tenant, although he may not have been called in the action of mailles and duties. *Robertson's Trustees v. Gardner*, May 31, 1889, p. 705.

*Right in security—Personal action—Scottish Drainage and Improvement Company Act, 1856.*

4. Held (aff. judgment of First Division) that the *Scottish Drainage and Improvement Company Act, 1856*, imposes no personal liability upon a landowner to whom advances are made under the Act, and that a personal action against such landowner for payment of the annual rent charge is incompetent. *Scottish Drainage and Improvement Co. v. Campbell*, June 24, 1889, H. L., p. 16.

*See Foreign, 1—Pounding.***SALE. Offer and acceptance—Qualification of offer—Consensus in idem.**

1. N. wrote this letter to A.,—"I hereby offer to purchase the following parts of the tenement . . . known as His Lordship's Larder . . . ." The parts were described in detail, and a price was named. A. replied,—"I hereby accept your offer, as copied on the other side, . . . for our interest in the property known as His Lordship's Larder." On examination of the titles it appeared that A. had no clear and indisputable title to certain portions of the subjects specially described. In an action by N. to enforce implement, the Court *assolized* A., on the ground that the missives did not constitute a completed contract for the purchase and sale of the subjects. *Nelson v. Assets Co., Limited*, July 3, 1889, p. 898.

*Suspensive condition—Sale or hire—Contract.*

2. M. & Co., a firm of piano sellers, entered into the following contract with A:—"In consideration of M. & Co. (hereinafter called the owners) letting to the undersigned (hereinafter called the hirer) a harmonium (hereinafter called the goods) on hire, the hirer hereby agrees to pay to the owners the sum of £1, 10s. on delivery of the goods, as deposit, and a further sum of £1 every four weeks thereafter, as hire, until the full amount of £15, 15s. (including the deposit) shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever." A paid the deposit, and made one of the monthly payments. She then left the country, and her goods were sold by public auction. At the sale G. bought the harmonium, and obtained delivery. In an action for delivery of the harmonium at the instance of M. & Co. against G., the Court *granted* decree of delivery as craved on the ground that the contract was one of sale under the suspensive condition that the property in the harmonium should not pass till the full price was paid, and that the condition not having been fulfilled, G.'s title was bad. *Murdoch & Co., Limited, v. Greig*, Feb. 6, 1889, p. 396.

*Sale retenta possessione—Reputed ownership—Mercantile Law Amendment Act, 1856, sec. 1.*

3. Certain creditors of an insolvent agreed to accept a composition of 8s. per pound in full of their claims. A, the insolvent's mother-in-law, one of the creditors, took his furniture, as valued by an appraiser, in part payment of her composition. The furniture remained in his possession on a verbal agreement that his wife and he should have the use of it. Two years afterwards his estates were sequestrated under the Bankruptcy Act. In a ques-

**SALE—Continued.**

tion between A's representatives and the trustee in the sequestration *held* that under section 1 of the Mercantile Law Amendment Act, 1856, the former were entitled to delivery of the furniture, as having been sold to A but not delivered. *Scott v. Scott's Trustee*, Feb. 20, 1889, p. 504.

**Property—Description by boundaries inconsistent with measurements—Plan.**

4. A feu-contract described the subject by boundaries. It also described it by measurements, and referred to a plan or sketch annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In an action brought by the vassal for declarator that his property extended to the limits shewn by the measurements and plan, *held* that the description by boundaries must prevail, and defenders assolizied. *Currie v. Campbell's Trustees*, Dec. 18, 1888, p. 237.

**Assignment of rents—Shooting rents.**

5. Where certain heritable subjects were sold during the subsistence of a shooting lease, *held* (*rev. judgment of Lord Trayner, Ordinary*) that the shooting tenant's rent fell to be apportioned between the seller and purchaser according as the right of shooting was exercised before or after the purchaser's term of entry to the subjects. *Lord Glasgow's Trustees v. Clark*, Feb. 27, 1889, p. 545.

**Assignment of rents—Legal and conventional terms—Seller and Purchaser.**

6. The seller of certain heritage, consisting of two farms, assigned to the purchaser the rents "due and payable from and after the term of entry," which was Martinmas 1886. In a question as to the right to the farm rents payable at Whitsunday 1887 for the crop and year 1886, *held* (*rev. judgment of Lord Trayner, Ordinary*) that the proportion applicable to the possession prior to Martinmas 1886 belonged to the seller, and that applicable to the possession subsequent thereto to the purchaser. *Lord Glasgow's Trustees v. Clark*, Feb. 27, 1889, p. 545.

**Constructive delivery—Possession—Bonded warehouse.**

7. A, a distiller sold certain parcels of whisky to B, who paid the price, leaving the whisky undelivered in A's bonded warehouse, where none but whisky from his own distillery was kept. The whisky was sold by B to a purchaser, and there were subsequently several other subsales, extending over a period of six years—a delivery-order being in each case intimated to A, who noted the transfer in his books and intimated to the transferee that he would be charged warehouse rent. C, the last subvendee, having become bankrupt, the trustee upon his sequestrated estate demanded delivery from A of the whisky, which had all along remained in A's warehouse at a specified rent. *Held* (by the Lord President, Lords Adam and Kinnear, *diss.* Lords Mure and Shand, and *rev. judgment of Lord Trayner*) that A continued undivested owner of the whisky, and therefore had a right to retain it for a debt due to him by C. *Distillers Co., Limited, v. Russell's Trustees*, Feb. 9, 1889, p. 479.

**Payment—Conditional payment—Repetition.**

8. S., a merchant, agreed to buy sixty tons of potatoes from a farmer. Subsequently he was informed by the seller that his crop and stock had been previously sequestrated at the instance of his landlord. S. thereupon entered into an agreement with the farmer, and with the landlord's factor, by which he agreed to prepay the price of the goods to the factor, to be applied in payment of the farmer's rent. S. sent a cheque for the amount to the factor, which he requested him to acknowledge "by receipt as per copy enclosed." This copy ran thus,—*"Received from S. the sum of £120 in full payment of sixty tons of potatoes . . . which I bind and oblige myself to deliver."* The factor retained and cashed the cheque, but refused to guarantee delivery of the goods. S. thereafter repudiated the contract, and raised an action against him for redelivery of the cheque, or for repayment of the amount thereof. The Court *held* that as the pursuer had sent the cheque expressly on the understanding that the defender should guarantee delivery of the goods, the latter was not entitled to retain



**SALE—Continued.**

it or its proceeds, and ordered it to be repaid. *Semple v. Wilson*, June 14, 1889, p. 790.

**Entailed estate—Essential error.**

9. Sale of entailed estate subject to the ratification of the Court—Specific performance—Reduction—Essential error. *Stewart v. Kennedy*, Feb. 8, 1889, p. 421, June 25, 1889, p. 857.

**SCHOOL. Schoolmaster—Retiring allowance—School Board—Parochial teacher's house—Education Act, 1872, secs. 23, 60, 61.**

1. A parochial teacher appointed prior to 1872 agreed with the school board that in consequence of age and infirmity he should resign office, on condition of receiving during life a certain annual sum, and the free use of the teacher's house and garden, which he had occupied for many years. Certain ratepayers objected to the arrangement as *ultra vires* of the board, in respect (1) that the school board were not entitled to allow a larger money allowance than that to which the teacher would have been entitled on removal for inefficiency without fault under section 60 of the Education Act, 1872; and (2) that they were not entitled to divert the teacher's house from its proper use. *Held* that the school board had acted within their powers. *School Board of Eckford v. Rutherford*, Feb. 2, 1889, p. 377.

**Educational Endowments Act, 1882—Summary dismissal of pupil.**

2. *Held* that the headmaster of a school, which was regulated by a scheme under the above Act, was acting within the powers conferred upon him by the scheme when he summarily dismissed from the school a foundationer whom the medical officers reported as suffering from an attack of leprosy, which, in their opinion, might be communicated to the rest of the school. *Piggott v. Governors of the Fettes Trust*, Dec. 11, 1888, p. 199.

**Reparation.**

3. Liability of school board for condition of school premises. *Cormack v. School Board of Wick and Pulteneytown*, June 21, 1889, p. 812.

**SHERIFF. Process—Jurisdiction—Lease—Summary ejection for failure to stock.**

1. In a Sheriff Court petition by the landlord of a farm for warrant to sequester and sell his tenant's effects for rent past due, and for an order on the tenant to replenish the farm if necessary, decree of sale was pronounced of consent, and the sale having exhausted the subjects, the landlord moved for an order on the tenant to re-stock, and on his failure to do so within fourteen days, for decree of summary ejection, and warrant to re-let. The tenant by minute stated that he was proceeding to stock. The Sheriff in respect of this minute remitted to a man of skill to see the stocking carried out, and to report within one month. The man of skill reported at the end of the month that the farm had not been re-stocked. The Sheriff thereupon granted warrant for summary ejection. In an action for reduction of this warrant by the tenant, *held (diss. Lord Young)* that as the Sheriff had not fixed a time within which the re-stocking must be carried out, the tenant was not in default, and that decree of reduction of the warrant to eject fell in consequence to be pronounced.

*Question*, whether the Sheriff has jurisdiction to grant warrant for the summary ejection of the tenant of an agricultural subject on account of failure to stock. *Opinion per Lord Young* that he has. *Macdonald v. Mackessack*, Nov. 30, 1888, p. 168.

**Summons—Amendment—Sheriff Court Act, 1876.**

2. *Held* that a summons raised in the Sheriff Court by a widow in her individual capacity could not on her being subsequently decerned executrix-dative to her husband, be amended so as to admit of her suing also as executrix, the power of amendment given in sec. 24 of the Sheriff Court Act, 1876, not being applicable to such a case. *Turnbull v. Veitch*, July 18, 1889, p. 1079.

**Process—Extract—Sheriff Court Act, 1876, sec. 32.**

3. An interlocutor in a Sheriff Court allowed "extract of this decree to go out upon caution being found," and extract was taken on the day after the

**SHERIFF**—*Continued.*

interlocutor was issued. *Held* that the words quoted did not restrict the time for appealing, and meant only that extract was not to go out until after the fourteen days provided by the above Act, and then only upon caution being found. *Simpson v. Jack*, Nov. 23, 1888, p. 131.

*Process—Decree conform—Crofters Holdings Act, 1886, secs. 25, 27, 28.*

4. When an order of the Crofters Commission is presented to a Sheriff, with a request for a decree conform, the Sheriff, if satisfied that the order is in conformity with the statute, and has been duly recorded, should, without further procedure, grant decree conform. *Duke of Argyll v. Cameron*, Nov. 24, 1888, p. 139.

See *Justiciary Cases*, 4—*Reparation*, 22.

**SHIP.** *Charter-party—Cesser and lien clauses—Demurrage.*

1. A charter-party provided "charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead-freight, and demurrage. To be loaded as customary at Sydney. To be discharged as customary at . . . and at the rate of not less than 100 tons of coals per working-day, . . . and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day." In an action brought by the owners against the charterers for damages for detention at the port of loading, the defenders founded on the cesser and lien clauses as freeing them from responsibility. *Held* that the word "demurrage" in the lien clause did not cover undue detention at the port of loading, and therefore that the charterers were not exempted by the cesser clause from liability for damages for such detention. *Gardiner v. Macfarlane, M'Crindell, & Co.*, March 20, 1889, p. 658.

*Charter-party—Freight—Hire payable in advance—General average.*

2. In a charter-party the charterer became bound to pay hire for a steam-vessel at a certain rate per month, and the owners to provide the officers and crew and stores. It was stipulated that "in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On 30th September 1887, on a voyage from the West Coast of Africa to Harburg, the high-pressure engine broke down, and the vessel put in to Las Palmas in the Canary Isles, where she was pronounced to be unfit to proceed on her voyage. As repairs could not be effected in that port, the owners and charterers arranged to send from England a tug to bring the ship to Harburg, it being agreed that the cost should be treated as general average. The ship arrived at the port of discharge by the use of her low-pressure engine and with the assistance of the tug. The charterer paid £867 as his share of general average. In an action by the shipowner against the charterer for hire of the ship from the time she left Las Palmas with the assistance of the tug till she was discharged, *held* (1) (*rev. judgment of Lord Trayner*) that the ship had not been "in an efficient state" from the time of the accident, and that in terms of the charter-party the owner had no claim to hire for the subsequent voyage, but (2) (*dub. Lord Young*) that the charterers must pay hire for the period during which she was necessarily engaged in discharging her cargo at the port of arrival. *Hogarth v. Miller, Brother, & Co.*, March 15, 1889, p. 599.

*Charter-party—Seaworthiness—Exception—"Error or negligence of navigation"—Onus.*

3. The charter-party of a steamship freed the owners from liability for "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever nature and kind, during the said voyage." The vessel was lost through failure of steam-power, in consequence of which she drifted on a lee shore. In an action at the instance of the charterers against the owners

**SHIP—Continued.**

for damages for the loss of the cargo, the Court (*rev. judgment of Lord Kinnear*) held (1) upon the evidence that the failure of steam-power was attributable to the water having been allowed to run too low in the boiler, so that the metal surfaces of the crowns of the wing furnaces and some of the boiler tubes were denuded of water, with the result that they contracted unevenly, and consequently leaked, when cold sea-water was admitted into the boiler, and (2) that the loss fell under the exception of "errors or negligence of navigation" in the charter-party, and that therefore the owners were not liable in damages. *Cunningham v. Colvils, Lowden, & Co.*, Dec. 21, 1888, p. 295.

**Charter-party—Guarantee that ship should carry a certain dead-weight—Stowage of machinery and coal.**

4. By a charter-party it was agreed that the vessel should proceed to G, and there load "all such goods and merchandise as the charterers" should tender alongside, "not exceeding what she can reasonably stow and carry"; that the charterers should pay a lump sum for the voyage of £2200; that the "owners guarantee that the vessel should carry not less than 2000 tons dead-weight of cargo"; that, "should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a pro rata reduction per ton to be made" from the freight. At the time the charter-party was signed, this unsigned note was put upon it with consent of the parties, "including machinery, the largest pieces measure about say,"—the dimensions and weight of twenty-five pieces of machinery were then given. The charterers tendered 2000 tons of cargo, consisting partly of large pieces of machinery, including, in addition to the twenty-five pieces mentioned in the note, sixty additional pieces of the same description, and partly of coal and partly of general cargo. In consequence of the large space required by the machinery, which was stowed separately, only 1691 tons were shipped. Had the coals and machinery been stored together, the vessel would have held the 2000 tons. In an action for payment of the balance of freight, the charterers claimed deduction in respect of the 309 tons not shipped, on the grounds (1) that by the contract the freight was limited to the dead-weight actually carried, and (2) that the short shipment was due to improper stowage. Held (*rev. judgment of the Second Division*) that, as the owners had provided a vessel capable of carrying a dead-weight of 2000 tons, and as the short shipment was not due to improper stowage, but to the charterers providing a cargo more bulky than that contemplated by the parties when they entered into the contract, the charterers were not entitled to any deduction from the full freight. *Mackill & Co. v. Wright Brothers & Co.*, Dec. 18, 1888, H. L., p. 1.

**Right of Mortgagees—Charter-party.**

5. The owner of a ship, over which he has granted a mortgage, is not entitled to deal with the ship as owner, in such way as may materially prejudice the mortgagee's security. *Laming & Co. v. Seater*, June 21, 1889, p. 828.

**Arrestment—Recall of arrestment—Caution or consignment for expenses.**

6. In a petition at the instance of the owners of a ship praying the Court to recall arrestments laid on the ship upon the dependence of an action against them for payment of £176, and to prohibit any further arrestment on the dependence of the same action, the Court recalled the arrestments and prohibited further arrestments as prayed for on the petitioners finding caution for £200 or consigning that sum. *M'Phedron and Currie v. M'Callum*, Oct. 31, 1888, p. 45.

See *Justiciary Cases*, 18, 20.

**SLANDER.** See *Reparation*, 13 to 21 inclusive.

**STAMP.** *Bill of Exchange—Coupon—Renewal of Debenture—Stamp Act, 1870, sec. 48, and schedule, voce Bill of Exchange.*

1. Under the schedule to the Stamp Act, 1870, dealing with bills of exchange, there is exempted from the 1d. stamp-duty exigible upon bills of exchange payable on demand (9) "coupon or warrant for interest attached to and

**STAMP—Continued.**

issued with any security." *Held* that that exemption did not cover interest coupons which were attached to the original security upon its being renewed by minute for a further term of years after its original term of endurance had expired, and that they fell to be stamped with the 1d. stamp. *Australasian Mortgage and Agency Co., Limited, v. Commissioners of Inland Revenue*, Nov. 9, 1888, p. 64.

*Transfer of debenture—Customs and Inland Revenue Act, 1888, sec. 13—Stamp Act, 1870, sec. 2—Marketable security.*

2. By the Stamp Act, 1870, and the Customs and Inland Revenue Act, 1888, a marketable security is defined as meaning "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." *Held* that debentures of a land and cattle company incorporated under the Companies Acts fell within that definition, and that transfers on sales thereof were therefore liable, under the 13th section of the Customs and Inland Revenue Act, 1888, to a stamp-duty of 10s. per cent on the price as conveyances on sale. *Texas Land and Cattle Co., Limited, v. Commissioners of Inland Revenue*, Nov. 9, 1888, p. 69.

**STATUTE Construction of private Act.**

*Observations on the construction of private Acts of Parliament which confer on companies incorporated for the purposes of profit powers not possessed by such companies at common law. Scottish Drainage and Improvement Co. v. Campbell*, June 24, 1889, H. L., p. 16.

**STATUTES.**

- 1696, cap. 5. See *Bankruptcy*, 2, 4, 5.  
 48 Geo. III. cap. 55 (*House Tax Act*, 1808). See *Revenue*, 1.  
 6 Geo. IV. cap. 120 (*Judicature Act*, 1825). See *Process*, 14, 23.  
 9 Geo. IV. cap. 29. See *Justiciary Cases*, 1.  
 1 and 2 Will. IV. cap. 37 (*Truck Act*, 1831). See *Justiciary Cases*, 13.  
 2 and 3 Will. IV. cap. 68 (*Day Trespass Act*, 1832). See *Justiciary Cases*, 8, 9.  
 1 and 2 Vict. cap. 114 (*Personal Diligence Act*, 1838). See *Bankruptcy*, 18—*Process*, 8, 21.  
 5 and 6 Vict. cap. 35 (*Income-Tax Act*, 1842). See *Revenue*, 4, 5, 6.  
 8 and 9 Vict. cap. 17 (*Companies Clauses Act*, 1845). See *Company*, 2.  
 8 and 9 Vict. cap. 19 (*Lands Clauses Consolidation Act*, 1845). See *Trust*, 2—*Railway*, 1.  
 8 and 9 Vict. cap. 33 (*Railway Clauses Consolidation Act*, 1845). See *Railway*, 2, 3.  
 8 and 9 Vict. cap. 83 (*Poor Law Amendment Act*, 1845). See *Poor*, 1, 2.  
 11 and 12 Vict. cap. 36 (*Entail Amendment Act*, 1848). See *Entail*.  
 13 and 14 Vict. cap. 36 (*Court of Session Act*, 1850). See *Process*, 12, 13.  
 14 and 15 Vict. cap. 36 (*Inhabited House Duty Act*, 1851). See *Revenue*, 1, 2.  
 16 and 17 Vict. cap. 80 (*Sheriff Court Act*, 1853). See *Process*, 21.  
 16 and 17 Vict. cap. 94 (*Entail Amendment Act*, 1853). See *Entail*.  
 17 and 18 Vict. cap. 31 (*Railway and Canal Traffic Act*, 1854). See *Railway*, 2.  
 17 and 18 Vict. cap. 91 (*Lands Valuation Act*, 1854). See *Valuation Acts*.  
 19 and 20 Vict. cap. 60 (*Mercantile Law Amendment Act*, 1856). See *Sale*, 3.  
 19 and 20 Vict. cap. lxx. (*Scottish Drainage and Improvement Act*, 1856). See *Statute—Right in Security*, 4.  
 19 and 20 Vict. cap. 79 (*Bankruptcy Act*, 1856). See *Bankruptcy*.  
 21 and 22 Vict. cap. 56 (*Confirmation of Executors Act*, 1858). See *Executor*.  
 24 and 25 Vict. cap. 37 (*Poor Assessments Act*, 1861). See *Poor*, 2.  
 24 and 25 Vict. cap. 88 (*Conjugal Rights Act*, 1861). See *Parent and Child*, 1.

## STATUTES—Continued.

- 25 and 26 Vict. cap. 35 (*Public-Houses Acts Amendment Act*, 1862). See *Public-House—Justiciary Cases*, 21.
- 25 and 26 Vict. cap. 89 (*Companies Act*, 1862). See *Company*.
- 25 and 26 Vict. cap. 101 (*Police and Improvement Act*, 1862). See *Police*, 1.
- 26 and 27 Vict. cap. 108 (*Vaccination Act*, 1863). See *Justiciary Cases*, 14.
- 26 and 27 Vict. cap. 118 (*Companies Clauses Consolidation Act*, 1863). See *Company*, 2.
- 29 and 30 Vict. cap. 112 (*Evidence Act*, 1866). See *Process*, 11.
- 29 and 30 Vict. cap. 118 (*Industrial Schools Act*, 1866). See *Justiciary Cases*, 3.
- 29 and 30 Vict. cap. cclxxxiii. (*Glasgow Police Act*, 1866). See *Police*, 2, 3—*Justiciary Cases*, 2, 3.
- 31 and 32 Vict. cap. 38 (*Representation of the People Act*, 1868). See *Election Law*, 3.
- 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868). See *Process*.
- 31 and 32 Vict. cap. 123 (*Salmon Fisheries Act*, 1868). See *Justiciary Cases*, 11, 12.
- 33 and 34 Vict. cap. xxxv. (*Paisley Corporation Gas Act*, 1870). See *Succession*, 28.
- 33 and 34 Vict. cap. 97 (*Stamp Act*, 1870). See *Stamp*, 1, 2.
- 35 and 36 Vict. cap. 62 (*Education Act*, 1872). See *School*, 1.
- 36 and 37 Vict. cap. 48 (*Regulation of Railways Act*, 1873). See *Railway*, 2.
- 37 and 38 Vict. cap. 94 (*Conveyancing Act*, 1874). See *Superior and Vassal*, 3.
- 38 and 39 Vict. cap. 61 (*Entail Amendment Act*, 1875). See *Entail*.
- 39 and 40 Vict. cap. 70 (*Sheriff Court Act*, 1876). See *Executor—Process*, 2, 20—*Sheriff*, 2, 3.
- 40 and 41 Vict. cap. 29 (*Married Women's Property Act*, 1877). See *Husband and Wife*, 5.
- 41 and 42 Vict. cap. 15 (*Customs and Inland Revenue Act*, 1878). See *Revenue*, 2.
- 41 and 42 Vict. cap. 74 (*Contagious Diseases (Animals) Act*, 1878). See *Justiciary Cases*, 7.
- 42 and 43 Vict. cap. 42 (*Valuation of Lands Act*, 1879). See *Valuation Acts*, 6.
- 42 and 43 Vict. cap. cxxxii. (*Edinburgh Municipal and Police Act*, 1879). See *Justiciary Cases*, 4—*Public Health*.
- 43 and 44 Vict. cap. 19 (*Taxes Management Act*, 1880). See *Revenue*, 4—*Expenses*, 3.
- 43 and 44 Vict. cap. 20 (*Inland Revenue Act*, 1880). See *Public-House*, 6.
- 43 and 44 Vict. cap. 34 (*Debtors Act*, 1880). See *Bankruptcy*, 1, 15—*Process*, 5—*Justiciary Cases*, 10.
- 43 and 44 Vict. cap. 42 (*Employers Liability Act*, 1880). See *Insurance*, 1—*Reparation*, 12.
- 44 and 45 Vict. cap. 21 (*Married Women's Property Act*, 1881). See *Husband and Wife*, 6, 7.
- 44 and 45 Vict. cap. 22 (*Bankruptcy and Cessio Act*, 1881). See *Bankruptcy*, 16.
- 44 and 45 Vict. cap. 33 (*Summary Jurisdiction Act*, 1881). See *Justiciary Cases*, 21.
- 45 and 46 Vict. cap. 42 (*Civil Imprisonment Act*, 1882). See *Reparation*, 22.
- 45 and 46 Vict. cap. 43 (*Entail Act*, 1882). See *Entail*.
- 45 and 46 Vict. cap. 59 (*Educational Endowments Act*, 1882). See *School*, 2.
- 45 and 46 Vict. cap. 61 (*Bills of Exchange Act*, 1882). See *Bill of Exchange*, 1.
- 45 and 46 Vict. cap. cxiv. (*Forth Bridge Railway Act*, 1882). See *Valuation Acts*, 5.
- 45 and 46 Vict. cap. clxxxv. (*Dundee Police and Improvement Act*, 1882). See *Justiciary Cases*, 21.

## STATUTES—Continued.

- 46 and 47 Vict. cap. 53 (*Factory and Workshop Act*, 1883). See *Reparation*, 11.
- 46 and 47 Vict. cap. 57 (*Patents, Designs, and Trades-Marks Act*, 1883). See *Copyright of Designs*.
- 48 and 49 Vict. cap. 3 (*Representation of the People Act*, 1884). See *Election Law*, 2, 3.
- 49 and 50 Vict. cap. 27 (*Guardianship of Infants Act*, 1886). See *Parent and Child*, 1, 4, 5.
- 49 and 50 Vict. cap. 29 (*Crofters Holdings Act*, 1886). See *Sheriff*, 4—*Public Burden—Lease*, 6.
- 49 and 50 Vict. cap. 32 (*Contagious Diseases (Animals) Act*, 1886). See *Justiciary Cases*, 7.
- 50 and 51 Vict. cap. 35 (*Criminal Procedure Act*, 1887). See *Justiciary Cases*, 1, 16, 17, 18.
- 50 and 51 Vict. cap. 38 (*Public-Houses Hours of Closing Act*, 1887). See *Public-House*, 6.
- 51 and 52 Vict. cap. 8 (*Customs and Inland Revenue Act*, 1888). See *Stamp*, 2.
- 51 and 52 Vict. cap. 25 (*Railway and Canal Traffic Act*, 1888). See *Railway*, 2.
- 51 and 52 Vict. cap. 36 (*Bail Act*, 1888). See *Justiciary Cases*, 15.

SUCCESSION. *Legitim—Right to deduct aliment to widow.*

1. A husband died, leaving a will by which he gave his widow a liferent of his whole estate, with power to appropriate such part of the capital as from time to time she should think necessary for her maintenance. Some months after the husband's death a child claimed legitim. *Held* that the widow was not entitled in the accounting for legitim to credit for aliment out of the estate from her husband's death till the demand for legitim was made. *Morrison v. Tawse's Executrix*, Dec. 18, 1888, p. 247.

*Legitim—Liferent and Fee—Effect of parent's repudiation of liferent on children's fee.*

2. One of the daughters (of the testator) having repudiated the provisions in her favour and claimed legitim, terms of trust-deed under which *held* (1) that on a construction of the special terms of the deeds the daughter by her repudiation forfeited not only her own rights under the settlement but those of her heirs and successors; (2) that the repudiated share of residue fell to be divided, in terms of the deed, amongst those beneficiaries who had not repudiated. *Campbell's Trustees v. Campbell*, July 17, 1889, p. 1007.

*Legitim—Date of valuing estate for legitim purposes.*

3. A right to legitim is a debt to be measured by the actual value of the moveable estate left by the father at his death, and its ascertainment does not involve realisation of his estate.

In an action for payment of legitim the Lord Ordinary, Fraser, while recognising the rule that legitim is to be calculated on the value of the estate at the date of the father's death, *held* that shares of certain ships which were not marketable at the date of the father's death, but soon after increased in value, were to be estimated at the increased value, and allowed a proof "of the market price at the present time."

The Court recalled the Lord Ordinary's interlocutor, and allowed a proof of the value of the shares of ships as at the date of the father's death (*dub.* Lord Shand, who was of opinion that the pursuer was entitled to have the estate valued as on a fair realisation six months after the father's death).

*Opinion (per Lord Adam)* that the question whether the price realised by the sale of one of the ships three months after the father's death was to be taken as its value in estimating legitim depended on whether the ships were then being held for the beneficiaries or for the purpose of realising as at the date of the father's death. *Gilchrist v. Gilchrist Trustees*, July 19, 1889, p. 1118.

*Legitim—Interest.*

4. *Held (per Lord Fraser)* that interest at five per cent is due upon a claim

*Succession—Continued.*

for legitim which an executor delays to pay without justifiable excuse. *Gilchrist v. Gilchrist's Trustees*, July 19, 1889, p. 1118.

*Heritable and Moveable—Conversion—Terce and jus relictæ.*

5. A bondholder infest sold the security subjects under his bond, but died before granting a disposition. His widow maintained that the bond formed part of her husband's moveable estate at the date of his death, subject to *jus relictæ*. *Held* that the bond had not been rendered moveable in a question between the executor and the widow. *Rossborough's Trustees v. Rossborough*, Nov. 28, 1888, p. 157.

*Heritable and Moveable—Incidence of debts—Lease.*

6. A testator in his trust-settlement directed his trustees to pay the income of the residue of his estate to his sister and her children, and after her death, and when the youngest attained the age of twenty-five years, to divide the capital of the residue among them. He was tenant under lease of a music-hall, and when he died some years of the lease were still to run. His trustee failed to dispose of the lease or to sublet the premises. His widow claimed her legal rights. *Held* that the loss occasioned by the lease of the music-hall fell to be charged (1) against the moveable estate in a question with the widow, and (2) against the fee of the residue of the estate in a question between the liferentrix and fiars under the settlement. *Rossborough's Trustees v. Rossborough*, Nov. 28, 1888, p. 157.

*Heritable or Moveable—Conversion.*

7. A testator conveyed his heritable and moveable estates to trustees with directions to pay to his wife, in case she survived him, a liferent of the trust-estate, and "to pay" to her "for her own use and disposal, out of the capital of the trust-estate any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He further directed his trustees, at the first term which should happen six months after her death, "to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half" of the residue. The other half was to be divided into six shares and paid to certain relatives. For accomplishing the purposes of the trust he gave his trustees power to sell his whole estate, heritable and moveable. The widow received the liferent, but never applied for or received any payment from the capital. She died, leaving a will conveying her "moveable estate." In a question between her heir-at-law and the executors under her will as to whether her right to one-half of the price realised from heritage belonging to the trust-estate, and unsold at her death, was heritable or moveable, *held* that it was moveable, and was carried by her will. *Kippen's Trustees*, March 20, 1889, p. 669.

*Legacy—Charitable bequest—Uncertainty.*

8. A testator bequeathed a sum to found bursaries for behoof of "residents in the parish of Alves, or in the parish and burgh of Elgin." The parish of Elgin extended beyond the burgh, and parts of the burgh were outside that parish. *Held* that the description included residents in any part of the parish or of the burgh. *Anderson's Bursary Trustees v. Sutherland*, March 7, 1889, p. 574.

*Legacy—Falsa demonstratio.*

9. A truster, by his trust-disposition and settlement, directed his trustees to pay or make over to each of three of his daughters one-fifth share of the residue and remainder of his means and estate, "the said shares to be at the absolute disposal of my said three daughters respectively." By subsequent codicil he "revoked and altered" his settlement "to this extent, that, in place of the absolute power therein given to" his three daughters, "I restrict that absolute power in each case to one half of their respective shares of my heritable estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime, beyond the interest or revenue derived from it; but they shall have power,

SUCCESSION—*Continued.*

by any deed or writing duly executed by them, to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." The trustor's moveable estate amounted to £175,000, and his heritable estate to £8000. In a special case between the trustees and the three daughters *held* (1) that the words "shares of my heritable estate" applied to shares of the testator's whole estate whether heritable or moveable. *Clouston's Trustees v. Bulloch*, July 5, 1889, p. 937.

*Trust—Alimentary provision—Fee and liferent—Power of fiar to demand payment.*

10. A testatrix by her settlement directed her trustees to divide the residue of her estate equally between her two daughters, who were married, "and to their respective heirs and assignees, but declaring that the provision hereby made . . . is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their husbands, . . . but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions." *Held* that the fee of the residue was vested in the daughters, and that they were entitled to have the residue paid over to them upon their own receipts, the receipts to bear the exclusion of the *jus mariti* and right of administration. *Jamieson v. Lesslie's Trustees*, June 19, 1889, p. 807.
11. A testator appointed trustees, and left his property to be divided equally among his three children—two daughters and a son—providing that "any share that my daughter M. may receive to go direct to her and her children. Failing the above mentioned, her share to return to her nearest of kin, except her husband shall have the liferent. My daughter H.'s share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin. Also my trustees shall retain charge of her share. It is not to go into her hands. The same with reference to my son C., his share to remain in the hands of my trustees for his behoof. In the event of his demise, his share to return to his nearest of kin." *Held* that the fee of each of the shares vested at the testator's death in his three children respectively; that the trustees were bound to pay over M.'s share to her at once; but that they were bound to retain the shares of H. and C. for their behoof. *Christie's Trustees v. Murray's Trustees*, July 3, 1889, p. 913.
12. A testatrix, in her trust-disposition and settlement, left the residue of her estate to certain persons named, equally, the said shares of residue to vest at the death of the testatrix, "declaring that the share falling to any of the said residuary legatees who are females and may be married at the time of my death shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors." *Held* that the fee of the shares of females who were married at the death of the testatrix vested in them at her death, and that they were entitled to immediate payment thereof. *Duthie's Trustees v. Forlong*, July 17, 1889, p. 1002.
13. A trustor directed his trustees to divide his estate into shares in a certain manner, "said shares to be payable to my said children as soon as my estate shall be realised and converted into cash." In the event of the death of any of the children before receiving payment of their shares without leaving lawful issue, the share of such decesser was to be divided among the surviving children or their issue. By a codicil he directed his trustees "to invest the shares of my means and estate falling to my daughters," so soon as the same is realised and can be invested, upon heritable security, taking



conceived in favour of such daughters in liferent for their ly, and to the child or children of their bodies, if more among them in fee"; declaring that such liferent provisionally alimentary, exclusive of the *jus mariti*, but with the daughters, by writing under her hand, to continue her hand, and to apportion the fee among her children. A married died without issue, predeceased by her husband, . She had not received payment of her share. *Held* and codicil taken together conferred upon each daughter a *morte testatoris*, subject only to a restriction in favour of the event of her having such. *Dalglish's Trustees v. Dalglish*, March 6, 1889, p. 559.

and codicil under which *held* that as there was a clear intention in the trust-settlement to pay over the daughters' direction was not recalled, and no machinery was provided for the provisions of the codicil, the trustees were not to take any part of the shares,—*diss.* Lord Adam, who was of opinion that the terms of the codicil amounted to a revocation of the trust as regards one half of each daughter's share, and an order to hold that half for her in liferent, and on her death to pay to the trustees as they have directed. *Clouston's Trustees v. Bulloch*, July 17, 1889, p. 1007.

by a father under which *held* that an accreting share in fee, although the principal share had vested in life, was not a *residuum*. *Paterson's Trustees v. Campbell*, July 17, 1889, p. 1007.

*mt.* under of apportionment of a fund provided by her husband in contract in liferent to herself and in fee to the children. She came party to a bond and assignation in security, whereby she gave security of a loan, assigned his interest under the bond to the lender, and his mother, in farther security, apportioned one-fifth of the fund and declared the apportionment to be binding leaving no other deed expressly bearing to be an answer. By her trust-disposition and settlement she left one of her daughters, and appointed the residue of her estate to be divided equally among her children other than this daughter, and provided that the provisions should be in full satisfaction "of all claims in my decease, whether legally or under my marriage-contract in any manner of way." In a special case, *held* that the bond in security contained a valid exercise of the power of apportionment of one-fifth of the fund; that the trust-disposition was binding with the lady's own estate only, and not with the fund of her husband, which consequently was as regarded four-fifths until that extent fell to be divided equally among all the children, and the son to whom the fifth had been apportioned. *Paterson*, July 16, 1889, p. 983.

marriage-contract the wife conveyed to herself in liferent, and her husband in liferent, exclusive of the *jus mariti*, and the children of the marriage in fee, certain bank shares, and the husband, and failing his exercising it, in the provisions made for them among the children. There were two sons and one son. By his settlement the husband conveyed to trustees to pay certain special legacies to the sons, and the residue of the whole residue and remainder of my estate, to be paid to my son, declaring that he had made use of the powers in the marriage-contract. The husband and wife, who thereafter executed a transfer of the bank shares and the children equally among them, and assigned in security to a creditor his whole interest "in

SUCCESSION—*Continued.*

the residue and remainder of the heritable and moveable estate of the said deceased G. W." (his father), "and all my right and interest of whatever kind or description under the same." In a question between the son and the assignee—*held* that the latter had no right to the bank shares, these having formed no part of the father's estate, and the father's settlement not being an effectual exercise of the power. *Whyte v. Murray*, Nov. 16, 1888, p. 95.

*Vesting—Payment postponed till death of liferenters—Clause of survivorship.*

18. A trustor by his trust-settlement, *inter alia*, directed his trustees, so soon as they should see fit, to convey certain heritable property to two daughters—his only children—in liferent respectively, and to two grandchildren *nominatim* and other grandchildren *nascituri*, equally among them, share and share alike, "any of whom failing, the share or shares of the decessor or decessors to the survivors, equally among them, share and share alike in fee." *Held* that the fee did not vest in the testator's grandchildren or their issue at the testator's death, but that on the death of each daughter the half liferented by her fell to be divided among the testator's grandchildren or their issue then in existence, exclusively. *Marshall v. King*, Oct. 30, 1888, p. 40.
19. A testator directed that the fee of the residue of his estate, including certain subjects liferented by his wife (who survived him) should be held by his trustees for behoof of his children in different proportions—the sons' provisions to be payable, to the extent of £2000, twelve months after the testator's death, and the remainder twelve months after the death of his widow, the daughters' provisions to be held for their liferent alimentary use *allenarly*, and for the heirs of the body of each of them in fee, and failing any daughter without leaving heirs, her share to form part of the residue. The testator further directed that should any of his children die upwards of twelve months after his widow without issue, and any part of the shares of the estate in that event devolve on his sons, the trustees should pay the same to the sons as soon after the death of the persons so dying as might be convenient. It was further provided "that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such decessors, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively, in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such decessors, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid."

The widow died, her death being followed, nine years after, by that of one of the sons unmarried. On the subsequent decease of one of the daughters without issue, *held* that the fee of the share liferented by her did not vest until the term of payment, and that no part of it therefore belonged to the representatives of the deceased son.

*Per the Lord President*,—Where in a testamentary deed a fund is settled on the children of the testator for their liferent use *allenarly* and their children, if any, in fee, whom failing, to another person or class of persons in absolute property, if the person or persons so called are known or the individuals composing the class are ascertained at the death of the testator, the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters or any of them leaving issue; if they are not so known or ascertained, the fee will not vest until the occurrence of the event which will determine who are the persons called, or until the individuals composing the class are ascertained. *Steel's Trustees v. Steel*, Dec. 12, 1888, p. 204.

*Vesting subject to defeasance—Conditional institution.*

20. A testator directed his trustees to pay the income of the residue of his estate to his sister during her life, and at her death to pay £6000 to each of his nephews whom he named. The deed then provided that "if any of my said

ore my sister" leaving issue, the issue should take any of my said nephews, . . . other than ie without issue, the share of such deceiver or de- viving brothers and sisters, equally among them, eceased brother or sister taking the share which arent, . . . and with regard to the £6000" to E. B. R., "I desire that, in the event of his sue, the same shall go" as directed in the deed. , predeceased the testator without issue, but sur- ister. E. B. R. survived the testator, but died rentrix survived both these nephews.

ed to the Court after the death of the liferentrix, brothers and the issue of a predeceasing brother onditional institutes to equal shares of the £6000 at the £6000 bequeathed to E. B. R. vested in subject to defeasance in the event of his prede- ing issue, and that, as he left no issue, it fell to . Earl of Dalhousie's Trustees v. Young, May

*-Destination to "nearest of kin."*

*marriage the spouses conveyed "each of them to her survivancy, in liferent," and to the children visible as after mentioned, their whole estate and ble, it being declared "that the said funds and the children of the present marriage in fee, in all be divisible amongst such children in such l appoint, and failing such appointment, equally."* "that in the event of the dissolution of the said of any of the said spouses without leaving chil- ill such children during the lifetime of the sur- he power of the said married parties severally to proper share of the said funds and effects belong- ally, but such disposition not to take effect until ver of the said married parties, and failing any in that case, the said whole funds and estate ll, after the decease of the said parties, suffer ntioned—that is to say, the whole funds and onging or which may belong to" the husband he property of his own nearest of kin," and the st of kin.

*t leaving any further deed, and was survived by*

*The latter died, leaving one child. Both pre-*

*r the widow's death as to the right to the hus- l (rev. judgment of the First Division) (1) that fee of his moveable estate vested in the only child e being his father's "nearest of kin," in the sense ot subject to divestiture in the event (which hap- his mother, the liferenter.*

*d constituted a contract dated in 1840, the con- vest of kin" was not affected by the passing of t, 1855.*

*tees) v. Murphy, 9 R. 269, questioned. Gregory's 1889, H. L., p 10.*

*make or withhold payment.*

*pose of his settlement directed his trustees, on divide a certain sum into six equal shares, of to two of his sons, and a third to be held by his third son J. L. The trustees were to retain*

**SUCCESSION—Continued.**

the whole or such part of J. L.'s share as they should think fit for such time as they should deem expedient, and to pay instalments thereof to him at such times as they should see fit. In the fifth purpose he directed the residue to be divided into six shares, repeating the above directions, with this exception, that payment was to be made "so soon as my estate shall be realised." Then followed a declaration "that the foresaid provisions to my said sons" "shall not become vested interests in them until the respective terms of payment thereof." *Held*, on a construction of the trust-deed, that the terms of payment referred to by the testator in fixing the dates of vesting were in regard to the second purpose the death of his widow, and in regard to the fifth purpose the realisation of his estate, and that the special discretion given to the trustees to postpone payment of J. L.'s shares did not suspend vesting in his case. *M'Elmail v. Lundie's Trustees*, Oct. 31, 1888, p. 47.

*Vesting—Direction to apportion residue within twelve months after death, or as soon thereafter as circumstances will permit—Period of payment.*

23. A trustor directed his trustees to pay over the free yearly income of his estate, both heritable and moveable, to his son. As regards the residue, he directed his trustees, "in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, . . . to apportion and divide the said residue among" my brother's "children equally, share and share alike, whom I hereby appoint to be my residuary legatees, . . . and it is hereby declared that the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The trustor's personal estate amounted to £48,000, which was all capable of early realisation, except the stock, crop, and implements of two farms of the value of £5000. The trustor's son died without issue. J., the eldest nephew, survived him about six months, and died unmarried and intestate. At the date of his death the trustees had not apportioned and divided the residue. *Held* that a share of the residue had vested in J. *Maclean's Trustees v. Macleans*, July 19, 1889, p. 1095.

**Accretion.**

24. A testator directed his trustees to hold £60,000 of his estate in trust "as a special fund for the special use and behoof of the four daughters of my brother . . . the survivors and survivor of them severally and respectively in liferent." He directed that "the interest or annual income arising from said special fund . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly, during their respective lives, . . . and that, subject to said liferent, . . . the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters, or either of them, to the extent of their respective mother's share in said special fund in fee, and that immediately, and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand, . . . and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing." The four nieces survived the testator. The eldest died unmarried, and without having executed any deed of nomination. Another niece, A, died subsequently leaving children. In a special case *held* that on the death of the eldest niece the fund had been properly divided into three shares, to the liferent of one of which the surviving nieces were each entitled; and that on the death of A her children became entitled to the fee of the third which had been liferented by their mother, and that unburdened by any liferent to their surviving aunts. *Strachan's Trustees v. Williamson*, June 4, 1889, p. 735.

SUCCESSION—*Continued.*

25. A testator directed his trustees to hold the whole residue of his moveable estate "for behoof of and equally among the children" of his only child, W. C. M., "and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or, in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use alienarily, and their respective children in fee." There was further a clause of survivorship in the event of any son of W. C. M. dying without issue before the period of payment, but there was no such clause with reference to daughters' shares. At the date of the trustor's death, W. C. M. had two sons and four daughters, and two daughters were born after that date. The second daughter survived the trustor, but died intestate and unmarried before attaining the age of twenty-five. In a special case W. C. M. maintained that his deceased daughter's share fell to be dealt with as intestate succession either of the trustor or of herself. *Held* that the daughter's share had not vested in her, and fell to be divided among the other children of W. C. M. as part of the residue of the trustor's estate. *Muir's Trustees v. Muir*, July 12, 1889, p. 954.

*Substitution in moveables—Plate and pictures.*

26. A trustor directed his trustees to pay over the free yearly income of his estate, heritable and moveable, to his son. In the event of the latter dying without lawful issue, the trustees were directed to dispoise and convey the trustor's heritage, with his plate and pictures, to J., his nephew, and the lawful heirs of his body, whom failing, to G., a younger nephew, and the lawful heirs of his body. The trustor's son survived him, and died without issue, and J. survived the latter about six months, and died unmarried and intestate. *Held* that the plate and pictures fell to be conveyed along with the heritage to G., as substitute heir of provision. *Maclean's Trustees v. Macleans*, July 19, 1889, p. 1095.

*Revocation—Implied Revocation.*

27. A testator by his settlement bequeathed to certain nephews, including A and B, legacies of £1000 each. Thereafter he executed a codicil to this effect,—“I recall the legacy of £1000 to my nephew B . . . and I give said sum to my nephew A . . . to be paid to him at the same time with the like legacy of £1000 already given to him.” Two days later he executed this other codicil:—“I . . . renew the legacy of £1000 to my nephew B, to be paid to him as at the time of the original legacy . . . .” *Held* that the additional legacy of £1000 to A had not been revoked. *Wright's Trustees v. Wright*, May 14, 1889, p. 677.

*Revocation—Ademption.*

28. A testator bequeathed a legacy of “the shares standing in my name in the Paisley Gas Company.” Before the date of the will a local Act had transferred the right of supplying gas to Paisley to the corporation, substituting annuities payable to the shareholders of the Paisley Gas Company for the shares in the company, and had provided that the annuities should be conveyed or affected by any deed or will which disposed of the shares. Subsequently to the will, and before the death of the testator, these annuities had been redeemed by the corporation, and the price of the testator's annuity had been lent to the corporation on a mortgage over the gas undertaking. *Held* (*diss.* Lord Rutherford Clark) that the legacy was not adeemed, and that the legatee was entitled to the mortgage as representing the shares. *Mitchell's Trustees v. Fergus*, July 3, 1889, p. 902.

See *Donation*.

**SUPERIOR AND VASSAL** *Personal obligation in feu-contract—Obligation on vassal, "his heirs, executors, and successors whomsoever."*

1. A feu-contract bore that the vassal "binds and obliges himself and his heirs, executors, and successors whomsoever" to make payment of a certain sum in name of feu-duty. The vassal having died, his heir declined to take up the feu. In an action against the vassal's executors for payment of the feu-duties which had become due since his death, and for damages for breach of contract, in failing to take up the feu on the heir declining to do so, *held* (1) that there was no obligation upon the executors to pay feu-duties accruing after the date of the vassal's death, and (2) that they were not liable in damages for breach of contract. *Aiton v. Russell's Executors*, March 19, 1889, p. 625.

*Revenue—Property and Income-Tax—Casualty—Income-Tax Act, 1842, sec. 60, schedule A—Taxes Management Act, 1880, sec. 60.*

2. A singular successor paid to the superior for his entry a casualty of a year's rent of the lands, without deduction of income-tax. The Crown, after receiving payment from the superior of income-tax on the casualty, assessed the vassal for income-tax on the rent. The vassal objected to the assessment, on the grounds (1) that the superior had received the whole rent for the year, and (2) that a casualty was of the same nature as feu-duty, for which deduction was allowed. The Court *sustained* the assessment. *Macgregor v. Commissioners of Inland Revenue*, Feb. 8, 1889, p. 438.

*Entry—Casualty—Composition—Relief—Implied entry—Conveyancing Act, 1874, sec. 4.*

3. In 1860 John Hamilton, a proprietor infeft in certain lands, and entered with the superior, disponed them *a me vel de me* to his brother James D. Hamilton, his heir-presumptive, who took infeftment but did not enter with the superior. On the passing of the Conveyancing Act, 1874, he was impliedly entered with the superior. John Hamilton died in 1877, and James D. Hamilton died in 1886, without having been called upon by the superior to pay a casualty. He left a general disposition and settlement in favour of William Hamilton, who was infeft thereon, and thus obtained an implied entry under the Conveyancing Act, 1874. The superior then raised an action against William Hamilton, concluding for declarator "that in consequence of the death of John Hamilton, who died upon the 27th day of February 1877, and who was vassal last seised in" the lands, "a casualty, being one year's rent of the lands, has become due to" the superior, "and that the said casualty is still unpaid, and that the full rents" after the date of citation belonged to the superior till payment of the casualty. The defender pleaded that the superior was not entitled to a casualty of composition in respect, that the defender was heir-at-law of James D. Hamilton and also of John Hamilton. *Held* by a majority of the whole Court (1) that by James D. Hamilton's statutory entry a new investiture was created, and the prior investiture evacuated; (2) that on the death of John Hamilton a casualty of composition became payable to the superior which could have been exacted from James; and (3) that this casualty not having been paid by James a casualty of composition was payable by the defender. *Stuart v. Hamilton*, July 18, 1889, p. 1030.

*Contract to grant feu-charter with precept of sasine—Obligation to relieve from minister's stipend and public burdens—Charters by progress.*

4. In 1764 C. and D. entered into a contract and agreement to the effect that "the said C. has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu-right to the said D., his heirs and successors," of sixty acres of land, "to be held in feu-farm and heritage of the said C., his heirs and successors, for yearly payment of £3 sterling, at the term of Martinmas yearly, . . . and to assign the rents from and after Martinmas 1765, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, in all time coming, except the said feu-duty, and to make the said public a real burden upon his other lands, and also the said C. binds him and his foressaids to enclose

*tinued.*

vixt and Martinmas 1766, . . . for the which part the said D., on the said C. performing his part, granting the said feu-contract in the terms above, granting him, his heirs and successors, to content and heirs, executors, and successors whatsoever, the sum Martinmas 1765, . . . and to pay £3 of feu at the first year's payment at Martinmas 1765." The act of sasine, on which D. took infeftment in May last, successor of D., who was duly entered with the act of confirmation, which did not set forth an obligation to relieve the vassal of public burdens, raised an action in which the pursuer, who was a singular successor of C., concluding for himself that the contract of 1764 was not a feu-charter, and that the obligation to grant a feu-charter, and that the obligation to relieve the vassal of public burdens was merely a personal obligation, which was against a singular successor in the superiority. *Held* that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

*Discharge of trustee—Radical right of bankrupt.*

A bankrupt, after his sequestration has been discharged, and no other creditor has been re-invested, the bankrupt, although not re-invested, has in himself a good title to sue for behoof of his estate. *Held* that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

*debtor.*

A person alleged to be a debtor to the estate of a bankrupt, after his sequestration has been discharged, and no other creditor has been re-invested, the bankrupt, although not re-invested, has in himself a good title to sue for behoof of his estate. *Held* that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

A person alleged to be a debtor to the estate of a bankrupt, after his sequestration has been discharged, and no other creditor has been re-invested, the bankrupt, although not re-invested, has in himself a good title to sue for behoof of his estate. *Held* that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

*Reparation—Title to sue—Parent and Child—*

A bastard child has no title to sue an action of damages for the death of his father. *Weir v. Coltness Iron Co., Limited*, *Held* that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

*Indiviso* proprietors of subjects let as grass parks bond and in security thereof granted a bond and disposition of the estate. The bond contained an assignation to the creditor raised an action of mails and duties against the debtor of his debtor's share of the rents, calling as debt the other *pro indiviso* proprietors. The debtor, and, while admitting the debt, maintained that he was not bound to sue. The Court *repelled* the defences, holding that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

A *pro indiviso* proprietor of an estate let under lease has no title to sue an action of damages for the death of his father. *Weir v. Coltness Iron Co., Limited*, *Held* that the pursuer was entitled to the relief sought. *Elgin*, July 19, 1889, p. 1104.

*Reduction.*

A company brought an action against the company for the reduction of an agreement between the company and certain persons, alleging that the agreement which had been made without consulting the company was to the pre-

TITLE TO SUE—*Continued.*

judice of himself and the other independent shareholders, that it was entered into "fraudulently and collusively," and that it would have the effect of seriously and unjustly depreciating the company's shares. There were further allegations that the agreement was *ultra vires* of the company. *Held* (rev. judgment of Lord Kinnear) that a plea of no title to sue fell to be repelled as an objection to satisfying the production, but that the pursuer was bound to call as defenders the whole parties to the agreement, and cause sisted to allow of that being done. *Rixon v. Edinburgh Northern Tramways Co.*, March 20, 1889, p. 653.

*Judicial Factor.*

7. *Held* that a judicial factor appointed on certain heritable subjects "with all the usual powers" had no title to sue a person for rents uplifted by him prior to the factor's appointment. *Gordon v. Williams' Trustees*, July 16, 1889, p. 980.

See *Sheriff*, 2.

TRUST. *Investment.*

1. *Held* that authority given by a testator to his trustees to continue investments made by him did not authorise them, on the reconstruction of an undertaking by the winding-up of an old company and the formation of a new one, to take up shares in the new company in lieu of shares belonging to the testator in the old one. *Thomson's Trustees v. Thomson*, Feb. 22, 1889, p. 517.

*Lands Clauses Consolidation Act*, 1845, *secs.* 67, 68, 79.

2. Lands held by testamentary trustees under a declaration that they should have no power to sell them during the lifetime of testator's children were taken by a railway company under compulsory powers and the price consigned in bank, "subject to the control and disposition of the Court of Session, to the intent that the same shall be applied, under the authority of the said Court, to some one or more of the purposes specified in the Lands Clauses Consolidation (Scotland) Act, 1845, relative to parties under disability." The Court on the petition of the trustees, while the truster's children were alive, *authorised* the bank to pay over the consigned money to the trustees to be invested by them in accordance with their powers under their trust-deed, without requiring them to apply it to some one or more of the purposes specified in the Act. *Dickson's Trustees*, Feb. 23, 1889, p. 519.

*Directions to trustees—Power of trustees to make or withhold payment—Vesting.*

3. A testator in the second purpose of his settlement directed his trustees, on the death of his widow, to divide a certain sum into six equal shares, of which two were to be paid to two of his sons, and a third to be held by the trustees for behoof of his third son J. L. The trustees were to retain the whole or such part of J. L.'s share as they should think fit for such time as they should deem expedient, and to pay instalments thereof to him at such times as they should see fit. In the fifth purpose he directed the residue to be divided into six shares, repeating the above directions, with this exception, that payment was to be made "so soon as my estate shall be realised." Then followed a declaration "that the foresaid provisions to my said sons" "shall not become vested interests in them until the respective terms of payment thereof." *Held*, on a construction of the trust-deed, that the terms of payment referred to by the testator in fixing the dates of vesting were in regard to the second purpose the death of his widow, and in regard to the fifth purpose the realisation of his estate, and that the special discretion given to the trustees to postpone payment of J. L.'s shares did not suspend vesting in his case. *M'Elmail v. Lundie's Trustees*, Oct. 31, 1888, p. 47.

*Liability of trustees' law-agent.*

4. *Held* that it was no part of the duty of a law-agent appointed to be factor and law-agent to the trustees under a trust-disposition and settlement to volunteer his advice to the trustees that a loan made by the testator on per-



**TRUST—Continued.**

sonal security was not such an investment of the trust-funds as they were entitled to retain, and that therefore he was not liable for loss resulting from their retaining the investment. *Currors v. Walker's Trustees*, Jan. 25, 1889, p. 355.

**Investment—Liability of trustees—Law-agent.**

5. A marriage-contract empowered the trustees acting under it (two of whom were the spouses) to lend on, inter alia, heritable securities, or personal securities or obligations, and declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The greater part of the trust-funds was lent by the trustees on the security of buildings in the course of erection, the rents of which, after their completion, turned out to be insufficient to meet the interest on the loan, and the borrower became bankrupt. While both spouses were alive the children of the marriage, whose interest under the contract was during the marriage contingent merely, brought an action against the trustees and the law-agent to the trust concluding to have them ordained, "conjunctly and severally, or severally, or in such other way or manner as should seem just," to restore the money to the trust. The law-agent and one of the trustees lodged defences. It appeared from a proof that the buildings, which were in Glasgow, were of the nature of a speculation in the particular locality, and that the speculation wholly failed. The proposal for the loan was (along with others) placed before the trustees at a meeting where the spouses were present, and with it a valuation by an architect which had been obtained by the borrower. This valuation shewed an ample margin on the estimated value of the buildings when completed. The trustees obtained no separate valuation, nor did their law-agent suggest the propriety of obtaining one. The loan was agreed to at the meetings at which it was placed before the trustees.

Held (aff. judgment of the Second Division and consulted Judges), that the pursuers had no title to sue the law-agent, because he had not been employed by them.

Held (rev. judgment of Second Division and consulted Judges), that the trustee, in making the investment, had failed to shew the reasonable care that a man of ordinary prudence would exercise in the management of his own business, and therefore that he was liable personally for the trust-funds so invested, the clause of immunity affording no protection for such negligence. *Raes v. Meek*, August 8, 1889, H. L., p. 31.

**Liability of trustees who have borrowed.**

6. Opinions (per Lord Herschell, Lord Watson, and Lord Fitzgerald) that the fact that trustees in the exercise of an express or implied power have borrowed money for trust purposes on the security of the trust-estate does not necessarily involve personal liability in the event of loss resulting to the estate from the transaction, their liability depending on whether the transaction was a prudent one in the circumstances. *Binnie v. Binnie's Trustees*, August 8, 1889, H. L., p. 23.

Trust for creditors. See *Bankruptcy*, 19.

**VALUATION ACTS. Value—Spinning-mill temporarily silent.**

1. The proprietor of a weaving factory kept a spinning-mill, which formed part of the factory, standing from reasons of temporary expediency, and made no attempt to obtain a return from the mill by letting it, or otherwise. Held that it was properly entered in the Valuation-roll by the Assessor at its full yearly value as a going mill. *Fraser & Sons v. Assessor for Burgh of Arbroath*, June 14, 1889, p. 796.

**Value—Consideration other than the rent—Obligation to erect a wooden circus removable by tenant.**

2. A lease of a plot of ground at a fixed rent contained an obligation on the tenant, within two months of his entry, to erect and complete a wooden circus upon the ground. The tenant was further to be entitled to remove his buildings at the termination of his lease, but he was bound to leave the

VALUATION ACTS—*Continued.*

site clear and free from all rubbish and débris. *Held* that the obligation to erect the circus was not a "consideration other than the rent" within the meaning of the 6th section of the Lands Valuation Act, 1854. *Martin v. Assessor for Burgh of Leith*, June 14, 1889, p. 799.

*Value—Principle of valuation—Cemetery.*

3. A cemetery company bought land which they laid out as a burial-ground. They derived an annual income from giving off lots for burial purposes, the right of the allottees being one of perpetual use. *Held* that the valuation of the land ought to be based upon the rent at which in its actual state it might be expected to let to a tenant to be used by him as it had been used by the company, and not at its agricultural value. *Craigton Cemetery Co., Limited, v. Assessor for Lower Ward of Lanarkshire*, June 14, 1889, p. 802.

*Value—Lease—Voluntary reduction of rent.*

4. A landlord is not entitled to have a farm entered in the Valuation-roll at a lower rent than that stipulated for on the ground that he has granted a reduction of the rent, unless he can produce conclusive evidence to shew that he has bound himself to grant the reduction. *Menzies v. Assessor for County of Perth*, June 19, 1889, p. 805.

*Whether valuation by burgh or by railway assessor—Unfinished railway—Lands Valuation Act, 1854, secs. 3, 20, and 21.*

5. A plot of ground lying within a burgh had been acquired by a railway company, whose Act of Parliament provided that the lands from time to time acquired by the company should, "for all purposes of tolls, rates and charges, and for all purposes whatsoever, be the undertaking, railway works, and property of the company." Part of the ground had been used in the construction of a railway embankment, the remainder being covered with the débris caused by the formation of the embankment. *Held* that, as the ground formed part of the undertaking of a railway company within the meaning of sections 20 and 21 of the Lands Valuation Act, 1854, the burgh assessor had no duty in regard to it. *Forth Bridge Railway Co. v. Assessor for Burgh of Queensferry*, June 14, 1889, p. 797.

*Remit to obtain further information—Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), sec. 9.*

6. The power conferred upon the Court by section 9 of the Valuation of Lands (Scotland) Amendment Act, 1879, to remit a case, for further information, to the Commissioners or Magistrates by whom it has been stated, is limited to such matters as a mistake committed in the statement of the case, the setting forth specific details of matters stated generally, or the correction of a judgment of the Valuation Committee refusing to allow competent, or admitting incompetent, evidence.

An appellant in a valuation appeal moved the Court, in terms of the 9th section of the above Act, to remit the case to the Valuation Committee to take further evidence. Information of the facts which he desired to prove was in his possession when the case came before the Commissioners, and he failed to lead evidence thereof, or to move for an adjournment of the case to another diet to enable him to prove them. The Court *refused* the motion. *Assessor for County of Argyll v. Marquis of Breadalbane*, June 14, 1889, p. 793.

WRIT. *Testament—Deletions—Marginal additions.*

1. *Per Lord M'Laren, Ordinary*,—(1) If a will or codicil is found with the signature cancelled, or lines drawn through the dispositive or other essential clause of the instrument, then on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held as revoked; otherwise it is to be treated as a subsisting will. (2) If a will or codicil is found with one or more of the legacies or particular provisions scored out, that raises no case for inquiry as to the testator's intention to revoke the instrument in whole; a question is raised only as to his intention to revoke the particular provision,

IT—*Continued.*

which will not be held to have been revoked unless upon evidence that the scoring was done by the testator himself or by his direction with the intention of revoking the clause, and the authentication of the deletion by the testator's initials is sufficient evidence of such intention. (3) Marginal or interlineal additions, apparently in the testator's handwriting, will not be held part of the instrument unless authenticated by his signature or initials, for until such authentication he cannot be supposed to have finally resolved to make the addition. (4) When a will or codicil contains words scored out and others inserted in their place the cancellation is conditional on the substituted words taking effect, so that if the substituted words are rejected for want of authentication the will is to be read as if there had been no deletion. *Pattison's Trustees v. University of Edinburgh*, Nov. 9, 1888, p. 73.

*Marriage-contract — Informality — Rei interventus — Notarial execution — Agent and Client.*

A widow brought an action of reduction of her antenuptial marriage-contract against her husband's trustees on the ground that the notary-public who executed the deed on her behalf, she being unable to write, was at the time acting as her husband's law-agent in the matter. *Held* that, assuming that the execution of the deed was invalid, the marriage, which took place on the faith of the contract, validated the deed *rei interventu*. *Question*, whether the execution was invalid. *Lang v. Lang's Trustees*, March 15, 1889, p. 590.

*Signature and delivery of blank paper stamped with sixpenny stamp — Caution — Mandate.*

A father, at the request of his son, signed and delivered to him to be filled up a blank paper stamped with a sixpenny stamp. The son filled in above the signature the words:—"Messrs A and B,—I hereby guarantee payment of £500 by my son J. H., and the payment of the premiums of insurance on his policies . . . assigned to your firm." The son, a few days afterwards, assigned the policies by assignation *ex facie* absolute to the creditor to whom the guarantee was to be delivered. The £500 was paid, but the father, on being informed of the obligation to pay the premiums, repudiated liability. In an action raised against the father by the creditor to enforce the obligation for payment of the premiums, *held* that as the document founded on was not tested or holograph the *onus* lay upon the pursuer to prove that the defender had authorised the obligation to pay the premiums to be inserted above his signature, and that the pursuer had failed to prove such authority. *Wylie & Lochhead, Limited, v. Hornsby*, July 3, 1889, p. 907.







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